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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1260

[No. AMS–LPS–13–0079]

Beef Promotion and Research; Reapportionment

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule adjusts representation on the Cattlemen's Beef Promotion and Research Board (Board), established under the Beef Promotion and Research Act of 1985 (Act), to reflect changes in cattle inventories as well as cattle and beef imports that have occurred since the most recent Board reapportionment rule became effective in July 2011. These adjustments are required by the Beef Promotion and Research Order (Order) and result in a decrease in Board membership from 103 to 100, effective with the U.S. Department of Agriculture's (USDA) appointments for terms beginning early in the year 2015. The rule also makes technical amendments to update and correct information in the Order and regulations.

DATES: Effective August 13, 2014.

FOR FURTHER INFORMATION CONTACT: Angie Snyder, Research and Promotion Division, on 202–720–5705, fax 202–720–1125, or by email at *angie.snyder@ams.usda.gov.*

SUPPLEMENTARY INFORMATION:

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, reducing costs, harmonizing rules, and promoting flexibility. This action has been designated as a ''non-significant regulatory action'' under § 3(f) of Executive Order 12866. Accordingly, the Office of Management and Budget (OMB) has waived the review process.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect.

Section 11 of the Act provides that nothing in the Act may be construed to preempt or supersede any other program relating to beef promotion organized and operated under the laws of the United States or any State. There are no administrative proceedings that must be exhausted prior to any judicial challenge to the provisions of this rule.

Executive Order 13175

This rule has been reviewed in accordance with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. The review reveals that this rule would not have substantial and direct effects on Tribal Governments and would not have significant tribal implications.

Regulatory Flexibility Act and Paperwork Reduction Act

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic effect of this action on small entities and has determined that this rule will not have a significant economic impact on a substantial number of small entities. The purpose of RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly burdened.

In the February 2013 publication of ''Farms, Land in Farms, and Livestock Operations,'' USDA's National Agricultural Statistics Service (NASS) estimates that the number of operations in the United States with cattle in 2012 totaled approximately 915,000, down from 950,000 in 2009. The majority of these operations that are subject to the Order may be classified as small entities. There are approximately 25 importers who import beef or edible beef products into the United States and 297 importers who import live cattle into the United States. It is estimated that the majority of these operations subject to the Order are considered small businesses under the criteria established by the Small Business Administration (SBA) [13 CFR 121.201]. SBA defines small agricultural service firms as those having annual receipts of $7.0 million or less, and small agricultural producers are defined as those having annual receipts of less than $750,000.

The rule imposes no new burden on the industry. It only adjusts representation on the Board to reflect changes in domestic cattle inventory, as well as changes in cattle and beef imports. The adjustments are required by the Order and result in a decrease in Board membership from 103 to 100.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the information collection and recordkeeping requirements imposed under part 1260 were previously approved under OMB control number 0581–0093.

Background

The Board was initially appointed August 4, 1986, pursuant to the provisions of the Act (7 U.S.C. 2901–2911) and the Order issued thereunder. Domestic representation on the Board is based on cattle inventory numbers, and importer representation is based on the conversion of the volume of imported cattle, beef, or beef products into live animal equivalencies.

Reapportionment

Section 1260.141(b) of the Order provides that the Board shall be composed of cattle producers and importers appointed by the Secretary of Agriculture from nominations submitted by certified producer and importer organizations. A producer may only be nominated to represent the State or unit in which that producer is a resident.

Section 1260.141(c) of the Order provides that at least every 3 years and not more than every 2 years, the Board shall review the geographic distribution of cattle inventories throughout the United States and the volume of imported cattle, beef, and beef products

and, if warranted, shall reapportion units and/or modify the number of Board members from units in order to reflect the geographic distribution of cattle production volume in the United States and the volume of cattle, beef, or beef products imported into the United States.

Section 1260.141(d) of the Order authorizes the Board to recommend to USDA modifications to the number of cattle per unit necessary for representation on the Board.

Section 1260.141(e)(1) provides that each geographic unit or State that includes a total cattle inventory equal to or greater than 500,000 head of cattle shall be entitled to one representative on the Board. Section 1260.141(e)(2) provides that States that do not have total cattle inventories equal to or greater than 500,000 head shall be grouped, to the extent practicable, into geographically-contiguous units, each of which have a combined total inventory of not less than 500,000 head. Such grouped units are entitled to at least one representative on the Board. Each unit that has an additional 1 million head of cattle within a unit qualifies for additional representation on the Board as provided in § 1260.141(e)(4). As provided in § 1260.141(e)(3), importers are represented by a single unit, with the number of Board members based on a conversion of the total volume of imported cattle, beef, or beef products into live animal equivalencies.

The initial Board appointed in 1986 was composed of 113 members. Reapportionment, based on a 3-year average of cattle inventory numbers and import data, reduced the Board to 111 members in 1990 and 107 members in 1993 before the Board was increased to 111 members in 1996. The Board was decreased to 110 members in 1999, 108 members in 2001, and 104 members in 2005; increased to 106 members in 2009; and decreased to 103 members in 2011. This proposal amends § 1260.141(a) by decreasing the number of Board members from 103 to 100 with appointments for terms effective early in 2015.

The current Board representation by States or units was based on an average of the January 1, 2008, 2009, and 2010 inventory of cattle in the various States as reported by NASS. Current importer representation was based on a combined total average of the 2007, 2008, and 2009 live cattle imports as published by USDA's Foreign Agricultural Service and the average of the 2007, 2008, and 2009 live animal equivalents for imported beef products.

In considering reapportionment, the Board reviewed cattle inventories for the period of January 1, 2011, 2012, and 2013 as well as cattle, beef, and beef product import data for the period of January 1, 2010, to December 31, 2012. The Board recommended that a 3-year average of cattle inventories and import numbers should be continued. The Board determined that an average of the January 1, 2011, 2012, and 2013 cattle inventory numbers would best reflect the number of cattle in each State or unit since publication of the last reapportionment rule published in 2011 (76 FR 42012). The Board reviewed data published by USDA's Economic Research Service to determine proper importer representation. The Board recommended the use of a combined total of the average of the 2010, 2011, and 2012 cattle import data and the average of the 2010, 2011, and 2012 live animal equivalents for imported beef products. The method used to calculate the total number of live animal equivalents was the same as that used in the previous reapportionment of the Board. The live animal equivalent weight was changed in 2006 from 509 pounds to 592 pounds (71 FR 47074).

As discussed in the proposed rule, the Board's recommended reapportionment plan would have decreased the number of representatives on the Board from 103 to 99. Based on the Board's recommendation, New Mexico would lose one Board seat and Texas would lose two Board seats. The Importer Unit loses one Board seat. This final rule, however, results in Texas losing one Board seat.

The States and units affected by the reapportionment plan and the current and revised representation per unit are as follows:

State/unit	Current representation	Revised representation
New Mexico	2	1
Texas	14	13
Importers	7	6

The Board reapportionment takes effect with appointments that will be made to fill positions beginning January 1, 2015.

Technical Amendments

A number of technical amendments are being made to update or correct information contained in the provisions of the Order and regulations. These include:

Section 1260.129 references the U.S. Customs Service of the U.S. Department of the Treasury. The language has been amended to reflect the updated agency and department.

Section 1260.312(4)(c) has been amended to update an outdated address.

Section 1260.316 has been amended to reflect the correct OMB paperwork reduction number.

Comments

USDA published the proposed rule for public comment in the March 25, 2014, **Federal Register** [79 FR 16236]. The comment period ended April 24, 2014. USDA received two comments by the deadline. One comment from an individual was outside the scope of the rulemaking.

Another comment, submitted jointly by eight Texas cattle, dairy, and farm associations, was against Texas losing two member positions because the 3-year average reflects a loss of cattle numbers due to a severe drought. With many regions of the State beginning to return to more normal precipitation and pasture conditions, the commenters argued, plus record cattle prices encouraging heifer retention and herd rebuilding, cattle numbers in Texas will increase in the next 1 or 2 years.

In response, USDA agrees that the drought and other factors affected cattle inventory across the country but in Texas in particular. In addition, based upon available information USDA has concluded that Texas cattle herds will increase due to beneficial environmental and economic conditions. In addition, reports indicate that cattle will be moving into Texas from other States. Therefore, by the time the Board is seated in February 2015 when this reapportionment would actually take effect, cattle numbers in Texas should increase to a level to warrant the loss of only one Board member position in Texas rather than two as proposed. As a result, USDA is decreasing the number of Board members in Texas to 13 rather than 12, as proposed.

Pursuant to 5 U.S.C. 553, it is found that good cause exists for not postponing the effective date of this action until 30 days after the publication in the **Federal Register** because this action needs to be in effect as soon as possible to allow sufficient time for completion of the nomination process and appointments for the term of office beginning February 2015.

List of Subjects in 7 CFR Part 1260

Administrative practice and procedure, Advertising, Agricultural research, Imports, Marketing agreement, Meat and meat products, Reporting and recordkeeping requirements.

For reasons set forth in the preamble, 7 CFR part 1260 is amended as follows:

PART 1260—BEEF PROMOTION AND RESEARCH

■ 1. The authority citation for 7 CFR part 1260 continues to read as follows:

Authority: 7 U.S.C. 2901–2911 and 7 U.S.C. 7401.

■ 2. Revise § 1260.129 to read as follows:

§ 1260.129 Customs Service.

Customs Service means the United States Customs and Border Protection of the United States Department of Homeland Security.

■ 3. In § 1260.141, paragraph (a) is revised to read as follows:

§ 1260.141 Membership of Board.

(a) Beginning with the 2014 Board nominations and the associated appointments effective early in the year 2015, the United States shall be divided into 37 geographical units and, 1 unit representing importers, for a total of 38 units. The number of Board members from each unit shall be as follows:

CATTLE AND CALVES [1]

State/Unit	(1,000 head)	Directors
1. Arizona	897	1
2. Arkansas	1,663	2
3. Colorado	2,667	3
4. Florida	1,667	2
5. Idaho	2,270	2
6. Illinois	1,097	1
7. Indiana	840	1
8. Iowa	3,883	4
9. Kansas	6,083	6
10. Kentucky	2,193	2
11. Louisiana	787	1
12. Michigan	1,107	1
13. Minnesota	2,377	2
14. Mississippi	920	1
15. Missouri	3,833	4
16. Montana	2,533	3
17. Nebraska	6,317	6
18. New Mexico	1,423	1
19. New York	1,403	1
20. North Carolina	810	1
21. North Dakota	1,727	2
22. Ohio	1,247	1
23. Oklahoma	4,600	5
24. Oregon	1,303	1
25. Pennsylvania	1,610	2
26. South Dakota	3,733	4
27. Tennessee	1,930	2
28. Texas	12,167	13
29. Utah	790	1
30. Virginia	1,547	2
31. Wisconsin	3,433	3
32. Wyoming	1,317	1
33. Northwest		1
Alaska	13	
Hawaii	138	
Washington	1,117	
Total	1,267	
34. Northeast		1
Connecticut	49	
Delaware	18	
Maine	87	
Massachusetts	40	
New Hampshire	34	
New Jersey	31	
Rhode Island	5	
Vermont	267	
Total	531	
35. Mid-Atlantic		1
Maryland	196	
West Virginia	390	
Total	586	
36. Southeast		3
Alabama	1,220	
Georgia	1,023	
South Carolina	370	
Total	2,613	
37. Southwest		6
California	5,283	
Nevada	463	
Total	5,747	

CATTLE AND CALVES [1]—Continued

State/Unit	(1,000 head)	Directors
38. Importer [2]	5,927	6

[1] 2011, 2012, and 2013 average of January 1 cattle inventory data.
[2] 2010, 2011, and 2012 average of annual import data.

* * * * *

■ 4. In § 1260.312, paragraph (c) is revised to read as follows:

§ 1260.312 Remittance to the Cattlemen's Board or Qualified State Beef Council.

* * * * *

(c) *Remittances.* The remitting person shall remit all assessments to the qualified State beef council or its designee, or if there is no qualified State beef council, to the Cattlemen's Board at P.O. Box 803834, Kansas City, MO 64180–3834, with the report required in paragraph (a) of this section not later than the 15th day of the following month. All remittances sent to a qualified State beef council or the Cattlemen's Board by the remitting persons shall be by check or money order payable to the order of the qualified State beef council or the Cattlemen's Board. All remittances shall be received subject to collection and payment at par.

■ 5. Section 1260.316 is revised to read as follows:

§ 1260.316 Paperwork Reduction Act assigned number.

The information collection and recordkeeping requirements contained in this part have been approved by the Office of Management and Budget (OMB) under the provisions of 44 U.S.C. Chapter 35 and have been assigned OMB control number 0581–0093.

Dated: August 7, 2014.

Rex A. Barnes,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2014–19029 Filed 8–11–14; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 13

[Docket No.: FAA–2014–0505; Amdt. No. 13–36]

RIN 2120–AK43

Orders of Compliance, Cease and Desist Orders, Orders of Denial, and Other Orders

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Immediate final rule; request for comments.

SUMMARY: This rulemaking provides the opportunity for an informal conference with an FAA attorney before an order is issued under the FAA's regulation covering orders other than certificate action and civil penalty orders. This change is necessary to provide additional fairness and process to those persons who are subject to such an order, and is consistent with the process available in other enforcement actions. These conferences may result in either a resolution of the matter or a narrowing of the issues, thereby conserving resources for respondents and the FAA.

DATES: Effective October 14, 2014.

Submit comments on or before September 11, 2014.

ADDRESSES: Send comments identified by docket number, FAA–2014–0505 using any of the following methods:

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

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

Docket: Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: For technical or legal questions concerning this action, contact Edmund Averman, Office of the Chief Counsel (AGC–210), Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267–3147; email *Ed.Averman@faa.gov.*

SUPPLEMENTARY INFORMATION:

Good Cause for Immediate Adoption

Section 553(b)(3)(A) of the Administrative Procedure Act (APA) (5 U.S.C. 553) authorizes agencies to dispense with notice and comment procedures for rules when the agency for ''good cause'' finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under this section, an agency, upon finding good cause, may issue a final rule without seeking comment prior to the rulemaking.

The FAA finds that notice and public comment to this immediately adopted final rule are impracticable, unnecessary, and contrary to the public interest. This rulemaking provides the opportunity for an informal conference with an FAA attorney before an order is issued under § 13.20. Since this change provides additional fairness and process to those persons who are subject to such an order, this amendment should not adversely impact those covered by an order. In fact, these conferences may result in a resolution of the matter or, in some cases, a narrowing of the issues, thereby conserving resources for respondents and the FAA. Finally, these conferences are optional.

Therefore, the FAA has determined that notice and public comment are unnecessary.

Comments Invited

For the reasons noted above, the FAA is adopting this final rule without prior notice and public comment. The Regulatory Policies and Procedures of the Department of Transportation (DOT) (44 FR 1134; February 26, 1979), provide that, to the maximum extent possible, operating administrations for the DOT should provide an opportunity for public comment on regulations issued without prior notice.

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. The agency also invites comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting the changes. The most helpful comments reference a specific portion of this rule, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, please send only one copy of written comments, or, if you are filing comments electronically, please submit your comments only one time.

The FAA will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning this rulemaking. Once the comment period closes, the FAA will review and dispose of the comments filed in the rulemaking docket. Because this is a final rule, the FAA will publish a disposition of comments in the **Federal Register**. Based on the comments received, the FAA will state whether it has decided that (i) no action is necessary other than publishing the disposition of comments in the **Federal Register**, or (ii) the FAA should prepare a revised final rule.

Proprietary or Confidential Business Information

Do not file in the docket information that you consider to be proprietary or confidential business information. Send or deliver this information directly to the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this document. Mark the information that is considered proprietary or confidential. If the information is on a disk or CD ROM, mark the outside of the disk or CD ROM and also identify electronically within the disk or CD ROM the specific information that is proprietary or confidential.

Under 14 CFR 11.35(b), when the FAA is aware of proprietary information filed with a comment, the agency does not place it in the docket. The FAA holds it in a separate file to which the public does not have access, and the agency places a note in the docket that it has received it. If the FAA receives a request to examine or copy this information, the FAA treats it as any other request under the Freedom of Information Act, 5 U.S.C. 552. The FAA processes such a request under the DOT procedures found in 49 CFR part 7.

Authority for this Rulemaking

The FAA's authority to issue rules on aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, the FAA is charged with prescribing regulations required in the interest of safety for the design and performance of aircraft; regulations and minimum standards in the interest of safety for inspecting, servicing, and overhauling aircraft; and regulations for other practices, methods, and procedures the Administrator finds necessary for safety in air commerce.

I. Discussion of the Final Rule

Section 13.20 of 14 CFR part 13 (Orders of compliance, cease and desist orders, orders of denial, and other orders) applies to a variety of orders issued by the Administrator to carry out the provisions of the Federal Aviation Act of 1958, as amended, the Hazardous Materials Transportation Act, the Airport and Airway Development Act of 1970, and the Airport and Airway Improvement Act of 1982, or the Airport and Airway Improvement Act of 1982 as amended by the Airport and Airway Safety and Capacity Expansion Act of 1987. This section does not apply to orders issued under the authority of 49 U.S.C. 46301 (assessing civil penalties) or 49 U.S.C. 44709 (amendments, modifications, suspensions, and revocations of certain certificates).

Paragraph (c) of § 13.20 allows, within 30 days after service of the notice, a person subject to an order to reply in writing or request a hearing in accordance with subpart D of part 13. This rule amends that paragraph to add a third option—an opportunity to be heard in an informal conference with an FAA attorney. The FAA has determined that this third option offers additional fairness and process to those persons who would be the subject of an order issued under § 13.20. In addition, since this opportunity is already available to persons subject to certificate actions under § 13.19 and civil penalty actions under §§ 13.16 and 13.18, it makes sense to add it to § 13.20 for consistency and fairness.

Through the mechanism of the informal conference in these other contexts, matters are sometimes resolved or the issues are narrowed. This results in conserving resources, both for respondents and the FAA. The FAA expects these benefits will also be realized for orders issued under § 13.20 when the informal conference option is selected.

This rule also amends paragraph (d) of § 13.20 to provide for these informal conferences. Paragraph (d) currently allows a person who files a reply under paragraph (c) to further request a hearing in accordance with Subpart D of part 13 as to any charges not dismissed or not subject to a consent order. The option to request a hearing is expanded to include persons who requested an informal conference.

Concurrent with the publication of this rule, the FAA is publishing a final rule entitled ''Repair Stations.'' One of the main purposes of that rulemaking is to amend the certificate application section to provide the FAA with the ability to deny an application for a repair station certificate to an applicant who previously held a repair station certificate that was revoked or who intends to use certain key management personnel or other persons who could exercise control over the repair station's operations and who had materially contributed to the circumstances that caused a previous repair station revocation. That action is necessary to provide the FAA with the authority to deny a repair station certificate to an applicant who has violated part 145 regulations to an extent that revocation of the certificate was warranted or who intends to use key decision makers who materially contributed to a prior revocation.

During the FAA's internal review of the Repair Stations final rule, the FAA noted that commenters raised due process issues with respect to how the FAA would determine who these persons were, how it would be determined that they materially contributed to a prior revocation, and what process would be afforded them to challenge such determinations. When considering the commenters' concerns, the FAA noticed that, although FAA certificate actions and civil penalty actions provide for the opportunity for an informal conference with an FAA attorney, that option is not provided to

persons who receive notice of a proposed order under § 13.20. The FAA believes that an amendment to part 13 is necessary to provide the informal conference option to all persons subject to an order issued under § 13.20. This provides a measure of fairness to affected persons, and because matters are sometimes resolved or the issues narrowed at the informal conference stage, this amendment has the potential to conserve resources for both respondents and the FAA.

To respond to those concerns, the FAA is adding a paragraph to the ''denial authority'' section (§ 145.51(f)) in the Repair Station Final Rule that provides that those persons are subject to an order under the procedures set forth in § 13.20. That section provides for notice and the opportunity for a hearing under subpart D of part 13.

In addition, we are making a minor clarifying change to paragraph (d). The current rule provides that, if a person files a reply, the person may request a hearing as to any charges not dismissed as a result of the agency's consideration of the reply. We are replacing the word ''dismissed'' with ''withdrawn'' because it more accurately reflects the role of the agency prior to a hearing. As provided in § 13.20(f), it is the role of the Hearing Officer at the close of the hearing to either dismiss the notice or issue an order. This change also aligns the agency's procedures in other enforcement contexts, for example, in civil penalty and certificate action matters.

II. Summary of the Costs and Benefits of the Final Rule

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 and Executive Order 13563 direct that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Pub. L. 96–39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, this Trade Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation with base year of 1995). This portion of the preamble summarizes the FAA's analysis of the economic impacts of this final rule.

Department of Transportation Order DOT 2100.5 prescribes policies and procedures for simplification, analysis, and review of regulations. If the expected cost impact is so minimal that a proposed or final rule does not warrant a full evaluation, this order permits that a statement to that effect and the basis for it to be included in the preamble if a full regulatory evaluation of the cost and benefits is not prepared. Such a determination has been made for this final rule. The reasoning for this determination follows:

The amendment to § 13.20 allows for informal conference with FAA Counsel for those persons subject to orders of compliance, cease and desist orders, orders of denial, and other orders. This amendment parallels due process already afforded to persons of other enforcement actions (i.e. § 13.16 and § 13.18—civil penalty actions, and § 13.19—certificate actions). Since the amendment provides voluntary opportunity for issues to be resolved, or at least narrowed, prior to a formal hearing, a positive net benefit is realized.

Since the expected outcome will be a minimal impact with positive net benefits, a regulatory evaluation was not prepared.

The FAA has, therefore, determined that this final rule is not a ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866, and is not ''significant'' as defined in DOT's Regulatory Policies and Procedures.

III. Regulatory Notices and Analyses

A. Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) (RFA) establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation.'' To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.'' The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA. However, if an agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

This final rule provides a positive net benefit to persons subject to orders the opportunity to have informal conference with FAA Counsel prior to a formal hearing. Thus, this rule affects persons, not small entities.

If an agency determines that a rulemaking will not result in a significant economic impact on a substantial number of small entities, the head of the agency may so certify under section 605(b) of the RFA. Therefore, as provided in section 605(b), the head of the FAA certifies that this rulemaking will not result in a significant economic impact on a substantial number of small entities.

B. International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standard has a legitimate domestic objective, such as the protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. The FAA has assessed the potential effect of this final rule and determined that it offers the same positive net benefit to all persons regardless of nationality and thus has a neutral trade impact.

C. Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (in 1995 dollars) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.'' The FAA currently uses an inflation-adjusted value of $151 million in lieu of $100 million. This final rule does not contain such a mandate; therefore, the requirements of Title II of the Act do not apply.

D. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the FAA consider the impact of paperwork and other information collection burdens imposed on the public. The FAA has determined that there is no new requirement for information collection associated with this final rule.

E. International Compatibility and Cooperation

(1) In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to conform to International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has reviewed the corresponding ICAO Standards and Recommended Practices and has identified no differences with these regulations.

(2) Executive Order 13609, Promoting International Regulatory Cooperation, promotes international regulatory cooperation to meet shared challenges involving health, safety, labor, security, environmental, and other issues and to reduce, eliminate, or prevent unnecessary differences in regulatory requirements. The FAA has analyzed this action under the policies and agency responsibilities of Executive Order 13609, and has determined that this action would have no effect on international regulatory cooperation.

F. Environmental Analysis

FAA Order 1050.1E identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances. The FAA has determined this rulemaking action qualifies for the categorical exclusion identified in Chapter 3, paragraph 312d and involves no extraordinary circumstances.

IV. Executive Order Determinations

A. Executive Order 13132, Federalism

The FAA has analyzed this final rule under the principles and criteria of Executive Order 13132, Federalism. The agency determined that this action will not have a substantial direct effect on the States, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, does not have Federalism implications.

B. Executive Order 13211, Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA analyzed this final rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). The agency has determined that it is not a ''significant energy action'' under the executive order and it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

V. How To Obtain Additional Information

A. Rulemaking Documents

An electronic copy of a rulemaking document may be obtained by using the Internet—

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

2. Visit the FAA's Regulations and Policies Web page at *http://www.faa.gov/regulations_policies/* or

3. Access the Government Printing Office's Web page at: *http://www.gpo.gov/fdsys/.*

Copies may also be obtained by sending a request (identified by notice, amendment, or docket number of this rulemaking) to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267–9680.

B. Comments Submitted to the Docket

Comments received may be viewed by going to *http://www.regulations.gov* and following the online instructions to search the docket number for this action. Anyone is able to search the electronic form of all comments received into any of the FAA's dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.).

C. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. A small entity with questions regarding this document, may contact its local FAA official, or the person listed under the **FOR FURTHER INFORMATION CONTACT** heading at the beginning of the preamble. To find out more about SBREFA on the Internet, visit *http://www.faa.gov/regulations_policies/rulemaking/sbre_act/.*

List of Subjects in 14 CFR Part 13

Administrative practice and procedure, Air transportation, Hazardous materials transportation, Investigations, Law enforcement, Penalties.

The Amendment

In consideration of the foregoing, the Federal Aviation amends Chapter I of Title 14, Code of Federal Regulations, as follows:

PART 13—INVESTIGATIVE AND ENFORCEMENT PROCEDURES

■ 1. Revise the authority citation for part 13 to read as follows:

Authority: 18 U.S.C. 6002; 28 U.S.C. 2461 (note); 49 U.S.C. 106(g), 5121–5128, 40113–40114, 44103–44106, 44701–44703, 44709–44710, 44713, 46101–46111, 46301, 46302 (for a violation of 49 U.S.C. 46504), 46304–46316, 46318, 46501–46502, 46504–46507, 47106, 47107, 47111, 47122, 47306, 47531–47532; 49 CFR 1.47.

■ 2. Amend § 13.20 by revising paragraphs (c) and (d) to read as follows:

13.20 Orders of compliance, cease and desist orders, orders of denial, and other orders

* * * * *

(c) Within 30 days after service of the notice, the person subject to the order may''

(1) Request an opportunity to be heard in an informal conference with an FAA attorney;

(2) Reply in writing; or

(3) Request a hearing in accordance with subpart D of this part.

(d) If an informal conference is held or a reply is filed, as to any charges not withdrawn or not subject to a consent order, the person subject to the order may, within 10 days after receipt of notice that the remaining charges are not withdrawn, request a hearing in accordance with subpart D of this part.

* * * * *

Issued under authority of 49 U.S.C. 106 and 44701 in Washington, DC, on July 17, 2014.

Michael P. Huerta,

Administrator.

[FR Doc. 2014–18294 Filed 8–11–14; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2014–0490; Directorate Identifier 2014–NM–133–AD; Amendment 39–17926; AD 2014–16–02]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Airplanes

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

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Bombardier, Inc. Model CL–600–1A11 (CL–600) airplanes. This AD requires revising the airplane flight manual to prohibit thrust reverser operation, and repetitive detailed inspections of both engine thrust reversers for cracks and modification if necessary. The modification of the thrust reversers is also an optional terminating action for the repetitive inspections. This AD was prompted by reports of partial deployment of an engine thrust reverser in-flight caused by a failure of the translating sleeve at the thrust reverser attachment points. We are issuing this AD to detect and correct cracks of the translating sleeve at the thrust reverser actuator attachment points, which could result in deployment or dislodgement of an engine thrust reverser in-flight and subsequent reduced control of the airplane.

DATES: This AD becomes effective August 12, 2014.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of August 12, 2014.

We must receive comments on this AD by September 26, 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:* 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 AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; email *thd.crj@aero.bombardier.com;* Internet *http://www.bombardier.com.* You may 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–2014–0490; or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the 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: Fabio Buttitta, Aerospace Engineer, Airframe and Mechanical Systems Branch, ANE–171, FAA, New York Aircraft Certification Office (ACO), 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7303; fax 516–794–5531.

SUPPLEMENTARY INFORMATION:

Discussion

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian Emergency Airworthiness Directive CF–2014–19, dated June 20, 2014 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Bombardier, Inc. Model CL–600–1A11 (CL–600) airplanes. The MCAI states:

> There have been two reported incidents of partial deployment of an engine thrust reverser in-flight, caused by a failure of the translating sleeve at the thrust reverser actuator attachment points. Inspection of the same area on some other thrust reversers revealed cracks emanating from the holes under the nut plates.
>
> In both incidents, the affected aeroplane landed safely without any noticeable controllability issues, however structural failure of thrust reverser actuator attachment points resulting in thrust reverser deployment or dislodgment in flight [and subsequent reduced control of the airplane] is a safety hazard warranting an immediate mitigating action.
>
> To help in mitigating any immediate safety hazard, Bombardier Inc. has revised the Aircraft Flight Manual (AFM) through Temporary Revisions (TR) 600/29, 600/30, 600–1/24 and 600–1/26, to prohibit the thrust reverser operation on affected aeroplanes. Additionally, as an interim corrective action, Bombardier Inc. has issued alert service bulletin (ASB) A600–0769 requiring an inspection and/or a mechanical lock out of the thrust reverser to prevent it from moving out of forward thrust mode.
>
> This [Canadian] AD is issued to mandate the incorporation of revised AFM procedures per TR 600/29, 600/30, 600–1/24 and 600–1/26 and compliance with ASB A600–0769 for all affected CL–600–1A11 aeroplanes.

Required actions also include repetitive detailed inspections (including a borescope inspection) of both engine thrust reversers for cracks, and modifying the thrust reversers if necessary. Modifying the thrust reversers terminates the detailed inspections. You may examine the MCAI on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2014–0490.

Relevant Service Information

Bombardier, Inc. has issued the following service information. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

- Bombardier Alert Service Bulletin A600–0769, Revision 01, dated June 26, 2014.
- Canadair Temporary Revision (TR) 600/29, dated June 20, 2014, to the Canadair CL–600–1A11 Airplane Flight Manual (AFM).
- Canadair TR 600/30, dated June 6, 2014, to the Canadair CL–600–1A11 AFM.
- Canadair TR 600–1/24, dated June 20, 2014, to the Canadair CL–600–1A11 AFM (Winglets) including Erratum, Publication No. PSP 600–1AFM (US), TR No. 600–1/24, June 20, 2014.
- Canadair TR 600–1/26, dated June 6, 2014, to the Canadair CL–600–1A11 AFM (Winglets).

FAA's Determination and Requirements of This 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 issuing this AD because we evaluated all pertinent information and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design.

''Contacting the Manufacturer'' Paragraph in This AD

Since late 2006, we have included a standard paragraph titled ''Airworthy Product'' in all MCAI ADs in which the FAA develops an AD based on a foreign authority's AD.

The MCAI or referenced service information in an FAA AD often directs the owner/operator to contact the manufacturer for corrective actions, such as a repair. Briefly, the Airworthy Product paragraph allowed owners/operators to use corrective actions provided by the manufacturer if those actions were FAA-approved. In addition, the paragraph stated that any actions approved by the State of Design Authority (or its delegated agent) are considered to be FAA-approved.

In an NPRM having Directorate Identifier 2012–NM–101–AD (78 FR 78285, December 26, 2013), we proposed to prevent the use of repairs that were not specifically developed to correct the unsafe condition, by requiring that the repair approval provided by the State of Design Authority or its delegated agent specifically refer to the FAA AD. This change was intended to clarify the method of compliance and to provide operators with better visibility of repairs that are specifically developed and approved to correct the unsafe condition. In addition, we proposed to change the phrase ''its delegated agent'' to include a design approval holder (DAH) with State of Design Authority design organization approval (DOA), as applicable, to refer to a DAH authorized to approve required repairs for the proposed AD.

One commenter to the NPRM having Directorate Identifier 2012–NM–101–AD (78 FR 78285, December 26, 2013) stated the following: ''The proposed wording, being specific to repairs, eliminates the interpretation that Airbus messages are acceptable for approving minor deviations (corrective actions) needed during accomplishment of an AD mandated Airbus service bulletin.''

This comment has made the FAA aware that some operators have misunderstood or misinterpreted the Airworthy Product paragraph to allow the owner/operator to use messages provided by the manufacturer as approval of deviations during the accomplishment of an AD-mandated action. The Airworthy Product paragraph does not approve messages or other information provided by the manufacturer for deviations to the requirements of the AD-mandated actions. The Airworthy Product paragraph only addresses the requirement to contact the manufacturer for corrective actions for the identified unsafe condition and does not cover deviations from other AD requirements. However, deviations to AD-required actions are addressed in 14 CFR 39.17, and anyone may request the approval for an alternative method of compliance to the AD-required actions using the procedures found in 14 CFR 39.19.

To address this misunderstanding and misinterpretation of the Airworthy Product paragraph, we have changed the paragraph and retitled it ''Contacting the Manufacturer.'' This paragraph now clarifies that for any requirement in this AD to obtain corrective actions from a manufacturer, the actions must be accomplished using a method approved by the FAA, Transport Canada Civil Aviation (TCCA), or Bombardier's TCCA Design Approval Organization (DAO).

The Contacting the Manufacturer paragraph also clarifies that, if approved by the DAO, the approval must include the DAO-authorized signature. The DAO signature indicates that the data and information contained in the document are TCCA-approved, which is also FAA-approved. Messages and other information provided by the manufacturer that do not contain the DAO-authorized signature approval are not TCCA-approved, unless TCCA directly approves the manufacturer's message or other information.

This clarification does not remove flexibility previously afforded by the Airworthy Product paragraph. Consistent with long-standing FAA policy, such flexibility was never intended for required actions. This is also consistent with the recommendation of the Airworthiness Directive Implementation Aviation Rulemaking Committee to increase flexibility in complying with ADs by identifying those actions in manufacturers' service instructions that are ''Required for Compliance'' with ADs. We continue to work with manufacturers to implement this recommendation. But once we determine that an action is required, any deviation from the requirement must be approved as an alternative method of compliance.

Difference Between This AD and the MCAI or Service Information

Part 3 of Canadian Emergency AD CF–2014–19, dated June 20, 2014, which specifies accomplishing a repair or modification of the thrust reversers, is not required in this AD. We are currently considering requiring a repair or modification of the thrust reversers. However, the planned compliance time for the action would allow enough time to provide notice and opportunity for prior public comment on the merits of the actions.

FAA's Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because cracks of the translating sleeve at the thrust reverser actuator attachment points could result in thrust reverser deployment or dislodgement in-flight and subsequent reduced control of the airplane. Therefore, we determined that notice and opportunity for public comment before issuing this AD are impracticable and that good cause exists for making this amendment effective in fewer than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not precede it by notice and opportunity for public comment. We invite you to send any written relevant data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2014–0490; Directorate Identifier 2014–NM–133–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD 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 AD.

Costs of Compliance

We estimate that this AD affects 18 airplanes of U.S. registry.

We also estimate that it will take about 29 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of this AD on U.S. operators to be $44,370, or $2,465 per product.

In addition, we estimate that any necessary follow-on actions will take about 72 work-hours and require parts costing $509, for a cost of $6,629 per product. We have no way of determining the number of aircraft that might need this action.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);
3. Will not affect intrastate aviation in Alaska; and
4. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2014–16–02 Bombardier, Inc.: Amendment 39–17926. Docket No. FAA–2014–0490; Directorate Identifier 2014–NM–133–AD.

(a) Effective Date

This AD becomes effective August 12, 2014.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Bombardier, Inc. Model CL–600–1A11 (CL–600) airplanes, certificated in any category, serial numbers 1004 through 1085.

(d) Subject

Air Transport Association (ATA) of America Code 78, Engine Exhaust.

(e) Reason

This AD was prompted by reports of partial deployment of an engine thrust reverser in-flight caused by a failure of the translating sleeve at the thrust reverser attachment points. We are issuing this AD to detect and correct cracks of the translating sleeve at the thrust reverser actuator attachment points, which could result in deployment or dislodgement of an engine thrust reverser in-flight and subsequent reduced control of the airplane.

(f) Compliance

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

(g) Airplane Flight Manual (AFM) Revision

Within 1 calendar day after the effective date of this AD: Revise the applicable sections of the AFM to include the information specified in the temporary revisions (TRs) identified in paragraphs (g)(1), (g)(2), (g)(3), and (g)(4) of this AD, as applicable. These TRs introduce procedures to prohibit thrust reverser operation. Operate the airplane according to the limitations and procedures in the TRs identified in paragraphs (g)(1), (g)(2), (g)(3), and (g)(4) of this AD, as applicable. The revision required by paragraph (g) of this AD may be done by inserting copies of the applicable TRs identified in paragraphs (g)(1), (g)(2), (g)(3), and (g)(4) of this AD into the AFM. When these TRs have been included in general revisions of the AFM, the general revisions may be inserted in the AFM, provided the relevant information in the general revision is identical to that in the applicable TRs, and the TRs may be removed.

(1) Canadair TR 600/29, dated June 20, 2014, to the Canadair CL–600–1A11 AFM.

(2) Canadair TR 600/30, dated June 6, 2014, to the Canadair CL–600–1A11 AFM.

(3) Canadair TR 600–1/24, dated June 20, 2014, to the Canadair CL–600–1A11 AFM (Winglets) including Erratum, Publication No. PSP 600–1AFM (US), TR No. 600–1/24, June 20, 2014.

(4) Canadair TR 600–1/26, dated June 6, 2014, to the Canadair CL–600–1A11 AFM (Winglets).

(h) Repetitive Inspections

Within 25 flight cycles or 90 days, whichever occurs first, after the effective date of this AD, do detailed inspections (including a borescope inspection) of both engine thrust reversers for cracks, in accordance with the Accomplishment Instructions of Bombardier Alert Service Bulletin A600–0769, Revision 01, dated June 26, 2014.

(1) If no cracking is found during any inspection required by paragraph (h) of this AD, repeat the inspection required by paragraph (h) of this AD thereafter at intervals not to exceed 100 flight cycles until the modification specified in paragraph (i) of this AD is done.

(2) If any cracking is found during any inspection required by paragraph (h) of this AD, before further flight, modify the thrust reversers on both engines, in accordance with the Accomplishment Instructions of Bombardier Alert Service Bulletin A600–0769, Revision 01, dated June 26, 2014.

(i) Optional Terminating Modification

Modifying the thrust reversers on both engines, in accordance with the Accomplishment Instructions of Bombardier Alert Service Bulletin A600–0769, Revision 01, dated June 26, 2014, terminates the inspections required by paragraph (h) of this AD.

(j) Credit for Previous Actions

This paragraph provides credit for actions required by paragraphs (h) and (i) of this AD, if those actions were performed before the effective date of this AD using Bombardier Alert Service Bulletin A600–0769, dated June 19, 2014, which is not incorporated by reference in this AD.

(k) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York Aircraft Certification Office (ACO), ANE–170, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information

directly to the ACO, send it to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; fax 516–794–5531. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/ certificate holding district office. The AMOC approval letter must specifically reference this AD.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, New York ACO, ANE–170, Engine and Propeller Directorate, FAA; or Transport Canada Civil Aviation (TCCA); or Bombardier, Inc.'s TCCA Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(l) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) Canadian Emergency Airworthiness Directive CF–2014–19, dated June 20, 2014, for related information. You may examine the MCAI on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2014–0490.

(2) Service information identified in this AD that is not incorporated by reference may be obtained at the addresses specified in paragraphs (m)(3) and (m)(4) of this AD.

(m) Material Incorporated by Reference

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

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

(i) Bombardier Alert Service Bulletin A600–0769, Revision 01, dated June 26, 2014.

(ii) Canadair Temporary Revision 600/29, dated June 20, 2014, to the Canadair CL–600–1A11 Airplane Flight Manual.

(iii) Canadair Temporary Revision 600/30, dated June 6, 2014, to the Canadair CL–600–1A11 Airplane Flight Manual.

(iv) Canadair Temporary Revision 600–1/24, dated June 20, 2014, to the Canadair CL–600–1A11 Airplane Flight Manual (Winglets) including Erratum, Publication No. PSP 600–1AFM (US), TR No. 600–1/24, June 20, 2014.

(v) Canadair Temporary Revision 600–1/26, dated June 6, 2014, to the Canadair CL–600–1A11 Airplane Flight Manual (Winglets).

(3) For service information identified in this AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; email *thd.crj@aero.bombardier.com;* Internet *http://www.bombardier.com.*

(4) 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.

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

Issued in Renton, Washington, on August 4, 2014.

Jeffrey E. Duven,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2014–18866 Filed 8–11–14; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 145

[Docket No.: FAA–2006–26408; Amdt. No. 145–30]

RIN 2120–AJ61

Repair Stations

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule amends the FAA's repair station regulations to allow the FAA to deny an application for a new repair station certificate if the applicant or certain associated key individuals had materially contributed to the circumstances that caused a previous repair station certificate revocation action. The rule also adds a new section prohibiting fraudulent or intentionally false entries or omissions of material facts in any application, record, or report made under the repair station rules, and provides that making the fraudulent or intentionally false entry or omitting or concealing the material fact is grounds for imposing a civil penalty and for suspending or revoking any certificate, approval, or authorization issued by the FAA to the person who made or caused the entry or omission. These changes are necessary because the repair station rules do not presently provide these safeguards as do other parts of the FAA's regulations. Both of these changes will enhance safety by reducing the number of individuals in the repair station industry who commit intentional and serious violations of the regulations or who demonstrate they are otherwise unqualified to hold repair stations certificates.

DATES: Effective November 10, 2014.

ADDRESSES: For information on where to obtain copies of rulemaking documents and other information related to this final rule, see ''How To Obtain Additional Information'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: For technical questions concerning this action, contact Susan Traugott, Repair Station Branch (AFS–340), Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (214) 277–8534; email *Susan.M.Traugott@faa.gov.* For legal questions concerning this action, contact Edmund Averman, Office of the Chief Counsel (AGC–210), Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267–3147; email *Ed.Averman@faa.gov.*

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

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

This rulemaking is promulgated under the authority described in title 49, subtitle VII, part A, subpart III, section 44701, General requirements, and section 44707, Examining and rating air agencies. Under section 44701, the FAA may prescribe regulations and standards in the interest of safety for inspecting, servicing, and overhauling aircraft, aircraft engines, propellers, and appliances. The FAA may also prescribe equipment and facilities for, and the timing and manner of, inspecting, servicing, and overhauling these items. Under section 44707, the FAA may examine and rate repair stations.

This regulation is within the scope of section 44707 since it specifies instances when the FAA may deny the issuance of a repair station certificate, especially when a previously held certificate has been revoked.

I. Background

A. NTSB Recommendations

As a result of a fatal accident, the National Transportation Safety Board (NTSB) recommended [1] that an applicant's past performance should be a consideration in determining whether a new certificate should be issued. The NTSB was concerned that the FAA had no mechanism for preventing individuals who have been associated with a previously revoked repair station certificate from continuing to operate through a new repair station certificate.

[1] NTSB Recommendation No. A–04–01, February 9, 2004.

The NTSB pointed out that the FAA has addressed this issue in the context of air carriers and other commercial operators. Specifically, 14 CFR 119.39(b) allows the FAA to deny an application for a part 121 or 135 air carrier or operating certificate if the applicant has previously held a certificate that was revoked or if a person who exercised control over (or held a key management position in) an operator with a revoked certificate will be exercising control over (or holding a key management position in) the new operator.

Additionally, § 119.39(b) allows the FAA to deny certification to an applicant who is substantially owned by (or who intends to fill a key management position with) an individual who had a similar interest in a certificate holder whose certificate was (or is being) revoked when that individual materially contributed to the circumstances causing revocation. The FAA agrees with the NTSB that part 145 should have the same safeguards as § 119.39(b).

The NTSB also took issue with the practice of an individual whose repair station was being investigated for serious violations of the regulations surrendering the certificate to stop the investigation process. Accordingly, the NTSB recommended that the ''FAA should complete the investigation to the extent necessary to document all available facts relating to the fitness of the involved individuals; . . . .'' [2]

The FAA is publishing this final rule in part to address these recommendations from the NTSB.

B. Summary of NPRM

On May 21, 2012, the FAA published a notice of proposed rulemaking (NPRM) titled ''Repair Stations'' (77 FR 30054). In the NPRM, the FAA proposed to amend the regulations for repair stations by revising the system of ratings, the repair station certification requirements, and the regulations applicable to repair stations providing maintenance for air carriers. The proposal also addressed the NTSB recommendation (discussed previously) by proposing amendments that would permit the FAA to deny certain applicants new certificates based on their enforcement history. The FAA believed these changes were necessary because many portions of the existing repair station regulations do not reflect current repair station aircraft maintenance and business practices, and the existing regulations have not kept pace with advances in aircraft technology. The agency proposed the changes to modernize the regulations to keep pace with current industry standards and practices.

The comment period was scheduled to close on August 20, 2012. However, the FAA received a request from the Aeronautical Repair Station Association (ARSA) and other organizations to extend the comment period. In a notice published on August, 17, 2012 (77 FR 49740), the FAA granted a 90-day comment period extension to November 19, 2012.

The NPRM proposed to amend part 145 by:

- Significantly revising the system of ratings to eliminate class, radio, instrument, and accessory ratings;
- Requiring each repair station choosing to use a capability list to audit the list for currentness at least every two years;
- Requiring new applicants for a repair station certificate to include a letter of compliance as part of their application;
- Requiring repair stations to provide permanent housing for their facilities, equipment, materials, and personnel;
- Identifying specific reasons that the issuance of a repair station certificate could be denied;
- Prohibiting fraudulent or intentionally false entries in an application, record, or report made under the repair station rules; and
- Accommodating revisions made to 14 CFR parts 91 and 43 providing for the change in rating system and standardization of language.

C. Summary of Comments

The FAA received more than 230 public comments to the NPRM. The majority of the commenters, including Aircraft Electronics Association (AEA), Aerospace Industries Association (AIA), Aircraft Owners & Pilots Association (AOPA), Aeronautical Repair Station Association (ARSA), Aviation Suppliers Association (ASA), Experimental Aircraft Association (EAA), General Aviation Manufacturers Association (GAMA), Helicopter Association International (HAI), Modification and Replacement Parts Association (MARPA), National Air Transportation Association (NATA), the Small Business Administration (SBA) Office of Advocacy, Coordinating Agency for Supplier Evaluation (CASE) and several individual commenters had serious concerns with the proposed changes, and many suggested withdrawing the entire proposal.

Although commenters recognized that the system of ratings is outdated, there was general dissatisfaction with the proposed new system of ratings and the transition process. Commenters also expressed concerns on the proposals for a capability list, recurring audit, letter of compliance, permanent housing, facilities and equipment, and the FAA's proposed authority to deny a repair station application.

D. Differences Between the NPRM and the Final Rule

In the NPRM, the FAA proposed significant changes to the system of ratings, the repair station certification requirements, and the rules for repair stations providing maintenance for air carriers.

The FAA is withdrawing most of the changes proposed in the NPRM because of the issues raised by commenters. Many commenters argued that the proposed ratings system would not be satisfactory for current and future repair stations. Also, many expressed concern that the FAA does not have sufficient resources to perform recertification of all currently certificated repair stations while continuing to certificate new repair stations in the course of the proposed 24-month transition. This concern is exacerbated by the possible influx of hundreds of repair station applicants resulting from the finalization of the Transportation Security Administration foreign repair station rule, which allows for the certification of new repair stations outside the United States for the first time since 2004.

The NPRM proposed extensive changes to the repair station regulations with accommodating changes to 14 CFR parts 43 and 91. The final rule implements only the denial authority, the falsification penalty, and several minor revisions and corrections. The rule also requires that a certificate surrender is not complete until the FAA accepts the certificate for surrender. The final rule does not change 14 CFR parts 43 and 91 as initially proposed.

II. Overview of Final Rule

Currently, 14 CFR 145.53 provides that, with certain exceptions, an applicant who meets the requirements of the rule is entitled to a repair station certificate. Section 145.53 does not provide an exception related to a past regulatory non-compliance history. There has been at least one incident where the FAA revoked a repair station certificate for serious maintenance-related safety violations, and a key management official from the repair station shortly thereafter obtained a new repair station certificate under which improper maintenance resulted in a fatal accident.

[2] NTSB Recommendation No. A–04–02, February 9, 2004.

As a result of the fatal accident, the NTSB recommended that an applicant's past performance should be a consideration in determining whether a new certificate should be issued. The FAA agrees that this is an important consideration in assessing an applicant's overall fitness to hold a certificate and is providing a new exception to certificate entitlement in § 145.51(e).

The new exception will apply to:

- An applicant who previously held a repair station certificate that was revoked or is in the process of being revoked;
- An applicant who intends to fill certain key management positions with individuals who had materially contributed to the circumstances that led to a prior repair station certificate revocation, or to an ongoing revocation action against a repair station; and
- An applicant whose repair station will be owned or controlled by an individual or individuals who previously owned or exercised control over a repair station that had its certificate revoked or is in the process of being revoked.

With regard to the exception stated in the second bullet above, the FAA notes that in the NPRM the agency erroneously proposed two nearly identical paragraphs—(§§ 145.1051(e)(2) and 145.1051(e)(3)) pertaining to individuals who would be slated to hold management positions with a new applicant. Proposed paragraph (e)(2) addressed instances where the applicant intended to (or did) fill a management position with an individual who exercised control over or who held the same or a similar position with a repair station that had its certificate previously revoked, and paragraph (e)(3) addressed instances where an individual who would hold a management position in the new repair station previously held a management position with a repair station that had a certificate revoked. The FAA has determined that these two paragraphs are largely redundant and would accomplish essentially the same thing. As discussed below, proposed § 145.51(e) was meant to parallel the similar exceptions found for air carrier operating certificates in 14 CFR 119.39(b), and that section does not contain the text of paragraph (e)(3) discussed above. Therefore, the FAA is withdrawing § 145.51(e)(3) as proposed in the NPRM.

Under this new exception, the FAA may still issue a new certificate, but the applicant will no longer be entitled to a certificate, even if other qualifying criteria are met. Knowledge of the compliance disposition of key management personnel is an important component of the fitness assessment the FAA makes in determining the overall qualifications of an applicant who will conduct repair station operations.

To implement this new exception, the FAA is adding a two-part question to FAA Form 8310–3, Application for Repair Station Certificate and/or Rating. The question asks: Will any person as described in part 145.51(e) be involved with the management, control, or have substantial ownership of the repair station? If yes, provide a detailed explanation on a separate page. The detailed response to a 'yes' answer will allow the FAA to evaluate the circumstances of the revocation and determine whether the certification will or will not continue.

Also, in response to the NTSB recommendation, the FAA is adding a requirement that a certificate surrender is not complete until the FAA accepts the certificate for surrender. The new surrender requirement codifies existing FAA policy, and will prevent a repair station under investigation from attempting to circumvent a possible enforcement action that could result in a revocation of the repair station certificate by surrendering its certificate to stop the investigation before it is completed.

The other significant amendments in this final rule are:

- The addition of a new § 145.12 that prohibits fraudulent or intentionally false entries or omissions in applications, records, or reports made under the repair station rules. The rule provides that making a prohibited fraudulent or intentionally false entry or knowingly omitting a material fact is grounds for suspending or revoking any certificate, approval, or authorization the FAA issued to the person who made the entry or caused the omission.
- A revision to paragraph (a) of § 145.53 to incorporate the new grounds for denying a certificate under § 145.51(e) (discussed above) as another exception to certificate entitlement even if the other qualification requirements are met.
- A revision to § 145.55 to add that a certificate surrender is not complete until the FAA accepts the certificate for cancellation.

This final rule will also make the following amendments:

- A revision to § 145.55 to add a new paragraph (c)(3) to require that a repair station outside the United States applying for certificate renewal must show the required fee has been paid.
- A revision to § 145.57 to add a requirement in paragraph(a)(1) that a certificate change is necessary if the repair station certificate holder changes the name of the repair station.
- A revision to § 145.57(b), which currently requires that if a repair station's assets are sold the new owner must apply for a certificate. The revision clarifies that a new owner will need to apply for a new certificate only if the new owner chooses to operate as a repair station.
- Revisions to §§ 145.153, 145.157, and 145.213 to add the terms ''appropriately'' before ''certificated'' and ''as a mechanic or repairman'' before ''under part 65'' in three instances: (1) Supervisory personnel requirements (§ 145.153(b)(1)); (2) Personnel authorized to approve an article for return to service (§ 145.157(a)); and (3) Inspection of maintenance, preventive maintenance, or alterations (§ 145.213(d)). The first two of these revisions were proposed in the NPRM; however, the third was inadvertently omitted, and we are including it here for clarity and consistency. As discussed in the NPRM, the omission of the term ''appropriately'' in the 2001 final rule was an oversight we proposed to correct with this final rule. This omission technically provides that any individual holding a certificate issued under part 65 (other than mechanics and repairmen—such as air traffic control tower operators and aircraft dispatchers) could fill these positions. Under these amendments, supervisors and persons authorized to inspect and approve an article for return to service would, at a minimum, have to hold a certificate appropriate for the work being performed (*e.g.,* a mechanic or a repairman certificate).
- A revision to § 145.155 to remove the word ''and'' at the end of paragraph (a)(2). Since no § 145.155(a)(3) currently exists, it is an error for ''and'' to appear after paragraph (a)(2), and its removal corrects this error.
- A revision to § 145.163 to add the term ''and use'' after ''must have'' in paragraph (a). This section requires a repair station to have an approved training program, but does not provide a specific requirement that the program be used. This revision is necessary to clarify the intent of the current rule that repair stations must have and use an employee training program approved by the FAA. This rule also removes the reference to April 6, 2006, (added by the 2001 amendments) as the date by which the FAA required new applicants to submit a training program for approval, and also the starting date from which each existing repair station would be required to submit its training program

for approval based on the specified staggered schedule, *i.e.,* by the last day of the month in which its repair station certificate had been issued. This revision results in the necessary inclusion of the text of paragraph (a)(1) into § 145.163(a) and the consequent deletion of paragraphs (a)(1) and (a)(2).

In addition, we are also making a correction that was not proposed in the NPRM. Specifically, we are correcting § 145.221(a) to remove the erroneous insertion of the word ''serious'' when addressing the service difficulty reporting requirements from any failure, malfunction, or defect. The word ''serious'' was removed through notice and comment rulemaking in the 2001 final rule entitled ''Repair Stations,'' (66 FR 41088, August 6, 2001) that significantly revised part 145. The word ''serious'' was inadvertently inserted by a separate final rule entitled ''Service Difficulty Reports,'' (65 FR 56191, September 15, 2000).

Section 553(b)(3)(B) of the Administrative Procedure Act (APA) (5 U.S.C.) authorizes agencies to dispense with notice and comment procedures for rules when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under this section, an agency, upon finding good cause, may issue a final rule without seeking comment prior to the rulemaking. The removal of the term ''serious'' in § 145.221(a) does not change a standard, nor will there be any effect on regulated entities other than to prevent future misunderstandings that would have been resolved when interested persons contacted the FAA. Accordingly, due to the nature and circumstances of the error explained above, the FAA finds that further notice and comment are unnecessary to effect the correction.

III. Summary of the Costs and Benefits of the Final Rule

The FAA determined that the expected outcome of the rule will be a minimal impact with positive net benefits. Therefore, a regulatory evaluation was not prepared for this final rule. The FAA has, therefore, determined that this final rule is not a ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866, and is not ''significant'' as defined in DOT's Regulatory Policies and Procedures.

IV. Discussion of Public Comments and Final Rule

A. System of Ratings (§§ 145.59 and 145.61)

The NPRM proposed reducing the number of repair station ratings from eight to five, and revising the ratings' definitions to indicate the type of work that a repair station would be authorized to perform. Approximately 190 commenters, including AEA, AIA, GAMA, and Duncan Aviation, commented specifically on the proposed change to the system of ratings. Generally, these organizations stated that the proposed rule would not modernize the ratings (or that the changes would be regressive), would be cost prohibitive, and would not enhance safety. The following are some examples of the comments received on this proposal.

AEA noted that the proposed changes in the rating system are the basis for the reissuance of the repair station certificates, but that the perceived added benefit of the ratings revision does not justify the extreme cost of reapplication. AEA recommended that the FAA retain the current rating classification system and provide a better description of the maintenance authorized by each rating.

AIA stated that class ratings are beneficial to industry, and that the FAA's proposal to eliminate this type of rating would cause additional burdens beyond those set forth in the NPRM. AIA further stated that the transition from class to category will most likely cause significant disruption to existing repair stations with no appreciable safety benefit. Large repair stations would need time and resources to make the transition based on the breadth of their customer base and complexity of their operations. Small repair stations would be faced with an overwhelming burden, with a lack of resources to make the transition to build compliant capability lists or operations specifications systems.

GAMA stated that the FAA's proposal would allow airframe-rated repair stations to repair and alter radios and instruments without any specific ratings or obvious qualifications. GAMA added that the FAA's proposed ratings did not provide due consideration to avionics, which are increasingly more complex integrated systems that require greater and unique levels of technical skills to maintain properly.

Duncan Aviation stated that the current outdated rating system was better than the proposed rating system, which added no value to the way a repair station conducts business. Duncan Aviation suggested that the current system remain in place until a better system is developed with input from industry.

Based on the comments received, and because the ARAC recommendation on which the FAA based the proposed ratings changes is dated, the FAA will retain the current system of ratings until such time it can better understand and learn from all stakeholders what the future of repair station ratings should look like. The comments on the proposed ratings system changes clearly point to differences between those repair stations that are well suited to the current ratings system and those who find the current ratings system outdated and not meaningfully descriptive.

B. Certification Requirements (§§ 145.51, 145.103, and 145.163)

In the NPRM, the FAA proposed changes to allow for certification denial when certain enforcement history exists. The proposal also clarified existing regulatory language. Approximately 175 commenters, including EAA, AOPA, AIA, ARSA, ASA, CASE, GAMA, NATA, and the SBA Office of Advocacy expressed concerns with several of the proposed changes to the repair station certification requirements.

EAA, GAMA, NATA, and other commenters also expressed concerns with the FAA's proposed requirement that equipment, tools, test apparatus, materials, and personnel must be in place for inspection at the time of certification, with no provision that the equipment requirement could be met with an acceptable contract for its availability when needed. They proposed that the FAA retain the current language. GAMA further stated that the proposed change would require a financial impact assessment. EAA added that the requirement is unrealistic and noted that many of today's modern materials are shelf-life limited and would likely expire during the application and approval process, and that it was unrealistic to begin hiring technicians when the repair station certification process could take as long as 24 to 36 months.

As to the proposal to eliminate the option for an applicant to have a contract to make equipment available at the time of certification and any other time when needed when the relevant work is being performed in lieu of actually having the equipment on site, the FAA believes there is uncertainty within the industry on both the current and proposed requirements. This uncertainty is exacerbated by the inconsistent application of the contract clause regarding whether the equipment

or only the contract must be on hand during the certification inspection. Many certificate holders have long argued that it makes no economic sense to own or have on hand expensive, seldom used tools and equipment during certification.

In view of these comments, the FAA is withdrawing the proposal to require that the equipment must be in place for inspection at the time of certification or rating approval by the FAA. The original purpose for permitting applicants to meet the equipment requirement at certification approval by having a contract to make the equipment available when the relevant work is being performed remains. This is because it makes no economic sense to require an applicant to have on site expensive and seldom used equipment that would be costly to locate on site and that might sit unused for extended periods of time. By having a contract acceptable to the FAA, an applicant would be able to demonstrate that the required equipment could be made available when needed. In some cases this ''contract'' may actually be a letter of intent from an air carrier for which the repair station intends to perform work, or something similar from an equipment supplier. We recognize that the mere existence of a contract at the time of certification does not guarantee equipment availability at some unknown future date—indeed, contracts may be broken and suppliers may go out of business. Nevertheless, the presence of documentation that the repair station has planned for its needs and has at least a present means of meeting those needs provides some assurance to the FAA that it would not be certificating a ''paper repair station.''

Because of the potential ambiguity in the existing text of § 145.51(b), however, we are amending the paragraph for clarification. We proposed this clarification in the 2006 NPRM, which was withdrawn in its entirety on May 7, 2009, due to the large number of adverse comments received on many of the other proposals. The ambiguity arose from the text in paragraph (b) that states: ''An applicant may meet the equipment requirement of this paragraph if the applicant has a contract acceptable to the FAA with another person to make the equipment available to the applicant *at the time of certification* and at any time that it is necessary when the relevant work is being performed by the repair station.'' (§ 145.51(b), emphasis added.) Except that we are no longer including tools and test apparatus in this paragraph as proposed in 2006, our reasoning to clarify this paragraph as proposed in the 2006 NPRM remains, and is quoted in pertinent part below:

> The FAA proposes to clarify the text of § 145.51(b) by removing the ambiguity in the relieving provision concerning the availability of the equipment at the time of certification. This ambiguity results from the phrase specifying that the equipment requirement of the paragraph could be met ''if the applicant has a contract acceptable to the FAA with another person *to make the equipment available* to the applicant at the time of certification. * * * '' The FAA believes that the phrase lacks clarity and could be subject to arbitrary application in individual cases, i.e., one inspector might require the contract to be executed and all the equipment brought to the premises for a pre-certification inspection, while another inspector might only review the contract for the specified items. In the first example, the equipment could be returned to the supplier the next day, and not be returned to the repair station until the relevant work is being performed, as required by § 145.109(a).
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> Consistent with the requirement in § 145.109(a), and as noted by some of the commenters to the proposal in Notice No. 99–09, it is important that the equipment be in place when the work is being performed. That is the safety basis for the equipment requirement If, at the time of initial certification or rating approval, an applicant has a contract acceptable to the FAA to make the equipment available when the relevant work is being performed, the FAA will be able to determine that the repair station has assessed its relevant needs, and that it has the means to obtain the pertinent equipment . . . when necessary. (71 FR 70256, Dec. 1, 2006 (emphasis in original)).

EAA, NATA, and other commenters questioned the legality of the proposed regulatory transition and expressed concern over the FAA's ability to recertify every repair station in a timely manner during the 24-month transition period. Several commenters stated that the intent of the proposed language was unclear and that the procedural elements lacked safety benefits.

EAA commented that the FAA does not have the necessary resources to reissue approximately 5,000 repair station certificates in 24 months. Another commenter stated that it is currently not uncommon for applicants to experience extended delays in processing new and amended repair station certificates due to the reported lack of availability of FAA staff and resources. NATA stated that the recertification effort is likely to be impossible to achieve given the scope of the other proposed changes in the NPRM. As a result, the proposed rule would be too costly for repair stations and would result in some existing repair stations ceasing operations.

The SBA Office of Advocacy and others expressed concern that the cost estimate associated with re-certification was understated. Additionally, NATA added that the FAA will likely have far less than 24 months for approving or disapproving applications and foresees a situation of cascading delays. Pratt & Whitney, The Boeing Company, and other commenters suggested a grandfather clause limiting the need for existing repair stations to re-apply.

Based on the negative comments and concerns regarding the FAA's ability to resource and complete the re-certification of all currently certificated repair stations in 24 months, and because this lengthy transition period was prompted by the proposed new ratings system that the FAA is not adopting in this rule, the FAA is not proceeding with the proposed transition.

With respect to the proposed amendment to § 145.103 that would have required each certificated repair station to provide and maintain suitable permanent housing for its facilities, equipment, materials, and personnel, AEA, GAMA, and other commenters stated that any definition of ''maintain'' would impose requirements that do not comport with the FAA's intent to provide flexible requirements that align with current repair station business practices. Additionally, they argued that the proposed language would require a certificate holder to have sole operational control of its housing at all times, and any repair stations that may currently share space within a hangar would no longer be permitted to share space.

Some commenters stated that the FAA failed to provide a definition of ''maintain'' in the proposed requirement that each repair station ''provide and maintain'' suitable permanent housing for its facilities, etc., whereas the current rule requires only that the certificate holder ''provide'' this housing. They also stated that this proposal would have imposed additional costs not reflected in the FAA's economic impact assessment.

As pointed out by commenters, FAA did not define ''maintain'' in changing ''provide suitable permanent housing'' to ''provide and maintain suitable permanent housing.'' This lack of definition created confusion. The FAA agrees with the commenters and is not amending § 145.103.

EAA, GAMA, and several other commenters questioned the need for the proposal that repair stations provide a description of their training program for approval by the FAA. EAA stated that the FAA had not adequately explained the failure of the current training program requirements and the need to increase the regulatory burden by

requiring a description of the training program for FAA approval. GAMA questioned the purpose of the language when the entire training program, not just a description of the training program, is required to be approved by the FAA. Both organizations requested that the FAA retain the current language.

With respect to commenters' concerns that requiring a description of the training program for approval to be included in the application package would be burdensome and not justified, the FAA notes that a meaningful description of the program would be necessary under the current training requirements regulation (§ 145.163), which requires the program be approved by the FAA. The agency concurs, however, that this description is not necessary as a separate part of the application, and is withdrawing this proposed requirement.

C. Personnel Requirements (§§ 145.153 and 145.157)

In the NPRM, the FAA proposed requiring supervisors to be present to oversee the work being performed by the repair station and that they be appropriately certificated under 14 CFR part 65 for the work being supervised. The NPRM also proposed that both supervisors and inspection personnel be able to speak English. The FAA is not adopting this proposal, except for a minor editorial change.

Many of the large repair stations, as well as ARSA, did not concur with the proposals that supervisors be present to oversee the work performed and that they speak English. AEA and others commented that if the FAA proceeded with the proposed regulation, it would have essentially required a supervisor to be present and to oversee every individual performing every maintenance activity at repair stations. This also would have had broad implications for contract maintenance.

The commenters further stated that a clear unintended consequence of this proposed language would have been a substantial increase in the cost of maintenance services to compensate additional supervisory positions, as well as a corresponding decrease in availability of maintenance services due to limited availability of supervisory personnel.

Most of the comments regarding the proposal that supervisors be present when the work was performed stated that this requirement would have required industry to hire numerous additional supervisory personnel at great cost to cover eventualities such as night work, emergency field maintenance, line maintenance, and work conducted at additional fixed locations.

EAA commented that the proposed requirement for supervisors to speak English was not justified, and that the Americans with Disabilities Act prohibits such discrimination. EAA reasoned that a supervisor might not be able to speak English, but could effectively ''communicate'' in English. Pratt and Whitney suggested the requirement to speak English served no purpose, was subjective, and would be a detriment to safety by forcing foreign persons to speak in a non-native language. Foreign repair stations Hong Kong Aircraft Engineering Company, Ltd., and Tamagawa Aero Systems Co., Ltd., and other domestic repair stations and individuals commented that the requirement to speak English was unnecessary as it did not enhance safety. The commenters also disagreed with the proposed requirement for inspection personnel to speak English.

Commenters also disagreed with the proposed requirement for a repair station inspector to be available at the article while performing inspections. The commenters viewed the need to have an inspector at each phase while the work was being performed as too costly and not necessary.

Based on the comments received, the FAA will not revise the current requirements for supervisory personnel, inspection personnel, or personnel authorized to approve an article for return to service, except to insert ''appropriately'' before ''certificated'' and ''as a mechanic or repairmen'' before ''under part 65'' in §§ 145.153 and 145.157. This will correct the inadvertent omissions from the 2001 rulemaking. The repair station industry generally agreed with this proposed editorial change. As discussed above in the Overview of Final Rule section, we are making the same change to § 145.213(d) for clarification and consistency.

D. Denial Authority (§§ 145.51, 145.53, and 145.55)

As proposed in the NPRM, the FAA may deny a repair station a certificate in instances where one or more key individuals had materially contributed to the circumstances causing a previous repair station certificate revocation. As discussed previously, the FAA's proposed changes were based on an NTSB recommendation, and the proposal was influenced to a large extent by 14 CFR 119.39(b). The FAA is also amending § 145.55, to now contain a certificate surrender provision that requires acceptance for cancellation by the FAA to render the certificate no longer effective.

Some commenters were concerned with the proposed amendment to § 145.55 (Duration and renewal of certificate) that would maintain the effectiveness of a surrendered repair station certificate until the FAA accepts it for cancellation. This new requirement addresses a loophole that allowed certificate holders to avoid the ramifications of a revoked certificate by voluntarily surrendering a repair station certificate at any point during the FAA's investigation prior to the certificate's actual revocation. Once surrendered, there would be no certificate to take action against, and the investigation would stop. Accordingly, no order would be issued, and there would be no findings of violations or certificate revocation of record.

Several commenters expressed their understanding of the proposed denial provision and credited the FAA's desire for safety, but they asserted that the agency's implementation of the denial provision in a fair and uniform manner would be difficult. The commenters generally stated that the increase in safety was outweighed by the burden that would be placed on the agency and the industry. In addition, the requirement would waste FAA resources through unnecessary paperwork exercises without providing any safety benefits.

The SBA Office of Advocacy stated that small entities expressed concerns about repair stations lacking the knowledge and ability to track parties whose certificates have been revoked or who voluntarily surrendered certificates during an enforcement proceeding. Additionally, repair stations have no way of knowing who these disqualified individuals are, thereby making the cost of complying with the certificate denial provisions highly unpredictable or impossible. Small entity representatives suggested that if the agency adopted this proposal, the FAA should maintain a list of disqualified individuals.

GAMA recommended the insertion of ''knowingly'' in proposed § 145.1051(e)(2) (§ 145.51(e)(2) in this final rule) to implicate the intent of an applicant and suggested that the text be amended to read ''the applicant knowingly fills or intends to fill a management position.'' The FAA declines to adopt this suggestion because, in general, the purpose of this provision is to help ensure that persons who have committed serious (and often intentional) violations of the regulations are not able to continue doing so under a newly issued repair station certificate.

It is important that the FAA be aware of the compliance disposition of key management personnel when the agency assesses the fitness of those who will be operating repair stations. This safeguard is necessary whether or not the applicant has knowledge of the person's compliance history. An applicant's knowledge of the person's compliance history is implicated only when he or she completes the application and checks ''Yes'' or ''No'' to the 2-part question on FAA Form 8310–3, whether key personnel described in § 145.51(e) will be involved in the management or control of the new repair station. If the applicant knowingly provides a false answer to this question, the entry would be considered intentionally false and in violation of § 145.12.

The International Association of Machinist Aircraft Workers (IAMAW), International Brotherhood of Teamsters—Aircraft Division (IBT–AD), Transportation Trades Department (TTD) of the AFL–CIO, and Transportation Workers Union (TWU) endorsed the new requirement. The IAMAW stated that it is a common sense reform. The IBT–AD stated that the proposal did not go far enough, and suggested that the FAA consider maintaining a list of persons or entities that have been involved in repair station certificate revocations, or require an applicant to affirmatively disclose whether it has previously had a certificate revoked.

AIA, ASA, GAMA, NATA, and HEICO Aerospace generally supported the FAA's intent to follow the NTSB's recommendation. However, with regard to the FAA's proposal to change the word ''entitled'' in § 145.53(a) to ''eligible,'' as one means to implement the denial provisions, AIA stated that it was unclear what the specifics of being found ''eligible'' are, and that the term left too much discretion to FAA inspector preference or interpretation. AIA also stated that its membership recognizes that there may be circumstances where the public interest is best served by denying a certificate, even when the other conditions are met. AIA suggested that ''entitled'' be retained with an additional exception that would remove the variability of local inspector preference or interpretation, but which would retain the intent of the proposal.

The FAA agrees with the suggestion from AIA that the term ''entitled'' be retained in § 145.53(a), and that an additional exception to entitlement reference be added to include the new exceptions. The FAA also agrees and will retain the current language that provides for entitlement of the certificate when the requirements of part 145 have been met. Paragraph (a) of § 145.53, however, is amended to add the denial authority (found in new § 145.51(e)) as another exception to the current certificate entitlement provision.

EAA believes it is not an applicant's responsibility to determine if certain individuals are subject to this provision and that the responsibility for this determination should remain with the FAA. EAA is concerned that the proposal introduces uncertainty and confusion into the application process by not providing a method for determining whom a repair station should not employ. To address this concern, the FAA will respond to an applicant request for information regarding specific persons.

MARPA stated that the proposed language would permit the FAA to deny a certificate to a range of applicants associated with previous certificate revocations and requested that the entire proposed rule be rescinded. MARPA noted the following effects this proposal would have on the repair station industry:

- It would impose a de facto blacklist of certain parties, potentially excluding those on the list from significant participation in the repair station industry, and could include personnel who may have had nothing to do with the offenses that caused the prior repair station certificate to be revoked.
- It would have a chilling effect on subsequent employment of experienced repair station personnel who had previous association with repair stations whose certificates were revoked.
- Although the language is permissive (''may be denied''), the expense of a repair station certificate application would make it impractical to proffer an application that might be denied on a discretionary basis, further leading to an effective blacklisting of such persons.

MARPA noted further that in cases where a repair station (especially a small one) accepts a revocation by the FAA due to a lack of resources to fight the action, the applicant would be effectively blacklisted from the repair station industry. It added that in such cases in the past, FAA employees have specifically advised certificate holders to accept the proposed revocation and then to reapply. For all past revocations, the proposed rule would effectively impose a new penalty that was unanticipated at the time of the original revocation. MARPA also stated that the ex post facto imposition of such a penalty on a class of persons represents a Bill of Attainder (or a Regulation of Attainder) and is in violation of Article I, Section 9, of the U.S. Constitution.

The FAA does not agree with MARPA's assertion that the new denial authority amendments to § 145.51 would effectively impose a new penalty that was unanticipated at the time of the original revocation, and therefore that this would amount to an *ex post facto* imposition of a penalty on a class of persons. Because the agency did not discuss the prospective nature of the proposal in the NPRM, it is understandable that MARPA raised this concern. The FAA intends, however, that the new denial authority in § 145.51(e) will be exercised only prospectively. It will be applied only in instances where the revocation at issue takes place after the effective date of this rule. Accordingly, no ''ex post facto imposition of a penalty'' issue could arise.

The FAA also disagrees with MARPA's characterization that the denial provision would represent a Bill of Attainder (or a Regulation of Attainder). Black's Law Dictionary defines Bill of Attainder as: ''Legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial.'' [3] Section 145.51(e) will not provide for punishment of any person without due process. First, a full appeal process through the NTSB and the federal courts is provided by 49 U.S.C. 44709 for any person identified in paragraph (e)(1)—an applicant who holds a repair station certificate that is undergoing a revocation process, or who held a repair station certificate that had been revoked. Second, to respond to the commenters' concerns about an absence of due process for individuals identified in paragraph (e)(2) and (3), we are adding a new paragraph (f) to § 145.51 to provide that, if the FAA revokes a repair station certificate for violations of the repair station regulations, those individuals identified in § 145.51(e)(2) and (3) may be subject to an order finding that they materially contributed to the circumstances causing the revocation. Issuance of these orders will be governed by the FAA's Investigative and Enforcement Procedures, 14 CFR part 13—specifically the procedures set forth in § 13.20 will apply, including the right to a hearing under subpart D of part 13.

In order to effectively implement this new provision, the FAA's investigation underpinning the revocation process

[3] Black's Law Dictionary, West Publishing Company (1079).

must develop evidence that supports the factual allegations leading to a charge that the identified person materially contributed to the circumstances that caused the revocation. The FAA will develop guidance to assist agency inspectors in gathering and documenting the necessary evidence simultaneously with an investigation leading to the associated repair station certificate revocation. In accordance with § 13.20, except in egregious matters in which the Administrator determines that an emergency exists requiring immediate issuance of an order, each identified individual would first be provided with a notice that would include the pertinent factual allegations and the charge that he or she materially contributed to the circumstances causing the revocation. Though § 13.20 presently does not provide for the opportunity for a person who receives a notice under that section to participate in an informal conference with an FAA attorney prior to the FAA issuing an order, the agency is simultaneously with this rule amending the part 13 regulation to provide for that option. The FAA believes that providing this option for all orders issued under § 13.20 would be beneficial for all affected parties because often the issues are resolved, or at least narrowed, at that stage, providing for economies of resources.

Section 145.51(e) is nearly identical to the similar rule for air carriers. In the same manner that § 119.39(b) applies to air carriers, this new repair station rule is intended to help ensure those persons who exercise operational authority over business decisions in a repair station are those who have not demonstrated an unwillingness or an inability to ensure safe and compliant operations. Along these lines, the FAA views the restriction on new repair stations being controlled or managed by persons identified in § 145.51(e)(2) and (3) as a continuing and ongoing requirement. In other words, the FAA would look with disfavor on the actions of a certificate holder who, sometime after obtaining the certificate with no association with key personnel identified in those paragraphs, becomes associated with one or more of the persons the regulation was designed to preclude from controlling repair station operations. In egregious cases, such a repair station could be subject to an enforcement action under § 145.51(e) based on its not meeting the original certification requirement. The FAA Administrator has previously decided that a regulation imposing a requirement addressed to an ''applicant'' can impose an ongoing and continuing qualification requirement. See *Alphin Aircraft, Inc.,* FAA Order No. 97–10 at 3 (1997), 1997 WL 93230 (FAA). For air carriers, in applying the similar provisions of 14 CFR 119.39(b), the FAA considers the obligation for an air carrier not to be controlled by one or more of these persons to be ongoing and continuing.

For the purposes of implementing § 145.51(e)(2) and (3), the notice sent to an identified individual will set forth the factual allegations supporting the agency's determination and advise the person that he or she may be subject to an order finding that he or she materially contributed to the revocation circumstances. The notice will also advise the person that, if the order described above is issued and affirmed, the person's name will be included in an FAA data base of individuals that have been found to have materially contributed to the circumstances causing a repair station certificate revocation. In addition, the notice will also advise that, under § 145.51(e), an applicant for a new repair station certificate in the future may be denied the certificate if a person in this data base will have the same or similar position of authority or control over the new repair station's operations. The notice should also advise that, as described above, the person may be denied a similar controlling role in an existing repair station. The means to facilitate this preclusion would be an action against the repair station to enforce the provisions of § 145.51(e).

AEA stated that it did not understand the proposed change to § 145.55—that a surrender of a certificate was not effective until the FAA accepted the certificate for cancellation. AEA stated the proposed language was not clear and recommended the current text be retained without that addition. ARSA was vehemently opposed to the FAA having to ''accept'' the surrender of a repair station certificate and therefore requested the proposal not be adopted.

Airborne Maintenance and Engineering Services, Inc. (Airborne) commented that adopting the proposed requirement would encourage entities working on the fringes of the regulations to impede or otherwise not support FAA inspector corrective actions and create a disincentive for a poorly run repair station to voluntarily surrender its certificate.

The FAA is including the proposed amendment to § 145.55(a) to make clear that an attempt by a repair station undergoing an enforcement investigation to surrender its certificate in order to stop the investigation will be ineffective, as the certificate will remain effective until the FAA accepts it for cancellation or otherwise takes appropriate enforcement action. As a consequence, the investigation would continue, and, if appropriate, enforcement action could be taken. If serious violations of the regulations were found and the FAA concluded that the certificate holder lacked qualifications to hold the certificate, an order revoking the certificate could ensue.

E. Falsification of Records (§ 145.12)

The FAA is adding new § 145.12 to prohibit any fraudulent or intentionally false entry or omission of a material fact in any application, record, or report made under part 145. Among other things, this new prohibition will help discourage applications that fail to include the names of the persons contemplated by the denial provisions found in § 145.51(e). The sanction for any of those acts is suspension or revocation of the repair station certificate and any certificate, approval, or authorization issued by the FAA and held by the person committing the act.

Several companies, along with three associations and one individual, commented on this proposal. None of the commenters disagreed with the need to prohibit fraudulent or intentionally false entries. The most common concerns were that the proposed requirement lacked due process, and that it was redundant to a similar prohibition in the maintenance rules, specifically 14 CFR 43.12. At least three of the commenters raised issues concerning determinations made by individual inspectors in initiating enforcement actions. Gulfstream Aerospace Corporation questioned whether ''intent'' to make the false entry must be determined.

Other than expressing concerns over possible abuses resulting from determinations made by individual inspectors, the comments concerning a lack of due process were rather vague and unspecific. The FAA notes that any report of an alleged violation made by an individual inspector will be reviewed at several levels within the FAA—including by legal counsel—before a notice or order is issued. Further, legal counsel will not issue a notice or order unless the agency has evidence that such a violation, in fact, had occurred. In any case brought by the FAA against an alleged violator of a falsification regulation, or any other regulation, the burden of proving the violation is on the agency, and the affected person is entitled to a full appeal process. Alleged violators of a

prohibition against making intentionally false entries, as with any other alleged violation, are entitled to due process in accordance with 49 U.S.C. 44709 or 46301 and associated FAA and NTSB regulations.

In answer to a comment by Gulfstream Aerospace Corporation as to whether ''intent'' must be determined, the answer is yes, but only to the extent that the false entry was made knowingly. That is, at the time the person made the false entry, the person knew the entry was false. Other FAA regulations already prohibit fraudulent or intentionally false entries, either of which necessarily incorporates an element of intentionality in making the false entry, *i.e.,* the person knew at the time of making the entry that it was false, but the person made the entry anyway. Similarly, an explicit element of the new paragraph (b) in this final rule (discussed below) is a knowing concealment of a material fact. As with knowingly making a false entry, paragraph (b) is triggered when a person knew that he or she failed to include the material fact in the document at issue.

As to the comments that opined that the proposal was redundant to the falsification prohibition already existing in the maintenance rules (§ 43.12), the FAA addressed both the differences between that rule and the one proposed for repair stations, and the need for this regulation in the NPRM. While § 43.12 provides for suspension or revocation of the applicable airman and other mentioned certificates and privileges for requisite maintenance record falsifications or fraudulent acts, it does not provide for repair station certificate suspension or revocation for the same kind of conduct (77 FR 30066, May 21, 2012).

In addition, we are adding two additional consequences that will apply to the making of intentionally false entries or omissions. The first additional potential consequence is that the proscribed conduct may warrant imposition of a civil penalty either in addition to or in combination with a certificate action. This sanction option reflects the civil penalty authority granted to the FAA by the Congress in 49 U.S.C. 46301, whereby the FAA can assess civil penalties against both individuals and businesses for violations of the statute and the agency's regulations. Depending on the circumstances, sometimes a civil penalty may be an appropriate deterrent. The second additional consequence is that the FAA may deny an application if it is supported by an intentionally false entry or omission. The FAA views this consequence to be within the scope of what was proposed in the NPRM. This reflects the common sense notion that, if a certificate could be suspended or revoked based on an intentional falsification, it would make no economic sense for the agency to first issue the certificate and then turn around and initiate a certificate action based on the falsification. This change is consistent with a November 2013 amendment to 14 CFR part 121, in which the agency added a new § 121.9, which, among other things, provides for the imposition of a civil penalty and/or the denial of an application if a person made or caused to be made a fraudulent or intentionally false statement or knowing omission as described in that section (78 FR 67836; Nov. 12, 2013).

The agency notes that, while § 43.12(b) does provide for the suspension or revocation of an applicable operator certificate, in addition to the applicable airman certificate, it does not provide for the suspension or revocation of a repair station certificate. Because of the importance to safety of accurate records, this final rule adopts the text proposed that provides for the suspension or revocation of not only the repair station certificate but also of any FAA-issued certificate, approval, or authorization held by the person who committed the falsification.

As stated in the NPRM, in view of the FAA's limited resources, both the agency and ultimately the flying public depend heavily on the integrity of the system of self-reports. Because of the importance of honest and trustworthy records and reports to aviation safety, the FAA believes that any person who makes or causes to be made an intentionally false or fraudulent entry in any record or report the agency needs to provide proper oversight of repair stations should be subject to enforcement action as noted above. Accordingly, the agency may suspend or revoke not only the repair station certificate, but any certificate, approval, or authorization issued by the FAA and held by that person.[4]

Another company, Airborne, expressed concern that most of the other falsification prohibition regulations referenced in the NPRM (*e.g.,* §§ 61.37, 61.59, 63.18, 63.20, 65.18, 65.20, and 67.403) refer to certificates held by individuals, not companies. Airborne stated that its review of other operating rules (*e.g.,* those in parts 121, 125, 129, and 135) found no similar falsification provisions applicable to those certificate holders. The company also referenced Chapter 7 of the FAA's Compliance and Enforcement Program, FAA Order 2150.3B, Paragraph 2.a(1), which states that the agency generally suspends the certificates of individual certificate holders for violations, but usually takes civil penalty action against air carriers and airports. The commenter was especially concerned that a wrongful act (fraudulent or intentional falsification) by a single individual could result in the closing of an entire certificated entity.

Although Airborne may be correct in observing that the other falsification prohibition regulations cited in the NPRM refer to suspending or revoking certificates held by individuals and not by companies, the FAA does not believe that is a reason to refrain from issuing this rule. Besides, as discussed briefly above, in November 2013 (approximately a year and a half after the Repair Station NPRM), the FAA published amendments to 14 CFR part 121, which added a new § 121.9 (Fraud and falsification), which provided for sanctions against air carriers and persons employed by them for violations of similar proscribed conduct. Those sanctions include: (1) A civil penalty; (2) suspension or revocation of any FAA-issued certificate held by that person; (3) the denial of an application for any FAA-issued approval; and (4) the removal of any FAA-issued approval (78 FR 67836; November 12, 2013). As noted in the NPRM, the importance of accurate records to assist the FAA in exercising its aviation safety oversight responsibilities cannot be overstated. If repair station officials know that one consequence of falsifying records is the loss of the repair station certificate, they may be motivated to produce accurate and truthful records.

The FAA also notes that Airborne, in opposing a regulation that could result in the revocation of a repair station's certificate, selectively quoted from the FAA's Compliance and Enforcement Program, FAA Order 2150.3B, when it stated: ''Thus, the agency generally suspends the certificates of individual certificate holders for violations. However, the FAA usually takes civil penalty action against air carriers and airports. . . .'' Airborne, however, neglected to reference the next sentence in Order 2150.3B, which states: ''Nevertheless, when the FAA determines that safety considerations warrant it, the agency will suspend the certificate of any type of certificate holder. In no case will the FAA take civil penalty action alone when remedial legal action is necessary or

[4] 77 FR 30067; May 21, 2012.

appropriate.'' [5] Additional FAA guidance in this area is found in paragraph 2.b(4) of the Order which states that revocation is normally appropriate when a certificate-holding entity deliberately or flagrantly violates the statute or regulations or falsifies records. Moreover, in the FAA's published sanction guidance, the sanction generally called for in the case of an intentionally false or fraudulent entry, reproduction, or alteration in a record or report is certificate revocation.[6]

As discussed above, however, we have added the additional sanctions of a civil penalty and the denial of an application. Consistent with § 121.9 (Fraud and falsification), three different sanctions will be available to the agency to enforce this rule. Section 145.12(c) provides that committing an act prohibited by either paragraph (a) or (b) is a basis for any one or any combination of (1) suspension or revocation, (2) a civil penalty, and (3) denial of an application. The addition of the civil penalty sanction addresses commenters' concerns that in some cases a civil penalty would be more appropriate for a company than a revocation of its certificate. Whether a civil penalty, a certificate action, or both, is an appropriate sanction would depend on the actual circumstances of the matter and a consideration of appropriate factors, including agency sanction guidance, related to determining the sanction or sanctions to be applied.

As discussed above and in the NPRM, the FAA has long considered intentional falsification of required records to be a serious safety-related problem with a potential for dire consequences. The referenced regulatory prohibitions against individual falsifications are long-standing, as are the recommended sanctions for both individuals and entities in the agency's published sanction guidance. Including in the regulations a proscription against entities falsifying records made, kept, or used to show compliance with a requirement is in the public interest, and the FAA is adopting this section as proposed, but with the added clarification that a falsification in material submitted in support of an application is also proscribed. This is to forestall an argument that information submitted, while false, technically was not in the application, and therefore was outside the reach of the regulation. Also, in response to a comment, the FAA is adding a proscription against concealment of a material fact by omission, as discussed below.

Finally ARSA, in stating it had no objection to the proposal, also noted that the FAA should be mindful that similar sections in 14 CFR include omission of material information as equally egregious. Consequently, ARSA suggested that the FAA may wish to consistently express all prohibitions of such actions.

The FAA agrees with ARSA's recommendation that the regulation should prohibit omissions of material information. ARSA's reference in its comments to similar sections in 14 CFR that include omission of material information may be a reference to the omission prohibition in 14 CFR 3.5(c)(2). The FAA issued 14 CFR part 3 in 2005 to prohibit persons from making fraudulent or intentionally false statements in records when conveying information in an advertisement or sales transaction about the airworthiness of a type-certificated product. Section 3.5(c)(2) provides, in pertinent part, that no person may make, or cause to be made, through the omission of material information, a representation that a type-certificated product is airworthy if that representation is likely to mislead a consumer.

Clearly, omissions of material information can be as damaging as the insertion of false information in a required document. This issue is brought to light in contemplation of new § 145.51(e) (Application for certificate), in which the FAA seeks information on who an applicant proposes to place in management or controlling positions. Information on the compliance history of these personnel is important to the FAA in determining the qualifications, including the compliance disposition, of those persons who could make operational decisions. Omitting the requested information could be as damaging as making an intentionally false entry.

The NTSB, in interpreting the plain language of current falsification prohibition regulations, has held that the failure to make an entry cannot constitute an intentionally false entry because the omission is not an entry.[7] The FAA aims to close this ''loophole'' by adding new paragraph (b) to new § 145.12, to provide that no person may, by omission, knowingly conceal or cause to be concealed, a material fact. This text also finds support in the Government's general falsification prohibition statute, 18 U.S.C. 1001, which, in paragraph (a)(1), provides for criminal penalties for whoever falsifies, conceals, or covers up by any trick, scheme, or device a material fact.

The FAA has also eliminated the phrase ''required to be'' with regard to any record or report made, kept, or used to show compliance. The agency has done so to forestall an argument a falsifier could make that, although the falsity occurred in a record or report that was made, kept, or used to show compliance, it was not a record or report that was required by a regulation to be made or kept. The NTSB has already rejected that argument in addressing a violation of § 43.12.[8] There, the respondent argued that he was not required to use those particular records that formed the basis for the falsification charge. The NTSB agreed instead with the FAA's position that the rule reaches falsifications in any maintenance documents kept or used to show compliance with a requirement in part 43, whether or not the documents are records or reports in a form or format the FAA requires an individual to keep or to use for that purpose.

The NTSB offered a second rationale in that case for construing the term ''required'' in the regulation. The term should not be restricted to mean ''required'' by the FAA Administrator. The NTSB decision noted that the term can also be broadly construed to mean required by the circumstances for which compliance is sought or necessary. Here, the respondent presented documents purporting to establish compliance with various airworthiness directives to establish that the aircraft was airworthy. The respondent's submission of the records attesting the airworthiness directives' accomplishment represented his recognition that they constitute records that he was required to make, keep, and use in order to satisfy the requirements of part 43. Even though NTSB case law should preclude an alleged falsifier from arguing the false entry at issue was not in a required record or report, the FAA determined that eliminating the term from this regulation will, at a minimum, remove the potential ambiguity.

The FAA also notes that a similar falsification prohibition in the FAA's certification rules (14 CFR part 21) does not contain the phrase ''required to be'' to modify the phrase ''kept, made, or used.'' Specifically, § 21.2(a)(2) prohibits any fraudulent, intentionally

[5] FAA Order 2150.3B, Ch. 7, Para. 2.a(1).

[6] FAA Order 2150.3B, Appendix B, Table of Sanctions, in Part Two, Section 1 (U.S. Air Carriers, U.S. Commercial Operators, Part 125 Operators, and Part 129 Operators) in Figure B–1–j (Records and Reports), in (1)(a).

[7] *Administrator* v. *Alvarez,* 5 NTSB 1906, 1907 NTSB Order No. EA–2504, 1987 WL 122066 (N.T.S.B.)

[8] *Administrator* v. *Anderson,* NTSB Order No. EA–4564, 1997 WL 355350 (N.T.S.B.).

false, or misleading statement in any record or report that is kept, made, or used to show compliance with any requirement of this part. The FAA's removal of the phrase ''required to be'' from the text proposed in the NPRM simply aligns this rule with the existing certification falsification provision and, as noted above, accords with NTSB precedent.

F. Other Specific Comments

The comments in this section concern proposed changes in definitions, contract maintenance, and compliance costs. All of the concerns raised by the commenters in this section are addressed by the FAA's withdrawal of the applicable proposed sections.

AEA, ARSA, CASE, EAA, and some repair stations voiced objection to the definitions of avionics and line maintenance proposed in § 145.1003, Definition of terms. AEA did not concur with the definition of avionics and suggested that it should include both mechanical and electronic radios, indicators, and instruments. Both AEA and ARSA commented that although the FAA defined avionics, the agency never used the term in part 145. ARSA added that the definition is unnecessary and should be removed in its entirety.

AEA and EAA objected to the definition of line maintenance, stating that the FAA has not given justification for establishing a new requirement on where line maintenance may be performed. AEA stated that maintenance authorizations may be limited to commercial operators; however the definition of line maintenance is much broader than unscheduled maintenance for a part 121 and 135 air carrier.

ARSA stated that the line maintenance definition should be stricken in its entirety and that the term can be defined only within the context of a repair station's capabilities and the operator's requirements. Therefore, the amount, type, and extent of line maintenance is already controlled by the performance standards; the only additional ''control'' needed under part 145 is the validation that the repair station has appropriate capabilities and quality procedures. ARSA also stated that if the agency keeps the definition it cannot be limited purely to work under parts 121 and 135; it must include part 91, subpart K, at a minimum. Further, the time allotment must be removed; it places an artificial barrier on the type of work that can and should be performed with limited resources in accordance with part 43.

GAMA commented on the proposed section covering contract maintenance, stating that on-site inspection of the subcontractor would be required before any maintenance is performed by that person. GAMA emphasized that this is not stated in the rule and should not be added as an interpretation without being added to the rule. For organizations with multiple service facilities, the proposed rule would have required each facility to inspect the subcontractor, which would place an undue burden on both the repair station and the subcontractor.

Almost all commenters disagreed with the FAA's economic forecast. They stated that the FAA's calculations grossly underestimated the costs to industry. EAA added that at a time when the aviation industry is in perilous condition, it does not seem appropriate to impose a large economic impact on aviation businesses and their customers for little or no safety benefit.

NATA, AOPA, Mobile Transponder Services, LLC, and others stated that the FAA identified two compliance costs to repair stations: The cost to apply for a rating and the cost to revise their manuals. However, the FAA also proposed significant changes to training program requirements but did not account for the resources required to develop the new training curriculum and the staff-hours necessary to re-train all applicable staff members. Some commenters also stated the FAA did not consider the complications and costs of limiting mobile maintenance operations, particularly to general aviation aircraft owners and operators. These expenses will increase the cost of these elements of the proposed rules exponentially.

Additionally, several commenters, including AOPA, noted that the agency estimated the average one-time compliance costs would be $1,146 for a small repair station, and $2,848 for a medium sized repair station. The commenters argued that those costs are just a fraction of the cost of the proposed rule. They also expressed the view that even considering just the costs identified by the FAA (application for rating and revision of manuals) the estimates are unrealistically low. Furthermore, the commenters stated that the costs assigned by the FAA are especially unreasonable if the FAA intended for currently certificated repair stations to complete a letter of compliance, in addition to enduring the entire certification process and revising manuals and other documents.

Collectively, the commenters stated that in large repair stations, ''supervisors'' are often hourly-paid lead personnel. The term ''supervisor'' in some instances may refer to the administrative supervisor who does not give technical guidance to those who are unfamiliar with all the necessary job requirements. Therefore, the commenters argued that naming each supervisor on a roster, as proposed in the NPRM, would be ineffective for enhancing safety.

The FAA is withdrawing the overarching ratings proposal with associated certification and personnel requirements. The proposals for changes to definitions, contract maintenance, and the required 24-month transition are inseparably linked to the overarching proposals and are not adopted in this final rule. This rule contains only the amendments that add denial authority, require FAA acceptance of a surrendered certificate, and prohibit fraudulent or intentionally false entries and omissions, as well as several minor administrative changes.

V. Regulatory Notices and Analyses

A. Regulatory Evaluation

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 and Executive Order 13563 direct that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Pub. L. 96–39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, the Trade Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation with base year of 1995). This portion of the preamble summarizes the FAA's analysis of the economic impacts of this final rule.

Department of Transportation Order DOT 2100.5 prescribes policies and procedures for simplification, analysis, and review of regulations. If the expected cost impact is so minimal that a proposed or final rule does not warrant a full evaluation, this order permits that a statement to that effect

and the basis for it to be included in the preamble if a full regulatory evaluation of the cost and benefits is not prepared. Such a determination has been made for this final rule. The reasoning for this determination follows:

This rule amends regulations for repair stations in four areas. First, it introduces a new exception that enables the FAA to deny an applicant a repair station certificate if the applicant previously held a repair station certificate that had been revoked, or if certain key individuals (those that would be in a management position or who would have control or a substantial ownership interest in the applicant) had materially contributed to the circumstances that caused a previous repair station certificate revocation. Along these lines, the rule also provides that a repair station's attempt to surrender its certificate is not effective until the FAA accepts the certificate for cancellation. Secondly, the rule provides that false or fraudulent entries or omissions in applications, records, or reports may result in revocation of any certificate issued by the FAA. Thirdly, the rule adopts administrative changes to clarify the intent of the current rule. Lastly, the rule corrects several errors in the repair station regulations.

Current regulations do not allow the FAA to deny a repair station certificate to a technically qualified applicant, regardless of conduct. This rule permits the FAA to deny an application if the applicant previously had a certificate revoked or if the certificate is in the process of being revoked, or the applicant intends to fill a position with an individual as described in part 145.51(e). To determine if an applicant fits the criteria described in part 145.51(e), the FAA will add one two-part question to FAA Form 8310–3 ''Application for Repair Station Certificate and/or Rating.'' The new question is: ''Will any person as described in part 145.51(e) be involved with the management, control, or have substantial ownership of the repair station? If 'YES', provide a detailed explanation on a separate page.'' If an applicant declares ''No,'' no additional explanation by the applicant is required. If an applicant declares ''Yes,'' the applicant is required to give a written narrative of the circumstances leading to the revocation. Based on the information provided in the narrative, the FAA can deny the applicant a repair station certificate, if warranted. In addition, an applicant, on occasion, may find it necessary to contact FAA personnel to determine if a certain individual has been identified as a contributor to a repair station certificate revocation. The time expended by both parties for this query, as well as the increased time required for an applicant to complete revised FAA Form 8310–3, is expected to be negligible.

Since the expected outcome will be a minimal impact with positive net benefits, a regulatory evaluation was not prepared. The FAA has, therefore, determined that this final rule is not a ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866, and is not ''significant'' as defined in DOT's Regulatory Policies and Procedures.

B. Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) (RFA) establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation.'' To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.'' The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA.

However, if an agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

For this regulatory flexibility analysis, the FAA used the SBA-defined categories of ''small'' (1,500 or fewer employees) and ''non-small'' (more than 1,500 employees) for the aircraft manufacturing industry. As of May 2013, there were 4,779 FAA certificated repair stations. Of these repair stations, a vast majority (99.5 percent or 4,753) are defined as ''small.'' The last time a certificate application was made by a ''non-small'' entity was in 2005.[9]

During the three-year period from 2010 through 2012, the FAA received 526 applications for repair station certification, for an average of 175 applications per year.[10] All 526 applications for certification were submitted by small entities. Consequently, it is projected that most future applicants for repair stations certificates will also be small entities. Accordingly, this final rule will impact a substantial number of small entities.

The SBA Office of Advocacy provided comments to the FAA on the NPRM. One comment was that the cost estimate for the re-certification of repair stations (which was prompted by a new ratings system) is understated. The FAA withdrew the provision for a new ratings system from the final rule. Thus, the cost estimate for recertification of repair stations has been eliminated.

The SBA also commented that small industry representatives stated that they lack the knowledge and ability to track parties whose certificates were either revoked or voluntarily surrendered during an enforcement proceeding, thereby making the cost of complying with the ''bad actor'' provisions highly unpredictable or impossible. The representatives recommended that should this provision be adopted then the FAA should maintain a list of disqualified individuals. Repair station applicants could then query the FAA regarding that information on certain persons. To address this concern, the FAA will respond to an applicant request for information regarding specific persons; however a list of disqualified persons will not be made available to the public.

There will be a substantial number of small entities impacted by this rule. However the expected economic impact to these entities will be minimal. To assist in implementing this rule, the FAA will add one additional two-part question to the application for a repair station certificate. To further assist applicants in answering this question, the FAA will answer an applicant's inquiry as to whether a named individual has contributed to the revocation of a repair station certificate. Thus, the cost of this incremental time required for these activities is expected to be minimal.

If an agency determines that a rulemaking will not result in a

[9] Federal Aviation Administration Safety Performance Analysis System Database (SPAS).

[10] SPAS Database—Applications for Repair Station Certificates: CY 2010—185 applications; CY 2011—171 applications; CY 2012—168 applications.

significant economic impact on a substantial number of small entities, the head of the agency may so certify under section 605(b) of the RFA. Therefore, as provided in section 605(b), the head of the FAA certifies that this rulemaking will not result in a significant economic impact on a substantial number of small entities.

C. International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standard has a legitimate domestic objective, such as the protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. The FAA has assessed the potential effect of this final rule and determined that it will impose the same costs on domestic and international entities and thus has a neutral trade impact.

D. Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (in 1995 dollars) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.'' The FAA currently uses an inflation-adjusted value of $151.0 million in lieu of $100 million. This final rule does not contain such a mandate; therefore, the requirements of Title II of the Act do not apply.

E. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the FAA consider the impact of paperwork and other information collection burdens imposed on the public. According to the 1995 amendments to the Paperwork Reduction Act (5 CFR 1320.8(b)(2)(vi)), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid Office of Management and Budget (OMB) control number.

This final rule will impose a revision to the existing information collection requirements previously approved under OMB Control Number 2120–0682, Application for Repair Station Certificate and/or Rating (FAA Form 8310–3). The FAA has determined that the revision to the information collection is not significant or substantive and does not change the terms of the existing OMB approval. As required by the Paperwork Reduction Act, the FAA submitted the information collection revision to OMB for its review to ensure that the public record is accurate.

F. International Compatibility and Cooperation

(1) In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to conform to International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has determined that there are no ICAO Standards and Recommended Practices that correspond to these proposed regulations.

(2) Executive Order (EO) 13609, Promoting International Regulatory Cooperation, promotes international regulatory cooperation to meet shared challenges involving health, safety, labor, security, environmental, and other issues and to reduce, eliminate, or prevent unnecessary differences in regulatory requirements. The FAA has analyzed this action under the policies and agency responsibilities of EO 13609, and has determined that this action would have no effect on international regulatory cooperation.

G. Environmental Analysis

FAA Order 1050.1E identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances. The FAA has determined this rulemaking action qualifies for the categorical exclusion identified in paragraph 312(d) and involves no extraordinary circumstances.

VI. Executive Order Determinations

A. Executive Order 13132, Federalism

The FAA has analyzed this final rule under the principles and criteria of Executive Order 13132, Federalism. The agency determined that this action will not have a substantial direct effect on the States, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, does not have Federalism implications.

B. Executive Order 13211, Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA analyzed this final rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). The agency has determined that it is not a ''significant energy action'' under the executive order and it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

VII. How To Obtain Additional Information

A. Rulemaking Documents

An electronic copy of a rulemaking document may be obtained by using the Internet—

1. Search the Federal eRulemaking Portal (*http://www.regulations.gov*);
2. Visit the FAA's Regulations and Policies Web page at *http://www.faa.gov/regulations_policies/* or
3. Access the Government Printing Office's Web page at *http://www.gpo.gov/fdsys/.*

Copies may also be obtained by sending a request (identified by notice, amendment, or docket number of this rulemaking) to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267–9680.

B. Comments Submitted to the Docket

Comments received may be viewed by going to *http://www.regulations.gov* and following the online instructions to search the docket number for this action. Anyone is able to search the electronic form of all comments received into any of the FAA's dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.).

C. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. A small entity with questions regarding this document, may contact its local

FAA official, or the person listed under the **FOR FURTHER INFORMATION CONTACT** heading at the beginning of the preamble. To find out more about SBREFA on the Internet, visit *http://www.faa.gov/regulations_policies/rulemaking/sbre_act/.*

List of Subjects in 14 CFR Part 145

Air carriers, Air transportation, Aircraft, Aviation safety, Recordkeeping and reporting, Safety.

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 145 as follows:

PART 145—REPAIR STATIONS

■ 1. The authority citation for part 145 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701–44702, 44707, 44709, 44717.

■ 2. Section 145.12 is added to subpart A to read as follows:

§ 145.12 Repair station records: Falsification, reproduction, alteration, or omission.

(a) No person may make or cause to be made:

(1) Any fraudulent or intentionally false entry in:

(i) Any application for a repair station certificate or rating (including in any document used in support of that application); or

(ii) Any record or report that is made, kept, or used to show compliance with any requirement under this part;

(2) Any reproduction, for fraudulent purpose, of any application (including any document used in support of that application), record, or report under this part; or

(3) Any alteration, for fraudulent purpose, of any application (including any document used in support of that application), record, or report under this part.

(b) No person may, by omission, knowingly conceal or cause to be concealed, a material fact in:

(1) Any application for a repair station certificate or rating (including in any document used in support of that application); or

(2) Any record or report that is made, kept, or used to show compliance with any requirement under this part.

(c) The commission by any person of an act prohibited under paragraphs (a) or (b) of this section is a basis for any one or any combination of the following:

(1) Suspending or revoking the repair station certificate and any certificate, approval, or authorization issued by the FAA and held by that person.

(2) A civil penalty.

(3) The denial of an application under this part.

■ 3. Amend § 145.51 by revising paragraph (b), and adding paragraphs (e) and (f) to read as follows:

§ 145.51 Application for certificate.

* * * * *

(b) The equipment, personnel, technical data, and housing and facilities required for the certificate and rating, or for an additional rating, must be in place for inspection at the time of certification or rating approval by the FAA. However, the requirement to have the equipment in place at the time of initial certification or rating approval may be met if the applicant has a contract acceptable to the FAA with another person to make the equipment available to the repair station at any time it is necessary when the relevant work is being performed.

* * * * *

(e) The FAA may deny an application for a repair station certificate if the FAA finds that:

(1) The applicant holds a repair station certificate in the process of being revoked, or previously held a repair station certificate that was revoked;

(2) The applicant intends to fill or fills a management position with an individual who exercised control over or who held the same or a similar position with a certificate holder whose repair station certificate was revoked, or is in the process of being revoked, and that individual materially contributed to the circumstances causing the revocation or causing the revocation process; or

(3) An individual who will have control over or substantial ownership interest in the applicant had the same or similar control or interest in a certificate holder whose repair station certificate was revoked, or is in the process of being revoked, and that individual materially contributed to the circumstances causing the revocation or causing the revocation process.

(f) If the FAA revokes a repair station certificate, an individual described in paragraphs (e)(2) and (3) of this section is subject to an order under the procedures set forth in 14 CFR 13.20, finding that the individual materially contributed to the circumstances causing the revocation or causing the revocation process.

■ 4. Amend § 145.53 by revising paragraph (a) to read as follows:

§ 145.53 Issue of certificate.

(a) Except as provided in § 145.51(e) or paragraph (b), (c), or (d) of this section, a person who meets the requirements of subparts A through E of this part is entitled to a repair station certificate with appropriate ratings prescribing such operations specifications and limitations as are necessary in the interest of safety.

* * * * *

■ 5. Amend § 145.55 by revising paragraphs (a), (b), and adding paragraph (c)(3) to read as follows:

§ 145.55 Duration and renewal of certificate.

(a) A certificate or rating issued to a repair station located in the United States is effective from the date of issue until the repair station surrenders the certificate and the FAA accepts it for cancellation, or the FAA suspends or revokes it.

(b) A certificate or rating issued to a repair station located outside the United States is effective from the date of issue until the last day of the 12th month after the date of issue unless the repair station surrenders the certificate and the FAA accepts it for cancellation, or the FAA suspends or revokes it. The FAA may renew the certificate or rating for 24 months if the repair station has operated in compliance with the applicable requirements of part 145 within the preceding certificate duration period.

(c) * * *

(3) Show that the fee prescribed by the FAA has been paid.

* * * * *

■ 6. Revise § 145.57 to read as follows:

§ 145.57 Amendment to or transfer of certificate.

(a) A repair station certificate holder applying for a change to its certificate must submit a request in a format acceptable to the Administrator. A change to the certificate must include certification in compliance with § 145.53(c) or (d), if not previously submitted. A certificate change is necessary if the certificate holder—

(1) Changes the name or location of the repair station, or

(2) Requests to add or amend a rating.

(b) If the holder of a repair station certificate sells or transfers its assets and the new owner chooses to operate as a repair station, the new owner must apply for an amended or new certificate in accordance with § 145.51.

■ 7. Amend § 145.153 by revising paragraph (b)(1) to read as follows:

§ 145.153 Supervisory personnel requirements.

* * * * *

(b) * * *

(1) If employed by a repair station located inside the United States, be appropriately certificated as a mechanic or repairman under part 65 of this chapter for the work being supervised.

* * * * *

■ 8. Amend § 145.155 by revising paragraph (a)(2) to read as follows:

§ 145.155 Inspection personnel requirements.

(a) * * *

(2) Proficient in using the various types of inspection equipment and visual inspection aids appropriate for the article being inspected.

* * * * *

■ 9. Amend § 145.157 by revising paragraph (a) to read as follows:

§ 145.157 Personnel authorized to approve an article for return to service.

(a) A certificated repair station located inside the United States must ensure each person authorized to approve an article for return to service under the repair station certificate and operations specifications is appropriately certificated as a mechanic or repairman under part 65.

* * * * *

■ 10. Amend § 145.163 by revising paragraph (a) to read as follows:

§ 145.163 Training requirements.

(a) A certificated repair station must have and use an employee training program approved by the FAA that consists of initial and recurrent training. An applicant for a repair station certificate must submit a training program for approval by the FAA as required by § 145.51(a)(7).

* * * * *

■ 11. Amend § 145.213 by revising paragraph (d) to read as follows:

§ 145.213 Inspection of maintenance, preventive maintenance, or alterations.

* * * * *

(d) Except for individuals employed by a repair station located outside the United States, only an employee appropriately certificated as a mechanic or repairman under part 65 is authorized to sign off on final inspections and maintenance releases for the repair station.

■ 12. Amend § 145.221 by revising paragraph (a) to read as follows:

§ 145.221 Service difficulty reports.

(a) A certificated repair station must report to the FAA within 96 hours after it discovers any failure, malfunction, or defect of an article. The report must be in a format acceptable to the FAA.

* * * * *

Issued under authority provided by 49 U.S.C. 106(f), 44701(a), and 44707 in Washington, DC, on July 14, 2014.

Michael P. Huerta,

Administrator.

[FR Doc. 2014–18938 Filed 8–11–14; 8:45 am]

BILLING CODE 4910–13–P

FEDERAL TRADE COMMISSION

16 CFR Part 305

[RIN 3084–AB03]

Energy Labeling Rule

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The Federal Trade Commission (''Commission'') amends its Energy Labeling Rule (''Rule'') by publishing new ranges of comparability for required labels on central air conditioners, heat pumps, and weatherized furnaces.

DATES: The amendments announced in this document will become effective on January 1, 2015.

FOR FURTHER INFORMATION CONTACT: Hampton Newsome, Attorney, Division of Enforcement, Federal Trade Commission, Washington, DC 20580 (202–326–2889).

SUPPLEMENTARY INFORMATION:

I. Background

The Commission issued the Energy Labeling Rule in 1979, 44 FR 66466 (Nov. 19, 1979) pursuant to the Energy Policy and Conservation Act of 1975 (''EPCA'').[1] The Rule covers several categories of major household appliances, including central air conditioners and heat pumps. It requires manufacturers of covered appliances to disclose specific energy consumption or efficiency information (derived from DOE test procedures) at the point-of-sale. In addition, each label must include a ''range of comparability'' indicating the highest and lowest energy consumption or efficiencies for comparable models. The Commission updates these ranges periodically.

II. Range Updates for Central Air Conditioners, Heat Pumps, and Weatherized Furnaces

The Commission is updating the Rule's ranges of comparability, based on current data, for central air conditioners, heat pumps, and weatherized furnaces, effective January 1, 2015. In a February 6, 2013 **Federal Register** Notice (78 FR 8362), the Commission issued new EnergyGuide label requirements to help consumers, distributors, contractors, and installers easily determine whether a specific furnace or central air conditioner meets applicable DOE regional efficiency standards. Among other things, these amendments revised labels for central air conditioners, heat pumps, and weatherized furnaces that will be required on January 1, 2015. In the 2013 Notice, the Commission did not publish updated comparability ranges for those products because energy data available at that time would likely become obsolete before the January 1, 2015 date. However, the Commission explained it would publish new ranges for central air conditioners, heat pumps, and weatherized furnaces, when more current data became available before 2015.[2] That date serves as the effective date for the new FTC labels and the new comparability ranges for these products.

In addition to publishing the new ranges, the Commission is updating the prototype and sample labels in the Rule to reflect these range changes. As discussed in a **Federal Register** Notice published this year, the Commission plans to address updates for other heating products, including boilers and non-weatherized furnaces, separately.[3]

III. Administrative Procedure Act

The amendments published in this Notice involve routine, technical and minor, or conforming changes to the labeling requirements in the Rule. These technical amendments merely provide a routine change to the range and cost information required on EnergyGuide labels. Accordingly, the Commission finds for good cause that public comment for these technical, procedural amendments is impractical and unnecessary (5 U.S.C. 553(b)(A)(B) and (d)).

IV. Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act relating to a Regulatory Flexibility Act analysis (5 U.S.C. 603–604) are not applicable to this proceeding because the amendments do not impose any new obligations on entities regulated by the Energy Labeling Rule. These technical amendments merely provide a routine change to the range information required on EnergyGuide labels. Thus, the amendments will not have a ''significant economic impact on a

[1] 42 U.S.C. 6294. EPCA also requires the Department of Energy (''DOE'') to set minimum efficiency standards and develop test procedures to measure energy use.

[2] 78 FR at 8365.

[3] 79 FR 34642, 34652 (June 18, 2014).

substantial number of small entities.'' [4] The Commission has concluded, therefore, that a regulatory flexibility analysis is not necessary, and certifies, under Section 605 of the Regulatory Flexibility Act (5 U.S.C. 605(b)), that the amendments announced today will not have a significant economic impact on a substantial number of small entities.

V. Paperwork Reduction Act

The current Rule contains recordkeeping, disclosure, testing, and reporting requirements that constitute information collection requirements as defined by 5 CFR 1320.3(c), the definitional provision within the Office of Management and Budget (OMB) regulations that implement the Paperwork Reduction Act (PRA). OMB has approved the Rule's existing information collection requirements through May 31, 2017 (OMB Control No. 3084 0069). The amendments now being adopted do not change the substance or frequency of the recordkeeping, disclosure, or reporting requirements and, therefore, do not require further OMB clearance.

List of Subjects in 16 CFR Part 305

Advertising, Energy conservation, Household appliances, Labeling, Reporting and recordkeeping requirements.

For the reasons set out in the preamble of this document, the Federal Trade Commission amends 16 CFR part 305 as follows:

PART 305—ENERGY AND WATER USE LABELING FOR CONSUMER PRODUCTS UNDER THE ENERGY POLICY AND CONSERVATION ACT (''ENERGY LABELING RULE'')

■ 1. The authority citation for part 305 continues to read as follows:

Authority: 42 U.S.C. 6294.

■ 2. Revise Appendix G1 to Part 305 to read as follows:

Appendix G1 to Part 305—Furnaces—Gas

Furnace Type	Range of annual fuel utilization efficiencies (AFUEs)	
	Low	High
Non-Weatherized Gas Furnaces Manufactured Before the Compliance Date of DOE Regional Standards—All Capacities	78.0	96.6
Non-Weatherized Gas Furnaces Manufactured After the Compliance Date of DOE Regional Standards—All Capacities	80.0	98.5
Weatherized Gas Furnaces Manufactured—All Capacities	81.0	95.0

■ 3. Revise Appendix G3 to Part 305 to read as follows:

Appendix G3 to Part 305—Furnaces—Oil

Type	Range of annual fuel utilization efficiencies (AFUEs)	
	Low	High
Non-Weatherized Oil Furnaces Manufactured Before the Compliance Date of DOE Regional Standards—All Capacities	78.0	86.1
Non-Weatherized Oil Furnaces Manufactured After the Compliance Date of DOE Regional Standards—All Capacities	83.0	95.4
Weatherized Oil Furnaces—All Capacities	78.0	83.0

■ 4. Revise Appendix H to Part 305 to read as follows:

Appendix H to Part 305—Cooling Performance for Central Air Conditioners

Manufacturer's rated cooling capacity (Btu's/hr)	Range of SEER's	
	Low	High
Single Package Units		
Central Air Conditioners (Cooling Only): All capacities	13	20
Heat Pumps (Cooling Function): All capacities	13	18.1
Split System Units		
Central Air Conditioners (Cooling Only): All capacities	13	26
Heat Pumps (Cooling Function): All capacities	13	30.5

■ 5. Revise Appendix I to Part 305 to read as follows:

Appendix I to Part 305—Heating Performance for Central Air Conditioners

[4] 5 U.S.C. 605.

Manufacturer's rated heating capacity (Btu's/hr)	Range of HSPF's	
	Low	High
Single Package Units		
Heat Pumps (Heating Function): All capacities	7.7	9.2
Split System Units		
Heat Pumps (Heating Function): All capacities	7.7	13.5

■ 6. Appendix L is amended as follows:

■ a. Prototype Labels 3 and 4 are revised.

■ b. Sample Label 7 is removed.

■ c. Sample Labels 7A and 7B are redesignated as Sample Labels 7 and 7A and revised.

■ d. Sample Label 8 is removed.

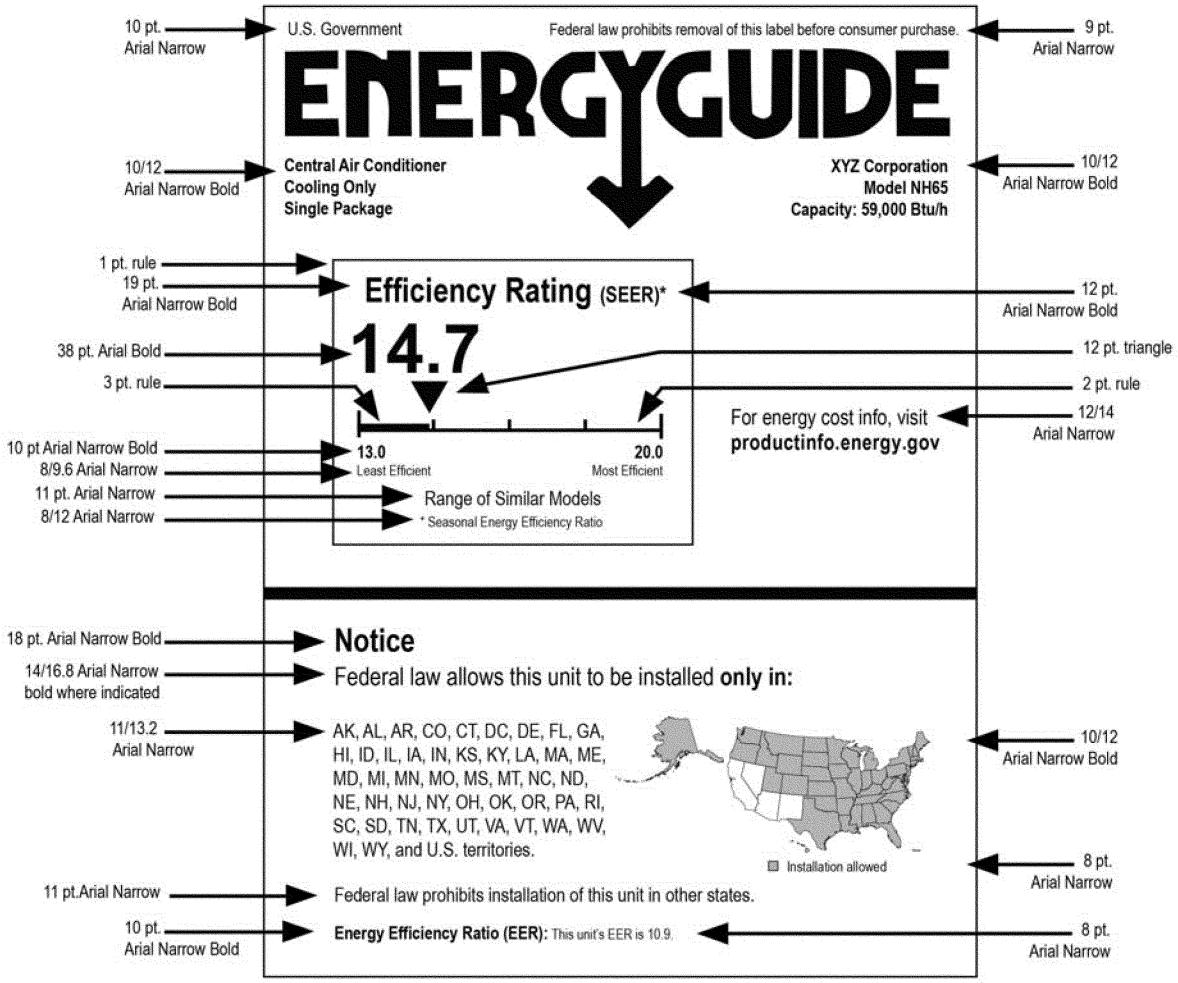
■ e. Sample Label 8A is redesignated as Sample Label 8 and revised.

The revisions read as follows:

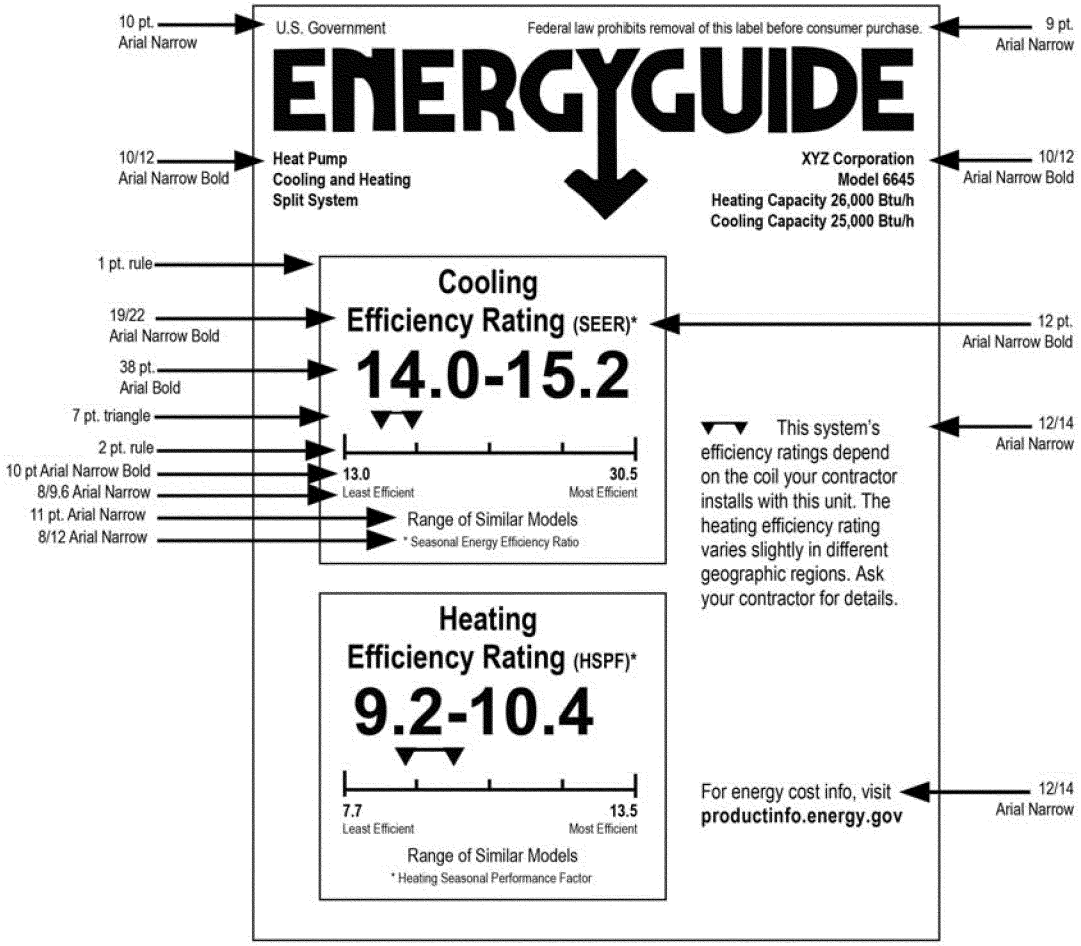
Appendix L to Part 305—Sample Labels

* * * * *

BILLING CODE 6750–01–P



Prototype Label 3 – Single-Package Central Air Conditioner (models manufactured after the compliance date of DOE regional efficiency standards in 10 CFR part 430)



Prototype Label 4 – Split-system Heat Pump (only for units manufactured on or after the compliance date of DOE regional efficiency standards in 10 CFR part 430)

U.S. Government

Federal law prohibits removal of this label before consumer purchase.

ENERGYGUIDE

Central Air Conditioner
Cooling Only
Split System

XYZ Corporation
Model HC47
Capacity 57,000 Btu/h

Efficiency Rating (SEER)*

13.0-14.2

13.0 Least Efficient

26.0 Most Efficient

Range of Similar Models

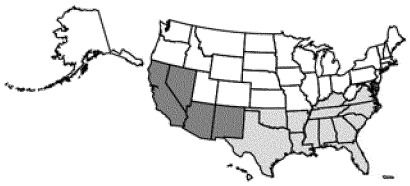
* Seasonal Energy Efficiency Ratio

This system's efficiency rating depends on the coil your contractor installs with this unit. Ask for details.

For energy cost info, visit **productinfo.energy.gov**

Notice

The installed system must meet minimum federal regional efficiency standards.
See **productinfo.energy.gov** for certified coil combinations.



North AK, CO, CT, ID, IL, IA, IN, KS, MA, ME, MI, MN, MO, MT, ND, NE, NH, NJ, NY, OH, OR, PA, RI, SD, UT, VT, WA, WV, WI, WY

Southeast AL, AR, DC, DE, FL, GA, HI, KY, LA, MD, MS, NC, OK, SC, TN, TX, VA, U.S. Territories

Southwest AZ, CA, NM, NV

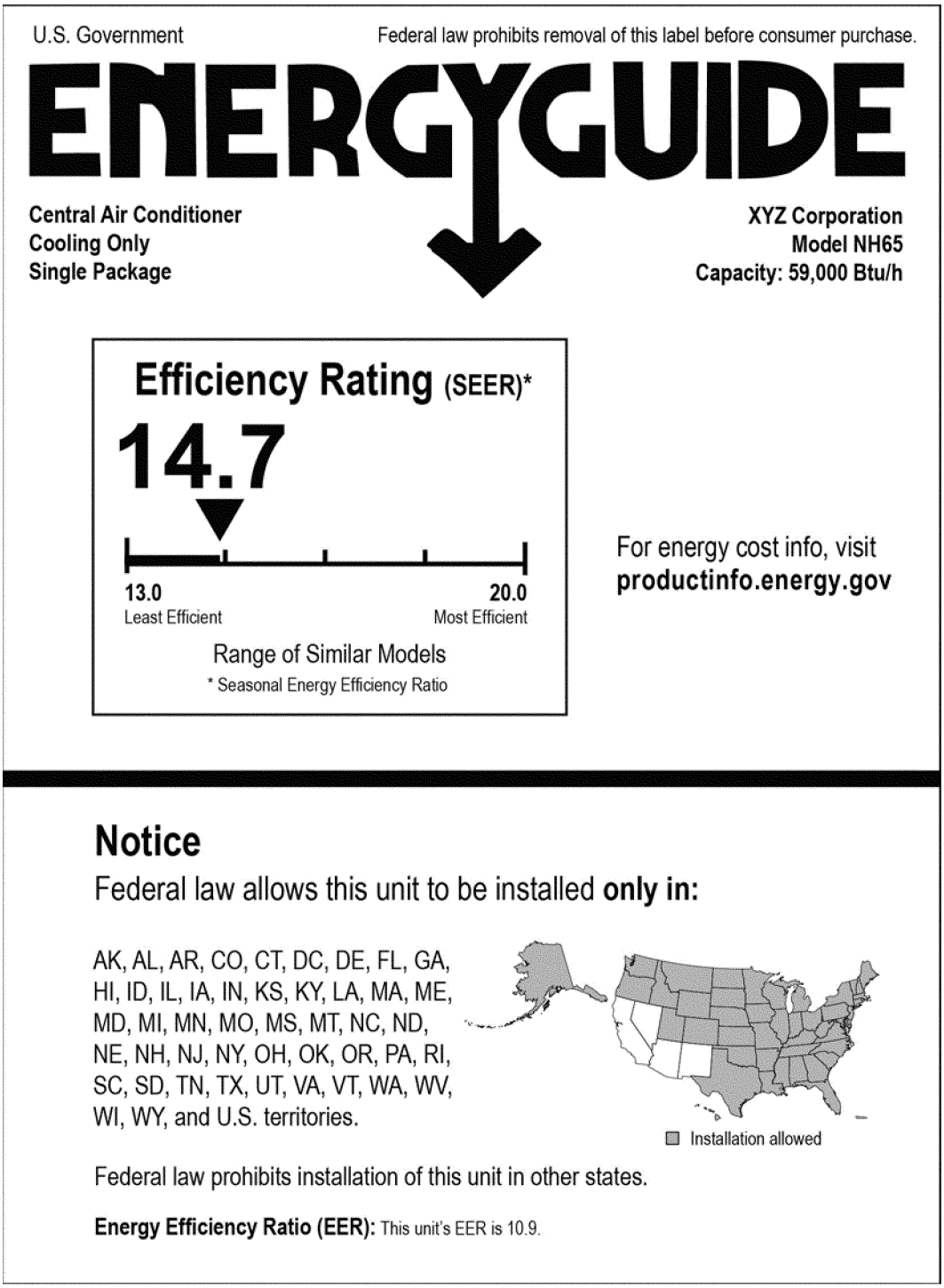
Minimum Standards

	North	Southeast	Southwest
SEER	13	14	14
EER†			12.2
EER††			11.7

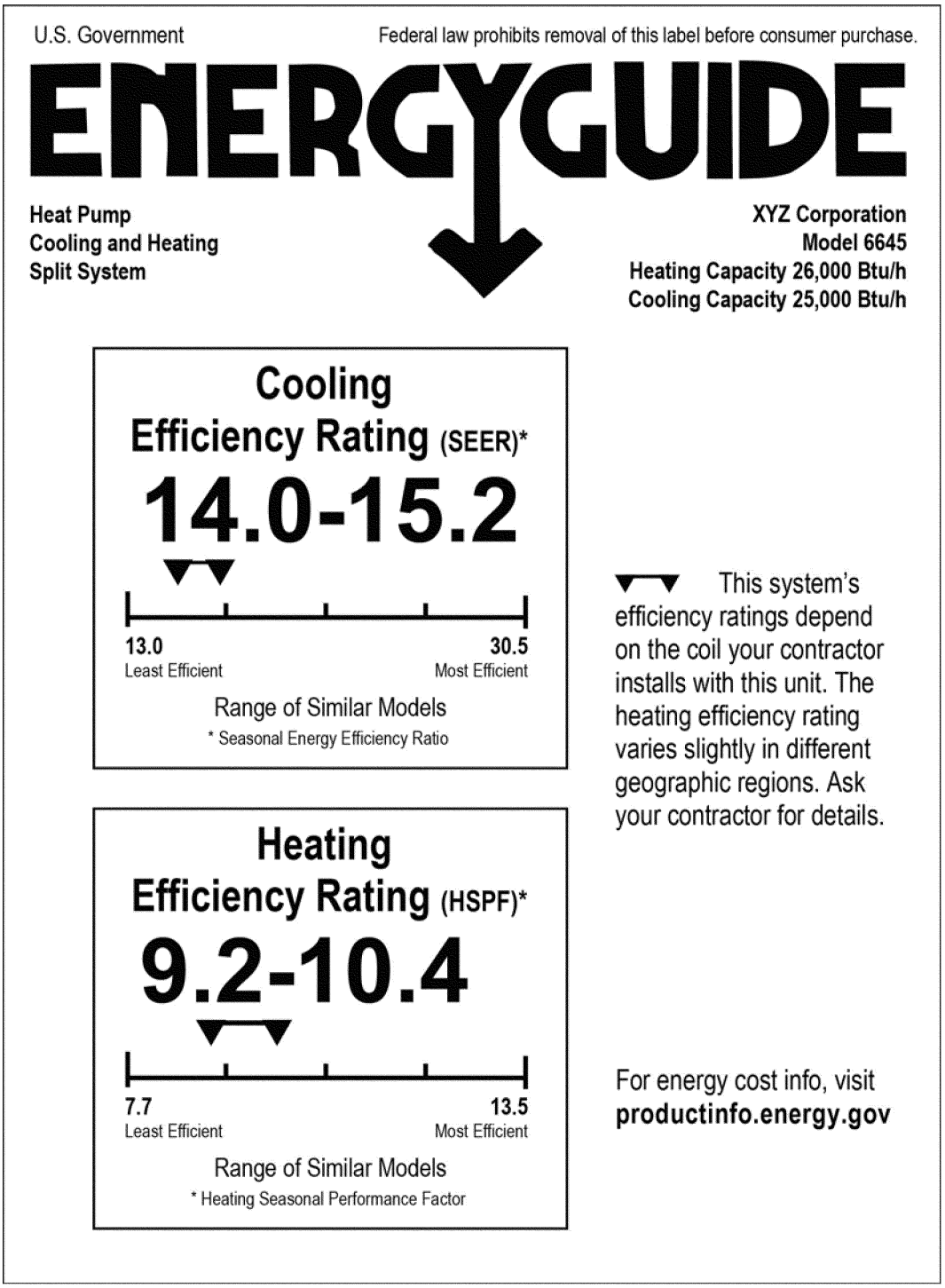
† Units with rated capacity of less than 45,000 btu/h
†† Units with rated capacity equal to or greater than 45,000 btu/h

Energy Efficiency Ratio (EER): could range from 11.4 to 12.5, depending on the coil installed with this unit

Sample Label 7 – Split-system Central Air Conditioner (models manufactured after the compliance date of DOE regional efficiency standards in 10 CFR part 430)



Sample Label 7A – Single-package Central Air Conditioner (models manufactured after the compliance date of DOE regional efficiency standards in 10 CFR part 430)



Sample Label 8 – Split-system Heat Pump (only for units manufactured on or after the compliance date of DOE regional efficiency standards in 10 CFR part 430)

* * * * *

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2014–18501 Filed 8–11–14; 8:45 am]

BILLING CODE 6750–01–C

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 172

[Docket No. FDA–2012–F–0138]

Food Additives Permitted for Direct Addition to Food for Human Consumption; Vitamin D_3

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA or we) is amending the food additive regulations to provide for the safe use of vitamin D_3 as a nutrient supplement in meal replacement beverages that are not intended for special dietary use in reducing or maintaining body weight and for use in foods that are sole sources of nutrition for enteral feedings. We are taking this action in response to a petition filed by Abbott Laboratories (Abbott).

DATES: This rule is effective August 12, 2014. See section VII ''Objections'' for further information on the filing of objections. Submit either electronic or written objections and requests for a hearing by September 11, 2014. The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of August 12, 2014.

ADDRESSES: You may submit either electronic or written objections and requests for a hearing identified by Docket No. FDA–2012–F–0138, by any of the following methods:

Electronic Submissions

Submit electronic objections in the following way:

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

Written Submissions

Submit written objections in the following ways:

- Mail/Hand delivery/Courier (for paper submissions): Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Instructions: All submissions received must include the Agency name and Docket No. FDA–2012–F–0138 for this rulemaking. All objections received will be posted without change to *http://www.regulations.gov,* including any personal information provided. For detailed instructions on submitting objections, see the ''Objections'' heading of the **SUPPLEMENTARY INFORMATION** section.

Docket: For access to the docket to read background documents or objections received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Judith Kidwell, Center for Food Safety and Applied Nutrition (HFS–265), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740–3835, 240–402–1071.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of March 6, 2012 (77 FR 13232), FDA announced that Abbott Laboratories, 3300 Stelzer Rd., Columbus, OH 43219, had filed a food additive petition (FAP 2A4788). The petition proposed that FDA amend the food additive regulations in § 172.380 (21 CFR 172.380), *Vitamin D_3,* to provide for the safe use of vitamin D_3 as a nutrient supplement in meal replacement beverages and meal replacement bars that are not intended for special dietary use in reducing or maintaining body weight and for use in foods that are sole sources of nutrition for enteral tube feeding. After the document was published, Abbott amended the petition to exclude the proposed use of vitamin D_3 in meal replacement bars. This final rule is a complete response to the petition.

Abbott has requested that we amend § 172.380 to authorize the use of vitamin D_3 as a nutrient supplement at levels not to exceed 500 International Units (IU) per 240 milliliters (mL) (prepared beverage) in meal replacement beverages that are not intended for special dietary use in reducing or maintaining body weight and that are represented for use such that the total amount of vitamin D_3 provided by the product does not exceed 1,000 IU per day, and at levels not to exceed 1.0 IU per kilocalorie (kcal) in food represented for use as a sole source of nutrition for enteral feeding.

Vitamin D comprises a group of fat-soluble seco-sterols and comes in many forms. The two major physiologically relevant forms are vitamin D_2 and vitamin D_3. Vitamin D without a subscript represents either vitamin D_2 or vitamin D_3 or both. Vitamin D is affirmed as generally recognized as safe (GRAS) for use in food as a nutrient supplement in § 184.1950(c)(1) (21 CFR 184.1950(c)(1)) in accordance with § 184.1(b)(2) (21 CFR 184.1(b)(2)), with the following specific limitations:

Category of food	Maximum levels in food (as served)
Breakfast cereals	350 IU/100 grams (g).
Grain products and pasta.	90 IU/100 g.
Milk	42 IU/100 g.
Milk products	89 IU/100 g.

Additionally, under § 184.1950(c)(2) and (c)(3), vitamin D is affirmed as GRAS for use in infant formulas and margarine, respectively. Under § 172.380, vitamin D_3 is approved for use as a food additive as a nutrient supplement in calcium-fortified fruit juices and fruit juice drinks; meal replacement and other type bars, soy protein-based meal replacement beverages represented for special dietary use in reducing or maintaining body weight; and cheese and cheese products as defined therein. Under § 172.379, vitamin D_2 is approved for use as a food additive as a nutrient supplement in soy beverages, soy beverage products, soy-based butter substitute spreads, and soy-based cheese substitutes and soy-based cheese substitute products. Under § 172.381, vitamin D_2 bakers yeast is approved for use as a food additive as a source of vitamin D_2 and as a leavening agent in yeast-leavened baked goods and baking mixes and yeast-leavened baked snack foods.

Vitamin D is essential for human health. The major function of vitamin D is the maintenance of blood serum concentrations of calcium and phosphorus by enhancing the absorption of these minerals in the small intestine. Vitamin D deficiency can lead to abnormalities in calcium and bone metabolism, such as rickets in children or osteomalacia in adults. Excessive intake of vitamin D elevates blood plasma calcium levels (hypercalcemia) by increased intestinal absorption and/or mobilization from the bone.

To ensure that vitamin D is not added to the U.S. food supply at levels that could raise safety concerns, FDA affirmed vitamin D as GRAS with specific limitations as listed in § 184.1950. Under § 184.1(b)(2), an ingredient affirmed as GRAS with

specific limitations may be used in food only within such limitations, including the category of food, functional use of the ingredient, and level of use. Any addition of vitamin D to food beyond those limitations set out in § 184.1950 requires either a food additive regulation or an amendment of § 184.1950.

To support the safety of the proposed uses of vitamin D_3, Abbott submitted dietary exposure estimates of vitamin D from the proposed uses of vitamin D_3, as well as all current dietary sources for four scenarios: (1) Background exposure from naturally occurring sources of vitamin D and currently regulated uses of vitamin D at levels reported in the U.S. Department of Agriculture Food and Nutrient Database for Dietary Studies, which represent typical vitamin D levels in foods; (2) background exposure plus exposure from yeast-leavened baked goods and baking mixes and yeast-leavened snack foods containing 400 IU vitamin D/100 g food as served (at the time that Abbott submitted their petition, the petition to amend the food additive regulations for the use of vitamin D_2 bakers yeast was under review); (3) background exposure, exposure from yeast-containing baked products containing 400 IU vitamin D/100 g food, and from dietary supplement use; and (4) background exposure, exposure from yeast-containing baked products containing 400 IU vitamin D/100 g food, dietary supplements, and the proposed uses in meal replacement beverages and bars. They compared these intake estimates to the Tolerable Upper Intake Level (UL) for vitamin D established by the Institute of Medicine (IOM) of the National Academies. Abbott also submitted a number of publications pertaining to human clinical studies on vitamin D. Based on this information, which is discussed in section II, Abbott concluded that the proposed uses of vitamin D_3 in meal replacement beverages that are not intended for special dietary use in reducing or maintaining body weight and in foods that are sole sources of nutrition for enteral feeding are safe.

II. Evaluation of Safety

To establish with reasonable certainty that a food additive is not harmful under its intended conditions of use, we consider the projected human dietary exposure to the additive, the additive's toxicological data, and other relevant information (such as published literature) available to us. We compare an individual's estimated daily intake (EDI) of the additive from all food sources to an acceptable intake level established by toxicological data. The EDI is determined by projections based on the amount of the additive proposed for use in particular foods and on data regarding the amount consumed from all food sources of the additive. We commonly use the EDI for the 90th percentile consumer of a food additive as a measure of high chronic dietary intake.

A. Acceptable Intake Level for Vitamin D

In 1997, the Standing Committee on the Scientific Evaluation of Dietary Reference Intakes of the Food and Nutrition Board at the IOM conducted an extensive review of toxicology and metabolism studies on vitamin D published through 1996. The IOM published a detailed report that included a UL for vitamin D for infants, children, and adults. At that time, the IOM established a UL for vitamin D of 2,000 IU/per day (p/d) for children 1 to 18 years of age and adults, and a UL of 1,000 IU/p/d for all infants.

In 2011, the IOM conducted an extensive review of relevant published scientific literature on vitamin D to update current dietary reference intakes and ULs for vitamin D. Based on this information, the IOM revised the ULs for vitamin D and developed a report on their findings (Ref. 1). In their 2011 assessment of vitamin D, the IOM established a UL of 1,000 IU/p/d for infants 0 months to 6 months of age and a UL of 1,500 IU/p/d for infants 6 months to 12 months of age. For children 1 year to 3 years of age, the IOM established a UL of 2,500 IU/p/d; for children 4 years to 8 years of age, the IOM established a UL of 3,000 IU/p/d. For children 9 years to 18 years of age and adults, the IOM established a UL of 4,000 IU/p/d.

The IOM considers the UL as the highest average daily intake level of a nutrient that poses no risk of adverse effects when the nutrient is consumed over long periods of time. The UL is determined using a risk assessment model developed specifically for nutrients and considers intake from all sources: Food, water, nutrient supplements, and pharmacological agents. The dose-response assessment, which concludes with an estimate of the UL, is built upon three toxicological concepts commonly used in assessing the risk of exposures to chemical substances: No-observed-adverse-effect level, lowest-observed-effect level, and an uncertainty factor.

B. Estimated Daily Intake for Vitamin D

1. Meal Replacement Beverages

For the proposed use of vitamin D_3 in meal replacement beverages that are not intended for special dietary use in reducing or maintaining body weight, Abbott provided dietary intake estimates for vitamin D for seven population groups, assuming typical vitamin D levels in food. Although Abbott stated that their proposed uses do not include products for infants or children less than 9 years of age, Abbott included exposure estimates for children 1 to 3 years of age and 4 to 8 years of age. Because Abbott's exposure estimates differed in several aspects from the way in which we typically calculate dietary exposure, we conducted our own exposure estimate for vitamin D from: (1) The proposed use of vitamin D_3 in meal replacement beverages that are not intended for special dietary use in reducing or maintaining body weight; (2) current food uses of vitamin D (including regulated uses, naturally occurring sources of vitamin D, and dietary supplements); and (3) combined current and proposed food uses. We estimated the exposure to vitamin D for the overall U.S. population (1 year of age and older) and 10 population subgroups (including 2 subgroups for infants less than 12 months of age), assuming that all foods that can be fortified with vitamin D will be fortified at the maximum level permitted.

Our estimated exposure to vitamin D from all food sources for the overall U.S. population (1 years of age and older), including consumers of meal replacement beverages that are not intended for special dietary use in reducing or maintaining body weight, was 1,520 IU per person per day (IU/p/d) for the 90th percentile consumer, based on food consumption data in the 2007–2008 National Health and Nutrition Examination Survey (NHANES). Infants are not expected to consume meal replacement beverages; however, we included these subpopulations in our exposure assessment for completeness. According to the 2007–2008 NHANES, no meal replacement beverage consumption was reported for infants 0 months to 6 months of age, and only very limited consumption of meal replacement beverages was reported for infants 6 to 12 months of age. The cumulative exposure for infants 0 to 6 months of age and infants 6 to 12 months of age from all food sources of vitamin D, including the proposed uses and dietary supplements, was estimated to be 844

IU/p/d and 831 IU/p/d, respectively, for the 90th percentile consumer (Ref. 2).

2. Enteral Feeding Products

For the proposed use of vitamin D_3 for food represented as the sole source of nutrition for enteral feeding, Abbott indicated that there are many different methods available in the scientific literature for estimating caloric needs when using fortified enteral nutrition products as the sole source of nutrition. Abbott reported that the simplest method is to assume that a person requires 25–30 kcal per kilogram body weight per day (kcal/kg bw/d). Thus, a 60 kg person being fed only an enteral nutrition product would require 1,500 kcal to 1,800 kcal per day. Assuming the proposed vitamin D_3 fortification level of 1.0 IU/kcal in enteral products represented for use as the sole source of nutrition and the highest recommended caloric requirement of 30 kcal/kg bw/d, results in an estimated vitamin D_3 exposure of 1,800 IU/p/d for a 60 kg person (Ref. 3). As noted by Abbott, this level is far below the UL of 4,000 IU vitamin D for an adult. In addition, any person receiving vitamin D_3 from an enteral feeding product as their sole source of nutrition would be under the care of a doctor who would be monitoring the patient's vitamin D intake.

C. Safety of the Petitioned Uses of Vitamin D_3

FDA reviewed and evaluated the information submitted by Abbott regarding the safety of the dietary intake of vitamin D_3 that would result from the proposed uses in meal replacement beverages that are not intended for special dietary use in reducing or maintaining body weight and for use in foods that are sole sources of nutrition for enteral feeding. Abbott submitted scientific articles published subsequent to the 1997 IOM report and issuance of the August 29, 2012, final rule (77 FR 52228) authorizing the use of vitamin D_2 bakers yeast in yeast-leavened baked goods and baking mixes and yeast-leavened baked snack foods. Abbott concluded that these recent publications support the safety of increases in the levels of vitamin D supplementation in humans that could result from the proposed uses. We concur with Abbott's conclusion (Ref. 4).

We considered the ULs established by the IOM relative to the intake estimates as the primary basis for assessing the safety of petitioned uses of vitamin D_3. We also reviewed the scientific articles on vitamin D intake submitted by Abbott, as well as other relevant published studies available to FDA since our previous evaluations of five food additive petitions for fortifying a variety of foods with vitamin D. The most recent petition resulted in our amendment of the food additive regulations in § 172.381 to allow for the safe use of vitamin D_2 bakers yeast as a source of vitamin D_2 and as a leavening agent in yeast-leavened baked goods and baking mixes and yeast-leavened baked snack foods (77 FR 52228, August 29, 2012). The four earlier food additive petitions also resulted in amendments of the food additive regulations to allow for the safe use of vitamin D as a nutrient supplement in certain foods (74 FR 11019, March 16, 2009; 70 FR 69435, November 16, 2005; 70 FR 37255, June 29, 2005; 70 FR 36021, June 22, 2005; and 68 FR 9000, February 27, 2003).

1. Meal Replacement Beverages

Depending on the age group, the IOM UL for vitamin D for the U.S. population 1 year of age and older ranges from 2,500 IU/p/d to 4,000 IU/p/d. The estimated exposure to vitamin D from all food sources, including the proposed use in meal replacement beverages that are not intended for special dietary use in reducing or maintaining body weight, at the 90th percentile for the overall U.S. population (1 years of age and older) is estimated to be 1,520 IU/p/d, which is below the lowest IOM UL in the range of ULs for the overall U.S. population (1 year of age and older), 2,500 IU/p/d. The estimated exposure to vitamin D from all food sources, including the proposed use in meal replacement beverages that are not intended for special dietary use in reducing or maintaining body weight, for infants 0 months to 6 months of age at the 90th percentile is 844 IU/p/d; for infants 6 months to 12 months of age, estimated exposure to vitamin D is 831 IU/p/d. Both of these estimates are below the respective IOM UL of 1,000 IU/p/d for infants 0 months to 6 months of age and 1,500 IU/p/d for infants 6 months to 12 months of age. Because the 90th percentile EDI of vitamin D from all current and proposed food sources for each population group is less than the corresponding IOM UL for that population group, we conclude that dietary intake of vitamin D_3 from the proposed use as a nutrient supplement in meal replacement beverages that are not intended for special dietary use in reducing or maintaining body weight is safe.

2. Enteral Feeding Products

Based on the proposed use level of 1.0 IU/kcal in enteral feeding products, the dietary exposure to vitamin D_3 is estimated to be 1,800 IU/p/d for a 60 kg person. This estimate is below the IOM UL of 4,000 IU/p/d for adults. Because the use of these products are intended for individuals under medical supervision and monitoring by a physician, we have no safety concerns regarding the proposed use of vitamin D_3 in enteral feeding products, and we conclude that this use is safe.

III. Conclusion

Based on all data relevant to vitamin D_3 that we reviewed, we conclude that the petitioned use of vitamin D_3 as a nutrient supplement in meal replacement beverages that are not intended for special dietary use in reducing or maintaining body weight and for use in foods that are sole sources of nutrition for enteral feeding within the limits proposed by Abbott is safe. Consequently, we are amending the food additive regulations as set forth in this document. Additionally, the current regulation for the use of vitamin D_3 in food (§ 172.380) indicates that the additive must meet the specifications in the Food Chemicals Codex, 7th Edition (FCC 7). The more current FCC is the 8th Edition (FCC 8). Because the specifications for vitamin D_3 in FCC 8 are identical to those in FCC 7, we are amending § 172.380 by adopting the specifications for vitamin D_3 in FCC 8 in place of FCC 7.

IV. Public Disclosure

In accordance with § 171.1(h) (21 CFR 171.1(h)), the petition and the documents that we considered and relied upon in reaching our decision to approve the petition will be made available for public disclosure (see **FOR FURTHER INFORMATION CONTACT**). As provided in § 171.1(h), we will delete from the documents any materials that are not available for public disclosure.

V. Environmental Impact

We previously considered the environmental effects of this rule, as stated in the March 6, 2012, **Federal Register** document of petition for FAP 2A4788. We stated that we had determined, under 21 CFR 25.32(k), that this action ''is of a type that does not individually or cumulatively have a significant effect on the human environment'' such that neither an environmental assessment nor an environmental impact statement is required. We have not received any new information or comments that would affect our previous determination.

VI. Paperwork Reduction Act of 1995

This final rule contains no collection of information. Therefore, clearance by the Office of Management and Budget

under the Paperwork Reduction Act of 1995 is not required.

VII. Objections

If you will be adversely affected by one or more provisions of this regulation, you may file with the Division of Dockets Management (see **ADDRESSES**) either electronic or written objections. You must separately number each objection, and within each numbered objection you must specify with particularity the provision(s) to which you object, and the grounds for your objection. Within each numbered objection, you must specifically state whether you are requesting a hearing on the particular provision that you specify in that numbered objection. If you do not request a hearing for any particular objection, you waive the right to a hearing on that objection. If you request a hearing, your objection must include a detailed description and analysis of the specific factual information you intend to present in support of the objection in the event that a hearing is held. If you do not include such a description and analysis for any particular objection, you waive the right to a hearing on the objection.

It is only necessary to send one set of documents. Identify documents with the docket number found in brackets in the heading of this document. Any objections received in response to the regulation 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.*

VIII. Section 301(*ll*) of the Federal Food, Drug, and Cosmetic Act

Our review of this petition was limited to section 409 of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 348). This final rule is not a statement regarding compliance with other sections of the FD&C Act. For example, the Food and Drug Administration Amendments Act of 2007, which was signed into law on September 27, 2007, amended the FD&C Act to, among other things, add section 301(*ll*) of the FD&C Act (21 U.S.C. 331(*ll*)). Section 301(*ll*) of the FD&C Act prohibits the introduction or delivery for introduction into interstate commerce of any food that contains a drug approved under section 505 of the FD&C Act (21 U.S.C. 355), a biological product licensed under section 351 of the Public Health Service Act (42 U.S.C. 262), or a drug or biological product for which substantial clinical investigations have been instituted and their existence has been made public, unless one of the exemptions in section 301(*ll*)(1) to (*ll*)(4) of the FD&C Act applies. In our review of this petition, FDA did not consider whether section 301(*ll*) of the FD&C Act or any of its exemptions apply to food containing this additive. Accordingly, this final rule should not be construed to be a statement that a food containing this additive, if introduced or delivered for introduction into interstate commerce, would not violate section 301(*ll*) of the FD&C Act. Furthermore, this language is included in all food additive final rules and therefore should not be construed to be a statement of the likelihood that section 301(*ll*) of the FD&C Act applies.

IX. References

The following sources are referred to in this document. References marked with an asterisk (*) have been placed on display at the Division of Dockets Management (see **ADDRESSES**), under Docket No. FDA–2012–F–0138, and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday, and are available electronically at *http://www.regulations.gov.* References without asterisks are not on display; they are available as published articles and books.

1. Committee to Review Dietary Reference Intakes for Vitamin D and Calcium, Food and Nutrition Board, Institute of Medicine, ''Dietary Reference Intakes for Calcium and Vitamin D,'' National Academies Press, Washington, DC, 2011.

*2. Memorandum from D. Folmer, Chemistry Review Group, Division of Petition Review, to J. Kidwell, Regulatory Group I, Division of Petition Review, December 11, 2013.

*3. Memorandum from D. Folmer, Chemistry Review Group, Division of Petition Review, to J. Kidwell, Regulatory Group I, Division of Petition Review, February 7, 2013.

*4. Memorandum from A. Khan, Toxicology Review Group, Division of Petition Review, to J. Kidwell, Regulatory Group I, Division of Petition Review, February 11, 2014.

List of Subjects in 21 CFR Part 172

Food additives, Incorporation by reference, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Director, Center for Food Safety and Applied Nutrition, 21 CFR part 172 is amended as follows:

PART 172—FOOD ADDITIVES PERMITTED FOR DIRECT ADDITION TO FOOD FOR HUMAN CONSUMPTION

■ 1. The authority citation for 21 CFR part 172 continues to read as follows:

Authority: 21 U.S.C. 321, 341, 342, 348, 371, 379e.

■ 2. Amend § 172.380 by revising paragraph (b) and by adding paragraphs (c)(6) and (c)(7) to read as follows:

§ 172.380 Vitamin D_3.

* * * * *

(b) Vitamin D_3 meets the specifications of the Food Chemicals Codex, 8th ed. (2012), pp. 1186–1187, which is incorporated by reference. The Director of the Office of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain copies from the United States Pharmacopeial Convention, 12601 Twinbrook Pkwy., Rockville, MD 20852 (Internet address *http://www.usp.org*). Copies may be examined at the Food and Drug Administration's Main Library, 10903 New Hampshire Ave., Bldg. 2, Third Floor, Silver Spring, MD 20993, 301–796–2039, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(c) * * *

(6) At levels not to exceed 500 IU per 240 mL (prepared beverage) in meal replacement beverages that are not intended for special dietary use in reducing or maintaining body weight and that are represented for use such that the total amount of Vitamin D_3 provided by the product does not exceed 1,000 IU per day.

(7) At levels not to exceed 1.0 IU per kilocalorie in foods represented for use as a sole source of nutrition for enteral feeding.

Dated: August 6, 2014.

Philip L. Chao,

Acting Director, Office of Regulations, Policy and Social Sciences, Center for Food Safety and Applied Nutrition.

[FR Doc. 2014–18969 Filed 8–11–14; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Parts 100 and 165

[Docket Number USCG–2014–0446]

RIN 1625–AA08; 1625–AA00

Special Local Regulations and Safety Zones; Marine Events in Captain of the Port Long Island Sound Zone

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing two special local regulations for two separate marine events and establishing three safety zones for two fireworks displays and one swim event within the Captain of the Port (COTP) Long Island Sound (LIS) Zone. This temporary final rule is necessary to provide for the safety of life on navigable waters during these events. Entry into, transit through, mooring or anchoring within these regulated areas and safety zones is prohibited unless authorized by COTP Sector Long Island Sound.

DATES: This rule is effective without actual notice from August 12, 2014 until 10:45 p.m. on August 17, 2014. For the purposes of enforcement, actual notice will be used from the date the rule was signed, July 25, 2014 until August 12, 2014.

ADDRESSES: Documents mentioned in this preamble are part of docket [USCG–2014–0446]. To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Petty Officer Scott Baumgartner, Prevention Department, Coast Guard Sector Long Island Sound, (203) 468–4559, *Scott.A.Baumgartner@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Cheryl Collins, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

COTP Captain of the Port
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of Proposed Rulemaking

A. Regulatory History and Information

This rulemaking establishes two special local regulations for two regattas and three safety zones for two fireworks displays and one swim event. Each event and its corresponding regulatory history is discussed below.

The Aquapalooza is a recurring marine event but with no regulatory history.

The Connecticut River Raft Race is also a recurring marine event but with a regulatory history. Specifically, the Coast Guard established a special local regulation in 2012 for this event via a final rule entitled, ''Safety Zones & Special local Regulations; Recurring Marine Events in Captain of the Port Long Island Sound Zone.'' This rulemaking was published on May 24, 2013 in the **Federal Register** (78 FR 31402). In 2013, the special local regulation for the Connecticut River Raft Race was modified by a temporary final rule issued by the Coast Guard entitled, ''Special Local Regulations and Safety Zones; Marine Events in Captain of the Port Long Island Sound Zone.'' This rulemaking was published on July 10, 2013 in the **Federal Register** (78 FR 41300).

The Sebonack Golf Club Fireworks Display is a new event with no regulatory history. The Sebonack Golf Club has helped sponsor a similar recurring event that was held in the same location on July 6, 2013 and known as National Golf Links Fireworks. A safety zone was established in 2012 for the National Golf Links Fireworks event via a final rule entitled, ''Safety Zones & Special local Regulations; Recurring Marine Events in Captain of the Port Long Island Sound Zone.'' This rulemaking was published on May 24, 2013 in the **Federal Register** (78 FR 31402).

Island Beach Two Mile Swim is a recurring event with some regulatory history. Specifically, the Coast Guard established a safety zone around this event on August 3, 2013 via a temporary final rule not published in the **Federal Register** entitled, ''Safety Zone, Island Beach Two Mile Swim, Captain Harbor, Greenwich, CT.''

The Bohlsen Wedding Fireworks Display is a new event with no regulatory history.

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because doing so would be impracticable and contrary to the public interest. There is insufficient time to publish a NPRM and solicit comments from the public before these events take place. Thus, waiting for a comment period to run would inhibit the Coast Guard's ability to fulfill its mission to keep the ports and waterways safe.

Under 5 U.S.C. 553(d)(3), and for the same reasons stated in the preceding paragraph, the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**.

B. Basis and Purpose

The legal basis for this temporary rule is 33 U.S.C. 1231, 1233; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6 and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1 which collectively authorize the Coast Guard to define regulatory special local regulations and safety zones.

As discussed in the *Regulatory History and Information* section, two regattas, two fireworks displays, and one swim event will take place in the COTP Long Island Sound Zone between July 27, 2014 and August 17, 2014. The COTP Long Island Sound has determined that the two special local regulations and the three safety zones established by this temporary final rule are necessary to provide for the safety of life on navigable waterways during those events.

Aquapalooza is a boating event open to the Public that attracts many people and boats into Zach's Bay near Jones Beach State Park in Wantagh, NY for an afternoon of music and entertainment. The event sponsor expects to have 500 participants, including swimmers and boaters, and 150 boats attend the event. The large number of boats operating in close proximity to each other and to a swim area, operating at dangerous speeds for the conditions and the large number of vessels departing Zach's Bay at the conclusion of the event creates hazardous conditions in the form of potentially dangerous boat operations

within heavily congested waters. These conditions are especially hazardous for any vessels attempting to navigate in the southbound direction and against the flow of the main vessel traffic at the conclusion of the event. The Coast Guard determined that a special local regulation that restricts vessel speed and the flow of vessel traffic will improve the safety of waterway users.

The Connecticut River Raft Race involves many participants operating human-powered and/or sail-powered vessels of their own design and construction along a stretch of the Connecticut River near Middletown, CT. The start and finish points of the race have been changed to locations within the same general area but with improved access to the Connecticut River creating safer entry and exit conditions for event participants and support personnel. Due to the hazards facing these participants, including the unknown and/or untested seaworthiness of their vessels and potential limitations to vessel navigation and/or maneuverability, the Coast Guard determined that a special local regulation that restricts vessel speed and operation is needed to protect participants, spectators and other waterway users during the event.

The Sebonack Golf Club fireworks display and the Bohlsen Wedding fireworks display are expected to attract large numbers of spectator vessels that will congregate around the locations of these events. The Coast Guard determined that safety zones are required for each of these fireworks displays to protect both spectators and participants from the hazards created by them, including unexpected pyrotechnics detonation and burning debris.

Island Beach Two Mile Swim is a swim event that is held in Captain Harbor near Greenwich, CT. Approximately 80 participants will swim an out and back, two mile course that starts on Little Captain Island, then continues roughly northwest for 1 mile towards Bower's Island and then returns along the same track to Little Captain's Island. The swim course includes waters routinely transited by commercial and recreational boat traffic which could present hazards, including increased risk of collision, to the event participants and safety and support resources. The Coast Guard has determined that a safety zone is required to protect the event participants from the hazards associated with swim events on navigable waters, including potential threats from commercial and recreational boat traffic. The safety zone would also improve visibility and maneuverability for the safety vessels and personnel supporting the event.

C. Discussion of the Final Rule

This rule establishes two special local regulations for two separate regattas and three safety zones for two fireworks display and one swim event. The location of these special regulated areas and safety zones are as follows:

Regattas	
1 Aquapalooza	• Location: All navigable waters of Zach's Bay south of the line connecting a point near the western entrance to Zach's Bay in approximate position 40°36′29.20″ N, 073°29′22.88″ W and a point near the eastern entrance of Zach's Bay in approximate position 40°36′16.53″ N, 073°28′57.26″ W.
2 Connecticut River Raft Race	• Location: All waters of the Connecticut River Middletown, CT between Gildersleeve Island (Marker no. 99) 41°36′02.13″ N 072°37′22.71″ W and Portland Riverside Marina (Marker no. 88) 41°33′38.30″ N 072°37′36.53″ W (NAD 83).
Fireworks Displays	
3 Sebonack Golf Club Fireworks	• Location: All waters of Great Peconic Bay within 1000 feet of the fireworks barge located ¾ of a mile northwest of Bullhead Bay, Shinnecock, NY in approximate position 40°55′11.79″ N, 072°28′04.34″ W (NAD 83).
4 Bohlsen Wedding Fireworks	• Location: All waters of Great South Bay within 600 feet of the fireworks barge located near the entrance to Champlin Creek, East Islip, NY in approximate position 40°42′28.91″ N, 073°12′19.57″ W (NAD 83).
Swim Event	
5 Island Beach Two Mile Swim	• Location. The following area is a safety zone: All waters of Captain Harbor between Little Captain's Island and Bower's Island that are located within the box formed by connecting four points in the following positions. Beginning at 40°59′23.35″ N 073°36′42.05″ W, then northwest to 40°59′51.04″ N 073°37′57.32″ W, then southwest to 40°59′45.17″ N 073°38′01.18″ W, then southeast to 40°59′17.38″ N 073°36′45.90″ W, then northeast to the beginning point at 40°59′23.35″ N 073°36′42.05″ W (NAD 83). All positions are approximate.

The special local regulation established for Aquapalooza includes two measures to reduce the risks to waterways users of Zach's Bay before, during, and after the event. The first measure restricts vessel movement within the regulated area to no wake speed or 6 knots, whichever is slower on July 27, 2014 from 11:30 a.m. to 8 p.m. The second measure restricts all vessel movement within the regulated area to the outbound or northbound direction on July 27, 2014 from 3 p.m. to 5:30 p.m.

The special local regulation established for the Connecticut River Raft Race restricts vessel movement within the regulated area of the Connecticut River to no wake speed or 6 knots, whichever is slower and also stipulates that vessels shall not anchor,

block, loiter, or impede the transit of event participants or official patrol vessels in the regulated areas unless authorized by COTP or designated representatives. Both measures will be enforced on August 2, 2014 from 9:30 a.m. to 2:30 p.m.

This rule prevents vessels from entering, transiting, mooring or anchoring within areas specifically designated as safety zones and establishes additional vessel movement rules within areas specifically under the jurisdiction of the special local regulations during the periods of enforcement unless authorized by the COTP or designated representative.

Public notifications will be made to the local maritime community prior to the event through the Local Notice to Mariners and Broadcast Notice to Mariners.

D. Regulatory Analyses

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

1. Regulatory Planning and Review

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

The Coast Guard determined that this rulemaking is not a significant regulatory action for the following reasons: The enforcement of these regulated areas and safety zones will be relatively short in duration. Also, persons or vessels desiring entry into a regulated area or a deviance from the stipulations within a regulated area may be authorized to do so by the COTP Sector Long Island Sound or designated representative. Additionally, persons or vessels desiring to enter a safety zone may do so with permission from the COTP Sector Long Island Sound or designated representative. Furthermore, these special local regulations and safety zones are designed in a way to limit impacts on vessel traffic, permitting vessels to navigate in other portions of the waterways not designated as a regulated area or as a safety zone. Finally, to increase public awareness of these special local regulations and safety zones, the Coast Guard will notify the public of the enforcement of this rule via appropriate means, such as via Local Notice to Mariners and Broadcast Notice to Mariners.

2. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This temporary final rule will affect the following entities, some of which may be small entities: The owners or operators of vessels intending to enter, transit, anchor or moor within a regulated area or a safety zone during the periods of enforcement from July 27, 2014 to August 17, 2014. However, this temporary final rule will not have a significant economic impact on a substantial number of small entities for the same reasons discussed in the REGULATORY PLANNING AND REVIEW section.

3. Assistance for Small Entities

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

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

4. Collection of Information

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

5. Federalism

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

6. Protest Activities

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

7. Unfunded Mandates Reform Act

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

8. Taking of Private Property

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

9. Civil Justice Reform

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

10. Protection of Children From Environmental Health Risks

We have analyzed this rule under Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to

health or risk to safety that may disproportionately affect children.

11. Indian Tribal Governments

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

12. Energy Effects

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

13. Technical Standards

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

14. Environment

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

List of Subjects

33 CFR Part 100

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

33 CFR Part 165

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

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR parts 100 and 165 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

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

Authority: 33 U.S.C. 1233.

■ 2. Add § 100.35T01–0446 to read as follows:

§ 100.35T01–0446 Special Local Regulations; Marine Events in Captain of the Port Long Island Sound Zone.

(a) *Regulations.* The general regulations contained in 33 CFR 100.35 as well as the following regulations apply to the marine events listed in Table to § 100.35T01–0446.

(b) *Enforcement Period.* This rule will be enforced on the dates and times listed for each event in Table to § 100.35T01–0446.

(c) *Definitions.* The following definitions apply to this section:

(1) *Designated Representative.* A ''designated representative'' is any commissioned, warrant or petty officer of the U.S. Coast Guard who has been designated by the Captain of the Port (COTP), Sector Long Island Sound, to act on his or her behalf. The designated representative may be on an official patrol vessel or may be on shore and will communicate with vessels via VHF–FM radio or loudhailer. While members of the Coast Guard Auxiliary will not serve as the designated representative, they may be present to inform vessel operators of this regulation.

(2) *Official Patrol Vessels.* Official patrol vessels may consist of any Coast Guard, Coast Guard Auxiliary, state, or local law enforcement vessels assigned or approved by the COTP.

(d) Vessel operators desiring to enter or operate within the regulated areas shall contact the COTP at 203–468–4401 (Sector Long Island Sound command center) or the designated representative via VHF channel 16.

(e) Vessels may not transit the regulated areas without the COTP or designated representative approval. Vessels permitted to transit must operate at a no wake speed or 6 knots, whichever is slower, and operate in a manner which will not endanger event participants or other crafts in the event.

(f) The COTP or designated representative may control the movement of all vessels in the regulated area. When hailed or signaled by an official patrol vessel, a vessel shall come to an immediate stop and comply with the lawful directions issued. Failure to comply with a lawful direction may result in expulsion from the area, citation for failure to comply, or both.

(g) The COTP or designated representative may delay or terminate any marine event in this section at any time it is deemed necessary to ensure the safety of life or property.

(h) The additional stipulations listed in TABLE to § 100.35T01–0446 also apply for the event in which they are listed.

TABLE TO § 100.35T01–0446

1 Aquapalooza, Zach's Bay, Wantagh, NY	• Event type: Regatta. • Date: July 27, 2014. • Time: 11:30 a.m. to 8 p.m. • Location: All navigable waters of Zach's Bay south of the line connecting a point near the western entrance to Zach's Bay in approximate position 40°36′29.20″ N, 073°29′22.88″ W and a point near the eastern entrance of Zach's Bay in approximate position 40°36′16.53″ N, 073°28′57.26″ W. • Additional stipulations: On July 27, 2014 from 11:30 a.m. to 8 p.m. vessel speed in the regulated area is restricted to no wake speed or 6 knots, whichever is slower. On July 27, 2014 from 3 p.m. to 5:30 p.m. vessels may only transit the regulated area in the northbound direction or outbound direction.

TABLE TO § 100.35T01–0446—Continued

2 Connecticut River Raft Race, Middletown, CT	• Event type: Boat Race. • Date: August 2, 2014. • Time: 9:30 a.m. to 2:30 p.m. • Location: All waters of the Connecticut River near Middletown, CT between Gildersleeve Island (Marker no. 99) 41°36′02.13″ N 072° 37′22.71″ W and Portland Riverside Marina (Marker no. 88) 41°33′38.30″ N 072°37′36.53″ W (NAD 83). • Additional Stipulations: Vessels shall not anchor, block, loiter, or impede the transit of event participants or official patrol vessels in the regulated areas unless authorized by COTP or designated representative.

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 3. The authority citation for Part 165 continues to read as follows:

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

■ 4. Add § 165.T01–0446 to read as follows:

§ 165.T01–0446 Safety Zones; Fireworks Displays and Swim Event in Captain of the Port Long Island Sound Zone.

(a) *Regulations.* The general regulations contained in 33 CFR 165.23 as well as the following regulations apply to the events listed in the TABLES 1 and 2 of § 165.T01–0446.

(b) *Enforcement Period.* This rule will be enforced on the dates and times listed for each event in TABLES 1 and 2 of § 165.T01–0446. If the event is delayed by inclement weather, the safety zone will be enforced on the rain date indicated in TABLES 1 and 2 of § 165.T01–0446.

(c) *Definitions.* The following definitions apply to this section:

(1) *Designated Representative.* A ''designated representative'' is any commissioned, warrant or petty officer of the U.S. Coast Guard who has been designated by the Captain of the Port (COTP), Sector Long Island Sound, to act on his or her behalf. The designated representative may be on an official patrol vessel or may be on shore and will communicate with vessels via VHF–FM radio or loudhailer. While members of the Coast Guard Auxiliary will not serve as the designated representative, they may be present to inform vessel operators of this regulation.

(2) *Official Patrol Vessels.* Official patrol vessels may consist of any Coast Guard, Coast Guard Auxiliary, state, or local law enforcement vessels assigned or approved by the COTP.

(d) Vessels desiring to enter or operate within a safety zone should contact the COTP or the designated representative via VHF channel 16 or by telephone at (203) 468–4401 to obtain permission to do so. Vessels given permission to enter or operate in a safety zone must comply with all directions given to them by the COTP Sector Long Island Sound or the designated on-scene representative.

(e) Upon being hailed by an official patrol vessel or the designated representative, by siren, radio, flashing light or other means, the operator of the vessel shall proceed as directed. Failure to comply with a lawful direction may result in expulsion from the area, citation for failure to comply, or both.

(f) Fireworks barges used in these locations will also have a sign on their port and starboard side labeled ''FIREWORKS—STAY AWAY.'' This sign will consist of 10 inch high by 1.5 inch wide red lettering on a white background.

(g) For the swim event listed in TABLE 2 to § 165.T01–446, vessels not associated with the event shall maintain a separation of at least 100 yards from the participants.

TABLE 1 TO § 165.T01–0446

Fireworks Events	
1 Sebonack Golf Club Fireworks	• Date: August 1, 2014. • Rain Date: August 8, 2014. • Time: 9 p.m. to 10:30 p.m. • Location: All waters of Great Peconic Bay within 1000 feet of the fireworks barge located ¾ of a mile northwest of Bullhead Bay, Shinnecock, NY in approximate position 40°55′11.79″ N, 072°28′04.34″ W (NAD 83).
2 Bohlsen Wedding Fireworks	• Date: August 16, 2014. • Rain Date: August 17, 2014. • Time: 8:45 p.m. to 10:45 p.m. • Location: All waters of Great South Bay within 600 feet of the fireworks barge located near the entrance to Champlin Creek, East Islip, NY in approximate position 40°42′28.91″ N, 073°12′19.57″ W (NAD 83).

TABLE 2 TO § 165.T01–0446

Swim Events	
1 Island Beach Two Mile Swim	• Date: August 9, 2014. • Time: 8 a.m. until 11 a.m. • Location: All waters of Captain Harbor between Little Captain's Island and Bower's Island that are located within the box formed by connecting four points in the following positions. Beginning at 40°59′23.35″ N 073°36′42.05″ W, then northwest to 40°59′51.04″ N 073°37′57.32″ W, then southwest to 40°59′45.17″ N 073°38′01.18″ W, then southeast to 40°59′17.38″ N 073°36′45.90″ W, then northeast to the beginning point at 40°59′23.35″ N 073°36′42.05″ W (NAD 83). All positions are approximate.

Dated: July 25, 2014.

E.J. Cubanski, III,

Captain, U.S. Coast Guard, Captain of the Port Sector Long Island Sound.

[FR Doc. 2014–19054 Filed 8–11–14; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2014–0437]

RIN 1625–AA09

Drawbridge Operation Regulation; Gulf Intracoastal Waterway, St. Petersburg Beach, FL

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is removing the existing drawbridge operation regulation for the Pinellas Bayway Structure ''C'' Bridge across the Gulf Intracoastal Waterway mile 114, St Petersburg Beach, Florida. The drawbridge was replaced with a fixed bridge in 2014 and the operating regulation is no longer applicable or necessary.

DATES: This rule is effective August 12, 2014.

ADDRESSES: The docket for this final rule, [USCG–2014–0437] 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 final rule. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Mr. Gene Stratton, Coast Guard; telephone 305–415–6744, email *allen.e.stratton@uscg.mil.* If you have questions on viewing the docket, call Cheryl Collins, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

A. Regulatory History and Information

The Coast Guard is issuing this final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because the Pinellas Bayway Structure ''C'' Bridge, that once required draw operations in 33 CFR 117.287(e), was removed from Gulf Intracoastal Waterway mile 114.0 and replaced with a fixed bridge in 2014. Therefore, the regulation is no longer applicable and shall be removed from publication. It is unnecessary to publish an NPRM because this regulatory action does not purport to place any restrictions on mariners but rather removes a restriction that has no further use or value.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective in less than 30 days after publication in the **Federal Register**. The bridge has been a fixed bridge for 1 year and this rule merely requires an administrative change, in order to omit a regulatory requirement that is no longer applicable or necessary. The modification has already taken place and the removal of the regulation will not affect mariners currently operating on this waterway. Therefore, a delayed effective date is unnecessary.

B. Basis and Purpose

The Pinellas Bayway Structure ''C'' Bridge across the Gulf Intracoastal Waterway mile 114.0 was removed and replaced with a fixed bridge in 2014. It has come to the attention of the Coast Guard that the governing regulation for this drawbridge was never removed subsequent to the completion of the fixed bridge that replaced it. The elimination of this drawbridge necessitates the removal of the drawbridge operation regulation, 33 CFR 117.287(e), that pertains to the former drawbridge.

The purpose of this rule is to remove paragraph (e) of 33 CFR 117.287 that refers to the Pinellas Bayway Structure ''C'' Bridge at mile 114.0, from the Code of Federal Regulations since it governs a bridge that is no longer able to be opened.

C. Discussion of Rule

The Coast Guard is changing the regulation in 33 CFR 117.287(e) by removing restrictions and the regulatory burden related to the draw operations for this bridge that is no longer in existence [is no longer a drawbridge]. The change removes the paragraph (e) of the regulation governing the Pinellas Bayway Structure ''C'' Bridge since the bridge has been replaced with a fixed bridge and the old bascule bridge was removed from the waterway. This Final Rule seeks to update the Code of Federal Regulations by removing language that governs the operation of the Pinellas Bayway Structure ''C'' Bridge, which no longer operates as a drawbridge. This change does not affect waterway or land traffic. This change does not affect nor does it alter the operating schedules in 33 CFR 117.287 that govern the remaining active drawbridges on the Gulf Intracoastal Waterway.

D. Regulatory Analyses

We developed this rule after considering numerous statutes and

executive orders related to rulemaking. Below we summarize our analyses based on these statutes or executive orders.

1. Regulatory Planning and Review

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

The Coast Guard does not consider this rule to be ''significant'' under that Order because it is an administrative change and does not affect the way vessels operate on the waterway.

2. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This rule will have no effect on small entities since this drawbridge has been removed and replaced with a fixed bridge and the regulation governing draw operations for this bridge is no longer applicable. There is no new restriction or regulation being imposed by this rule; therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this final rule will not have a significant economic impact on a substantial number of small entities

3. Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

4. Federalism

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

5. Protest Activities

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

6. Unfunded Mandates Reform Act

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

7. Taking of Private Property

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

8. Civil Justice Reform

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

9. Protection of Children

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

10. Indian Tribal Governments

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

11. Energy Effects

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

12. Technical Standards

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

13. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule simply removes the operating regulations or procedures for a fixed bridge. This rule is categorically excluded, under figure 2–1, paragraph (32)(e), of the Instruction.

Under figure 2–1, paragraph (32)(e), of the Instruction, an environmental analysis checklist and a categorical exclusion determination are not required for this rule.

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 0170.1.

§ 117.287 [Amended]

■ 2. In § 117.287, remove and reserve paragraph (e).

Dated: June 18, 2014.

J.H. Korn,

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

[FR Doc. 2014–18865 Filed 8–11–14; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2014–0656]

Safety Zone; Pyro Spectaculars for USS MIDWAY Museum, San Diego, CA

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the Pyro Spectaculars USS MIDWAY Museum firework display safety zone on August 28, 2014. This marine event occurs on the navigable waters of San Diego Bay, immediately to the west of the USS MIDWAY, in San Diego, California. This action is necessary to provide for the safety of the participants, crew, spectators, safety vessels, and general users of the waterway. During the enforcement period, persons and vessels are prohibited from entering into, transiting through, or anchoring within this regulated area unless authorized by the Captain of the Port, or his designated representative.

DATES: The regulations for the marine event listed in the Table to 33 CFR 165.1123(6) will be enforced on August 28, 2014 from 9 p.m. to 9:30 p.m.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call or email Petty Officer Giacomo Terrizzi, Waterways Management, U.S. Coast Guard Sector San Diego, CA; telephone (619) 278–7261, email *Giacomo.Terrizzi@uscg.mil*.

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the safety zone in San Diego Bay for the Pyro Spectacular, Inc for USS MIDWAY Museum fireworks display in 33 CFR 165.1123, Table 1, Item 6 from 9:00 p.m. to 9:30 p.m.

Under the provisions of 33 CFR 165.1123, persons and vessels are prohibited from entering into, transiting through, or anchoring within the 600 foot regulated area safety zone that includes the tug and barge unless authorized by the Captain of the Port, or his designated representative. Persons or vessels desiring to enter into or pass through the safety zone may request permission from the Captain of the Port or a designated representative. If permission is granted, all persons and vessels shall comply with the instructions of the Captain of the Port or designated representative. Spectator vessels may safely transit outside the regulated area, but may not anchor, block, loiter, or impede the transit of participants or official patrol vessels or commercial traffic within the federal channel. The Coast Guard may be assisted by other Federal, State, or local law enforcement agencies in patrol and notification of this regulation.

This notice is issued under authority of 5 U.S.C. 552 (a) and 33 CFR 165.1123. In addition to this notice in the **Federal Register**, the Coast Guard will provide the maritime community with advance notification of this enforcement period via the Local Notice to Mariners, Broadcast Notice to Mariners, and local advertising by the event sponsor. If the Captain of the Port Sector San Diego or his designated representative determines that the regulated area need not be enforced for the full duration stated on this notice, he or she may use a Broadcast Notice to Mariners or other communications coordinated with the event sponsor to grant general permission to enter the regulated area.

Dated: July 25, 2014.

S.M. Mahoney,

Captain, U.S. Coast Guard, Captain of the Port San Diego.

[FR Doc. 2014–19064 Filed 8–11–14; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2014–0511; FRL–9915–006–Region 3]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; Removal of Two Operating Permits and a Consent Agreement for the Potomac River Generating Station From the State Implementation Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking direct final action to approve revisions to the Commonwealth of Virginia State Implementation Plan (SIP). The revision removes from the Virginia SIP references to two operating permits and a consent agreement for GenOn Potomac River, LLC's Potomac River Generating Station (Potomac River), which was formerly owned by Potomac Electric Power Company. Potomac River has permanently shut down; therefore, the permits and consent agreement are no longer applicable and are being removed from the Virginia SIP. EPA is approving these revisions in accordance with the requirements of the Clean Air Act (CAA).

DATES: This rule is effective on October 14, 2014 without further notice, unless EPA receives adverse written comment by September 11, 2014. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2014–0511 by one of the following methods:

A. *www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *Email: fernandez.cristina@epa.gov.*

C. *Mail:* EPA–R03–OAR–2014–0511, Cristina Fernandez, Associate Director, Office of Air Quality Planning, Mailcode 3AP30, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2014–0511. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid

the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

FOR FURTHER INFORMATION CONTACT: Gregory Becoat, (215) 814–2036, or by email at *becoat.gregory@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In 1979, EPA promulgated the 1-hour 0.12 parts per million (ppm) ground-level ozone national ambient air quality standard (NAAQS). *See* 44 FR 8202 (Feb. 8, 1979). The Northern Virginia portion, consisting of the counties of Arlington, Fairfax, Loudoun, Prince William, and Stafford and the cities of Alexandria, Fairfax, Falls Church, Manassas, and Manassas Park in Virginia was originally classified as part of the Metropolitan Washington, DC–MD–VA serious nonattainment area (the Washington Area). *See* 40 CFR 81.347. On January 24, 2003 (68 FR 3411), EPA determined that the Washington Area failed to attain the 1-hour ozone NAAQS by November 15, 1999, as required by section 181(a) of the CAA, and the Washington Area was reclassified to a severe ozone nonattainment area pursuant to section 181(b)(2) of the CAA.

As a result of the Washington Area's classification, each state, including the Commonwealth of Virginia, was required to submit a SIP demonstrating how attainment of the NAAQS would be met. In order to demonstrate attainment, the Commonwealth of Virginia implemented state-specific controls with the goal of limiting emissions of nitrogen oxides (NO_X) from the area's electric utility plants to 0.15 pounds per million British Thermal Units (BTUs) of heat (fuel) input to the boilers. As a coal-fired electric generating facility that emitted volatile organic compounds (VOCs) and NO_X, Potomac River, located in Alexandria, Virginia, was identified as a source subject to control, and a state operating permit was created as a vehicle for implementing the control measure. EPA approved this permit into the SIP on December 14, 2000 (65 FR 78100).

Potomac River was also identified as a source subject to reasonably available control technology (RACT) requirements. EPA defines RACT as ''the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility.'' *See* 44 FR 53761 (Sept. 17, 1979). In order to ensure compliance with the RACT requirements for the control of VOCs, a state operating permit was issued by the Commonwealth of Virginia Department of Environmental Quality (VADEQ) for Potomac River and approved by EPA into the SIP on January 2, 2001 (66 FR 8). In order to ensure compliance with the RACT requirements for the control of NO_X, a consent agreement was entered between Virginia and the owner of Potomac River and approved by EPA into the SIP on January 2, 2001 (66 FR 8).

II. Summary of SIP Revision

On May 10, 2013, VADEQ submitted a formal revision to its SIP. The SIP revision consists of a request by the Commonwealth to remove from the Virginia SIP the two operating permits and consent agreement discussed above for Potomac River. On December 21, 2012, GenOn Potomac River, LLC and VADEQ signed a mutual determination of permanent shutdown of the Alexandria, Virginia facility. The SIP submission includes a copy of the signed determination which: (1) Mutually agrees that the source is permanently shutdown, (2) establishes that all permits for the source in accordance with 9VAC5–20–220 are revoked, (3) removes the source from the air emissions inventory, and (4) establishes that any future operations must be in accordance with Virginia's Prevention of Significant Deterioration (PSD) permit program pursuant to 9VAC5 Chapter 80. If Potomac River should resume operation in the future, VADEQ may be required at that time to revise its SIP as appropriate.

III. Final Action

EPA is approving the May 10, 2013 submittal from VADEQ that removes from the Virginia SIP the two operating permits and consent agreement for Potomac River because the source has permanently shutdown and all of the source's permits are revoked. EPA believes this revision will not interfere with Virginia's attainment or maintenance of any NAAQS. EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comment. However, in the ''Proposed Rules'' section of today's **Federal Register**, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective on October 14, 2014 without further notice unless EPA receives adverse comment by September 11, 2014. If EPA receives adverse comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

IV. General Information Pertaining to SIP Submittals From the Commonwealth of Virginia

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) ''privilege'' for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed. Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia's Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1–1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information that: (1) Are generated or developed before the commencement of a voluntary environmental assessment; (2) are prepared independently of the assessment process; (3) demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege Law, Va. Code § 10.1–1198, precludes granting a privilege to documents and information ''required by law,'' including documents and information ''required by Federal law to maintain program delegation, authorization or approval,'' since Virginia must ''enforce Federally authorized environmental programs in a manner that is no less stringent than their Federal counterparts. . . .'' The opinion concludes that ''[r]egarding § 10.1–1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by Federal law to maintain program delegation, authorization or approval.'' Virginia's Immunity law, Va. Code Sec. 10.1–1199, provides that ''[t]o the extent consistent with requirements imposed by Federal law,'' any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General's January 12, 1998 opinion states that the quoted language renders this statute inapplicable to enforcement of any Federally authorized programs, since ''no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with Federal law, which is one of the criteria for immunity.''

Therefore, EPA has determined that Virginia's Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its program consistent with the Federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on Federal enforcement authorities, EPA may at any time invoke its authority under the CAA, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the CAA is likewise unaffected by this, or any, state audit privilege or immunity law.

V. Statutory and Executive Order Reviews

A. General Requirements

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely 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 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.

B. Submission to Congress and the Comptroller General

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. Section 804, however, exempts from section 801 the following types of rules: Rules of particular applicability; rules relating to agency management or personnel; and rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. 5 U.S.C. 804(3). Because this is a rule of particular applicability, EPA is not required to submit a rule report regarding this action under section 801.

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 14, 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. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking action.

This action to remove the two operating permits and a consent agreement for Potomac River from the Virginia SIP 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, Nitrogen dioxide, Ozone, Volatile organic compounds.

Dated: July 29, 2014.

William C. Early,

Acting Regional Administrator, Region III.

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 VV—Virginia

§ 52.2420 [Amended]

■ 2. In § 52.2420, the table in paragraph (d) is amended by removing the three entries entitled ''Potomac Electric Power Company (PEPCO)-Potomac River Generating Station [Permit to Operate]'', ''Potomac Electric Power Company (PEPCO)—Potomac River Generating Station [Consent Agreement]'', and ''Potomac Electric Power Company (PEPCO)—Potomac River Generating Station''.

[FR Doc. 2014–18930 Filed 8–11–14; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–HQ–SFUND–1983–0002; FRL 9914–92–Region 8]

National Oil and Hazardous Substance Pollution Contingency Plan: Partial Deletion of the California Gulch Superfund Site National Priorities List

AGENCY: Environmental Protection Agency.

ACTION: Direct final rule.

SUMMARY: The U.S. Environmental Protection Agency (EPA) Region 8 is publishing a direct final Notice of Partial Deletion of Operable Unit 4, (OU4) Upper California Gulch; Operable Unit 5 (OU5), ASARCO Smelters/Slag/Mill Sites; and Operable Unit 7 (OU7), Apache Tailing Impoundment, of the California Gulch Superfund Site (Site), located in Lake County, Colorado, from the National Priorities List (NPL). The NPL, promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended, is an appendix of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). This direct final partial deletion is being published by EPA with the concurrence of the State of Colorado (State), through the Colorado Department of Public Health and Environment (CDPHE) because EPA has determined that all appropriate response actions at OU4, OU5 and OU7 under CERCLA, other than operation, maintenance, and five-year reviews, have been completed. However, this partial deletion does not preclude future actions under Superfund.

This partial deletion pertains to all of OU4, OU5 and OU7. Operable Unit 2 (OU2), Malta Gulch Tailing Impoundments and Lower Malta Gulch Fluvial Tailing; Operable Unit 8 (OU8), Lower California Gulch; Operable Unit 9 (OU9), Residential Populated Areas; and Operable Unit 10 (OU10), Oregon Gulch, were previously partially deleted from the NPL. Operable Unit 1 (OU1), the Yak Tunnel; Operable Unit 3 (OU3), D&RGW Slag Piles and Easement; Operable Unit 6 (OU6), Stray Horse Gulch; Operable Unit 11 (OU11), Arkansas River Floodplain; and Operable Unit 12 (OU12), Site-wide Surface and Groundwater Quality, are not being considered for deletion as part of this action and will remain on the NPL.

DATES: This direct final partial deletion is effective October 14, 2014 unless EPA receives adverse comments by September 11, 2014. If adverse comments are received, EPA will publish a timely withdrawal of the direct final partial deletion in the **Federal Register** informing the public that the partial deletion will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID no. EPA–HQ–SFUND–1983–0002, by one of the following methods:

- *http://www.regulations.gov.* Follow on-line instructions for submitting comments.
- *E-Mail:* Linda Kiefer, *kiefer.linda@epa.gov.*
- *Fax:* (303) 312–7151.
- *Mail:* Linda Kiefer, Remedial Project Manager, Environmental Protection Agency, Region 8, Mail Code 8EPR–SR, 1595 Wynkoop Street, Denver, CO 80202–1129.
- *Hand Delivery:* Environmental Protection Agency, Region 8, Mail Code 8EPR–SR, 1595 Wynkoop Street, Denver, CO 80202–1129. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID no. EPA–HQ–SFUND–1983–0002. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or email. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *http://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available electronically in *http://www.regulations.gov;* by calling EPA Region 8 at (303) 312–7279 and leaving a message; and at the Lake County Public Library, 1115 Harrison Avenue, Leadville, CO 80461, (719) 486–0569, Monday and Wednesday from 10:00 a.m.–8:00 p.m., Tuesday and Thursday from 10:00 a.m.–5:00 p.m., and Friday and Saturday 1:00 p.m.–5:00 p.m.

FOR FURTHER INFORMATION CONTACT: Linda Kiefer, Remedial Project Manager, U.S. Environmental Protection Agency, Region 8, Mailcode EPR–SR, 1595 Wynkoop Street, Denver, CO 80202–1129, (303) 312–6689, email: *kiefer.linda@epa.gov.*

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I. Introduction

EPA Region 8 is publishing this direct final Notice of Partial Deletion for all of Operable Unit 4 (OU4), Upper California Gulch; Operable Unit 5 (OU5), ASARCO Smelters/Slag/Mill Sites; and Operable Unit 7 (OU7), Apache Tailing Impoundment, of the Site, from the NPL. The NPL constitutes Appendix B of 40 CFR part 300, of the NCP, which EPA promulgated pursuant to section 105 of CERCLA of 1980, as amended. EPA maintains the NPL as the list of sites that appear to present a significant risk to public health, welfare, or the environment. Sites on the NPL may be the subject of remedial actions financed by the Hazardous Substance Superfund (Fund). This partial deletion of the Site is proposed in accordance with 40 CFR 300.425(e) and is consistent with the Notice of Policy Change: Partial Deletion of Sites Listed on the NPL. 60 FR 55466 (Nov. 1, 1995). As described in 40 CR 300.425(e)(3) of the NCP, a portion of a site deleted from the NPL remains eligible for Fund-financed remedial action if future conditions warrant such actions.

Because EPA considers this action to be noncontroversial and routine, this action will be effective October 14, 2014 unless EPA receives adverse comments by September 11, 2014. Along with this direct final Notice of Partial Deletion, EPA is co-publishing a Notice of Intent for Partial Deletion in the ''Proposed Rules'' section of the **Federal Register**. If adverse comments are received within the 30-day public comment period on this partial deletion action, EPA will publish a timely withdrawal of this direct final Notice of Partial Deletion before the effective date of the partial deletion and the partial deletion will not take effect. EPA will, as appropriate, prepare a response to comments and continue with the deletion process on the basis of the Notice of Intent for Partial Deletion and the comments already received. There will be no additional opportunity to comment.

Section II of this document explains the criteria for deleting sites from the NPL. Section III discusses procedures that EPA is using for this action. Section IV discusses OU4, Upper California Gulch; OU5, ASARCO Smelters/Slag/Mill Sites; and OU7, Apache Tailing Impoundment, and demonstrates how they meet the deletion criteria. Section V discusses EPA's action to partially delete the Site parcels from the NPL unless adverse comments are received during the public comment period.

II. NPL Deletion Criteria

The NCP establishes the criteria that EPA uses to delete sites from the NPL. In accordance with 40 CFR 300.425(e), sites may be deleted from the NPL where no further response is appropriate. In making such a determination pursuant to 40 CFR 300.425(e), EPA will consider, in consultation with the State, whether any of the following criteria have been met:

i. Responsible parties or other persons have implemented all appropriate response actions required;

ii. All appropriate Fund-financed response under CERCLA has been implemented, and no further response action by responsible parties is appropriate; or

iii. The remedial investigation has shown that the release poses no significant threat to public health or the environment and, therefore, the taking of remedial measures is not appropriate.

Pursuant to CERCLA section 121(c) and the NCP, EPA conducts five-year reviews to ensure the continued protectiveness of remedial actions where hazardous substances, pollutants, or contaminants remain at a site above levels that allow for unlimited use and unrestricted exposure. EPA conducts such five-year reviews even if a site is deleted from the NPL. EPA may initiate further action to ensure continued protectiveness at a deleted site if new information becomes available that indicates it is appropriate. Whenever there is a significant release from a site deleted from the NPL, the deleted site may be restored to the NPL without application of the hazard ranking system.

III. Partial Deletion Procedures

The following procedures apply to the deletion of OU4, OU5 and OU7:

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

(2) EPA has provided the State 30 working days for review of this notice and the parallel Notice of Intent for Partial Deletion prior to their publication today, and the State, through the CDPHE, has concurred on the partial deletion of OU4, OU5 and OU7 of the Site from the NPL.

(3) Concurrently with the publication of this direct final Notice of Partial Deletion, a notice of the availability of the parallel Notice of Intent for Partial Deletion is being published in a major local newspaper, the Leadville Herald Democrat. The newspaper notice announces the 30-day public comment period concerning the Notice of Intent for Partial Deletion of OU4, OU5 and OU7 of the Site from the NPL.

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

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

Deletion of a portion of a site from the NPL does not itself create, alter, or revoke any individual's rights or obligations. Deletion of a portion of a site from the NPL does not in any way alter EPA's right to take enforcement actions, as appropriate. The NPL is designed primarily for informational purposes and to assist EPA management. Section 300.425(e)(3) of the NCP states that the deletion of a site from the NPL does not preclude eligibility for further response actions, should future conditions warrant such actions.

IV. Basis for Site Partial Deletion

The following information provides EPA's rationale for deleting OU4, OU5 and OU7 of the Site from the NPL:

Site Background and History

The California Gulch Superfund Site, EPA ID No. COD980717938, is located in Lake County, Colorado approximately 100 miles southwest of Denver. The Site was proposed for inclusion on the NPL on December 30, 1982, (47 FR 58476), and listed on September 8, 1983, (48 FR 40658). The Site is in a highly mineralized area of the Colorado Rocky Mountains covering approximately 18 square miles of a watershed that drains along California Gulch to the Arkansas River. The Site includes the City of Leadville, various parts of the Leadville Historic Mining District, Stringtown, and a section of the Arkansas River from the confluence of California Gulch to the confluence of Two-Bit Gulch. Mining, mineral processing, and smelting activities have occurred at the Site for more than 130 years. Mining in the district began in 1860, when placer gold was discovered in California Gulch. As the placer deposits were

exhausted, underground mine workings became the principal method for removing gold, silver, lead and zinc ore. As these mines were developed, waste rock was excavated along with the ore and placed near the mine entrances. Ore was crushed and separated into metallic concentrates at mills, with mill tailing generally released into surrounding streams and after about 1930 slurried into tailing impoundments. Many of the mining operations ceased operations around 1900, although several smelters continued operations into the 1920s (Western Zinc) and the 1960s (AV Smelter) and the last active mine, the Black Cloud, shut down in 1999.

All of the mines within the Site boundaries are presently inactive, and all of the mills and smelters have been demolished. Mining remains that contributed to environmental contamination are (1) mill tailing (the fine-grained residue remaining after milling has removed the metal concentrates form the ore) in impoundments and fluvial deposits, (2) mine waste rock piles (mine development rock and low grade ore removed to gain access to an ore body, and often deposited near adits and shaft openings), (3) mine water drainage tunnels, (4) draining adits, and (5) various smelter wastes including slag piles, flue dust and fallout from stack emissions.

The Site was placed on the NPL due to concerns regarding the impact of acidic and metals laden mine drainage on surface waters leading to California Gulch and the impact of heavy metals loading into the Arkansas River. A Site-wide Phase I Remedial Investigation (Phase I RI), which primarily addressed surface water and groundwater contamination, was issued in January 1987. As a result of the Phase I RI, EPA identified the first operable unit, the Yak Tunnel, to address the largest single source of metallic loading. A number of additional Site-wide studies followed the Phase I RI.

EPA agreed, pursuant to a May 2, 1994 Consent Decree (1994 CD), to divide the Site into 12 operable units (OUs). With the exception of OU12, the OUs pertain to distinct geographical areas corresponding to areas of responsibility for the identified responsible parties and/or to distinct sources of contamination. The OUs are as follows: OU1, Yak Tunnel/Water Treatment Plant; OU2, Malta Gulch Tailing Impoundments and Lower Malta Gulch Fluvial Tailing; OU3, D&RGW Slag Piles and Easement; OU4, Upper California Gulch; OU5, ASARCO Smelter Sites/Slag/Mill Sites; OU6, Starr Ditch/Stray Horse Gulch/Lower Evans Gulch/Penrose Mine Waste Pile; OU7, Apache Tailing Impoundments; OU8, Lower California Gulch; OU9, Residential Populated Areas; OU10, Oregon Gulch; OU11, Arkansas River Valley Floodplain; and OU12, Site-wide Surface and Groundwater. To date, OU2, OU8, OU9, and OU10 have been partially deleted from the NPL.

The background and history, the Remedial Investigations and Feasibility Studies (RI/FS), Removal and Response Actions, Selected Remedies, Cleanup Standards, and Operation and Maintenance activities for OU4, OU5 and OU7 are discussed below.

OU4 Background and History

Upper California Gulch (OU4) is located to the southeast of the City of Leadville. A map of OU4 can be found in the docket at *http://www.regulations.gov* under Docket ID no. EPA–HQ–SFUND–1983–0002. OU4 covers an area of approximately 2.4 square miles, contains waste rock piles and fluvial tailing and is divided into six sub-basins, Garibaldi, Whites Gulch, Nugget Gulch, AY Minnie, Iron Hill and South Area, which also includes the Fluvial Tailing Site 4 known as Oro City. Although 131 waste piles were initially identified in OU4, the number of waste rock piles of concern in the OU has been reduced to 20 through remedial investigation and analytical screening. The twenty waste rock piles in these sub-basins contain a total estimated volume of 431,000 cubic yards, impacting 28.3 acres. The waste rock piles are primarily weathered porphyry with limited to no vegetation and with highly oxidized surfaces.

Fluvial tailing deposition within OU4 is discontinuous and appears to have been subdivided into several distinct pockets. In OU4, the Fluvial Tailing Site 4 extends for a distance of approximately 1.5 miles along Upper California Gulch, from slightly upstream of the Yak Tunnel portal to the upstream end of the Printer Boy Mine area. Fluvial tailing and fluvial tailing mixed with alluvial sediments are located in the South Area and Fluvial Tailing Site 4 (Oro City), and are estimated at 102,000 cubic yards in volume. The fluvial tailing piles are largely un-vegetated, with grasses and lodgepole pine growing on approximately a quarter of the tailing surface. A wetland area exists along the Upper California Gulch channel within the OU4 boundaries. Oro City is considered a cultural and historic resource for the Leadville Historic Mining District. The land in OU4 is zoned by Lake County for recreational, industrial and mining land uses. EPA is the lead agency for OU4 and the CDPHE is the support agency. Under the 1994 CD, Resurrection/Newmont Mining (Resurrection/Newmont) assumed responsibility for OU4.

Concurrent with the various investigations and studies, risk assessments were conducted. They included the Preliminary Baseline Risk Assessment (Preliminary BRA), the Final Baseline Human Health Risk Assessments (Final BRA): Part A, Part B, and Part C; the Ecological Risk Assessment for Terrestrial Ecosystems (ERA); the Surface Water Human Health Risk Assessment; the Groundwater Baseline Human Health Risk Assessment and the Baseline Aquatic Ecological Risk Assessment (BARA).

For human health risk issues at OU4, the Preliminary BRA and the Final BRA Part C, Evaluation of Worker Scenario and Evaluation of Recreational Scenarios, were most pertinent. The Preliminary BRA indicated that lead and arsenic are responsible for the majority of human health risks at the Site. Therefore, arsenic and lead were used as indicator contaminants for risk in the Final BRA. Residential, commercial, and industrial uses do not occur in OU4, nor are these uses anticipated to occur in the future at OU4. Therefore, commercial workers, industrial workers, and residents are not exposed to contaminated media in OU4. Recreation is the most likely land use scenario for OU4. Therefore, recreational visitors were selected as the receptors of concern for OU4. The Final BRA identified soil ingestion as the exposure pathway of concern for recreational visitors. Exposure to other media and exposure to soil/dust through other pathways (e.g., dermal) are considered an insignificant concern for recreational users. The OU4 investigations showed that average concentrations of arsenic and lead in exposure areas in OU4 where recreational use is considered likely were less than the risk-based action levels for the recreational land use scenario (lead 16,000 mg/kg and arsenic 1,400 mg/kg) identified in the Final BRA, indicating that an unacceptable health risk is unlikely to result from recreational exposure to lead or arsenic in surface soils in OU4.

For ecological risks at OU4, the BARA and the ERA were the most pertinent. The BARA characterized the impacts of mine waste contamination on the aquatic ecosystem of the Site. Results of the BARA indicate that mine waste poses potential unacceptable risk to all aquatic species. The BARA states that the Girabaldi Mine, the North Mike, and the fluvial tailing, as well as other

sources, such as high metal waste rock piles, contribute to the metals entering California Gulch and, ultimately, the Arkansas River. Potential risks to the terrestrial ecosystem from mine waste contamination were characterized in the ERA. Risks to the blue grouse, mountain bluebird, and least chipmunk exceeded EPA acceptable levels for exposure to contaminants in mine waste contamination in OU4. Potential risks to plants and soil fauna from exposure to mine waste contamination were also indicated. Surface water ingestion may also result in a potential risk of some effect to terrestrial receptors. Action levels were not developed for terrestrial receptors. Thus, these releases of contaminants from OU4 presented an unacceptable risk to aquatic and terrestrial ecological receptors and response actions were necessary at OU4 to control the release of contaminants and acidic water into the environment.

OU4 Remedial Investigations and Feasibility Study (RI/FS)

The State, the EPA and certain Potentially Responsible Parties (PRPs) have conducted various studies and investigations to evaluate the nature and extent of contamination generally at the Site, and specifically within OU4. Remedial Investigations (RIs) began in 1986 within the Site, including mine waste rock piles, tailing disposal areas, surface water and aquatics, groundwater, smelter sites, residential/populated area soils, slag piles, and terrestrial studies. The Yak Tunnel/California Gulch Remedial Investigation (1986 RI) evaluated the human health and environmental impacts due to historic mining activities. Waste rock piles were selected for sampling based upon their potential to impact surface water systems. Waste rock and fluvial tailing material samples (from 0 to 6 inches) were collected at 14 sites in OU4. Waste rock and/or tailing samples were collected in the Iron Hill drainage, at the Garibaldi, Agwalt, Printer Girl, and AY-Minnie mine sites, and along Fluvial Tailing Site 4.

In 1986 and 1987, EPA conducted additional RI investigations. The Draft Phase II Remedial Investigation Technical Memorandum 1986–1987 (Phase II RI) evaluated mine-related wastes, surface water and groundwater quality, associated with the Printer Girl and the AY-Minnie mine sites. The California Gulch Hydrologic Investigation, included surface water, groundwater, and sediment sampling; laboratory analysis of samples; and an inventory of mine and mineral waste. The primary objectives were to characterize the surface and groundwater quality and flow patterns, and to identify sources of contaminant loading in California Gulch. Conducted in 1991 and 1992, the Final-Surface Water Remedial Investigation Report (Surface Water Rl), prepared by ASARCO, involved surface water and sediment sampling in the Arkansas River and its tributaries, including California Gulch.

The Final-Hydrogeologic Remedial Investigation Report (Hydrogeologic RI), prepared for ASARCO, from the fall of 1991 through the winter of 1992, included well monitoring, and groundwater analysis. The objectives were to investigate groundwater quality and flow directions, evaluate potential impacts to water users and surface water receptors, and to characterize background groundwater quality.

Issued in 1994, the Final-Tailing Disposal Area Remedial Investigation Report (Tailing RI) discusses the investigation of the five major tailing impoundments and seven fluvial tailing deposits, and their potential impacts on surface and groundwater at the California Gulch Site for ASARCO in the fall of 1991.

The 1994 Draft Final-Field Reconnaissance Survey of Mine Waste Piles Located Within the Upper California Gulch Drainage identified 131 individual waste rock piles and ranked these waste rock piles for two criteria: (1) Potential physical instability that may expose or spread materials, and (2) minerals contained on the surface of the pile.

In addition to the Site investigations, cultural resource surveys were conducted at the Garibaldi, the North Moyer, Agwalt, and the Printer Girl mine sites in 1990, 1994, and 1995. Resurrection/Newmont conducted additional field investigation activities in 1994 and 1995 to evaluate the potential for waste rock piles to generate acid rock drainage (ARD) and leach metals; to further define conditions within OU4; to supplement existing RI information with additional physical, chemical, and geotechnical data; and to provide supplemental information for use in an Engineering Evaluation/Cost Analysis (EE/CA) and a Focused Feasibility Study (FFS).

Resurrection/Newmont completed an EE/CA in 1995 (1995 OU4 EE/CA). The 1995 OU4 EE/CA was prepared to evaluate and identify a preferred non-time critical removal action for the Garibaldi Mine site area within OU4. Resurrection/Newmont completed the FFS for OU4 of the California Gulch Site in January 1998 (1998 OU4 FFS). The purpose of the 1998 OU4 FFS was to identify and evaluate remedial alternatives to address potential sources of contaminant loading within the OU4 site area. The 1998 OU4 FFS provided a detailed analysis for the following waste rock piles and fluvial tailing material: Waste rock near the Garibaldi Mine; waste rock in Upper Whites Gulch; waste rock and fluvial tailing near the AY-Minnie and Printer Boy mining areas; waste rock piles at North Moyer/North Mike; and mine waste rock piles located near the Minnie pump shaft.

Based on the results of the numerous remedial investigations and the 1998 OU4 FFS for OU4, the EPA determined, at the time, that actual or threatened releases of hazardous substances from waste rock and fluvial tailing piles in OU4 may present an imminent and substantial endangerment to public health, welfare or the environment if not addressed through remedial action. Metals from former mining activities, present in waste rock and fluvial tailing piles, may leach to surface water or groundwater via ARD. Response actions were necessary at OU4 to control the release of contaminants and acidic water into the environment. These releases presented a risk to aquatic and terrestrial ecological receptors.

OU4 Removal Actions

In the 1994 CD, Resurrection/Newmont agreed to perform certain remediation work in three operable units (OU4, OU8, and OU10). The Work Area Management Plan (WAMP), included as Appendix D to the 1994 CD, defines the scope of work to be performed by Resurrection/Newmont. The 1995 OU4 EE/CA included site characterization, (utilizing existing remedial investigation data and collected field data) to be used to identify removal action objectives and alternatives. The 1995 OU4 EE/CA provided information to enable the EPA to select several removal actions.

Pursuant to the August 4, 1995 and July 19, 1996 Action Memorandums and the November 18,1996 Amended Action Memorandum, Resurrection/Newmont conducted Non-Time Critical Removal Actions at the Garibaldi sub-basin, the Agwalt Mine in Whites Gulch, and the Upper California Gulch surface water diversion. These removal actions successfully addressed contamination at the Garibaldi and the Agwalt mine sites. The removal actions included construction of portal collection systems and concrete-lined channels to intercept and divert surface water run-on and portal flow away from two waste rock piles. The Garibaldi removal action also included two groundwater interception trenches to divert groundwater flow.

OU4 Selected Remedy

The EPA issued the Record of Decision (ROD) for OU4 (1998 OU4 ROD) on March 31, 1998. The Remedial Action Objectives (RAOs) established in the 1998 OU4 ROD include: (1) Control erosion of contaminated materials into local water courses, (2) Control leaching and migration of metals from contaminated materials into the surface water, and (3) Control leaching and migration of metals from contaminated materials into the groundwater.

The selected remedy for OU4 consisted of the following remedial components: (1) Within the Garabaldi sub-basin, creation of a diversion of surface water and selected removal of waste; (2) within the Whites Gulch sub-basin, the excavation, consolidation and removal of waste rock at the Printer Girl Waste Rock Pile, and the regrading of excavated areas of the Printer Girl Waste Rock Pile and construction of diversion ditches to control surface water run-on to the regraded areas; (3) within the Nugget Gulch sub-basin: Excavation and consolidation of the Rubie, Adirondack, Colorado No. 2 east and North Mike Waste Rock Piles onto the Colorado No. 2 Waste Rock Piles; regrading and placement of a simple rock or vegetated cover over the Colorado No. 2 Waste Rock Pile, terracing, soil amendment and revegetation of excavated areas, and construction of diversion ditches to control surface water run-on to the terraced and regraded areas; (4) within the AY Minnie sub-basin: Construction of diversion ditches to reduce surface water run-on onto the AY Minnie Waste Rock Pile, and relocation of Lake County Road 2 to allow space for construction of a sedimentation pond and provide added protection from stability failures of timber cribbing without destroying the mining heritage and cultural resources of this mining area; Iron Hill sub-basin: Regrading and placement of a simple cover (revegetated soil or rock) over the Mab Waste Rock Pile as well as revegetation of surrounding disturbed areas; and (5) within Oro City, reconstruction and stabilization of the Upper California Gulch stream channel to prepare for a 500-year flood event, and regrading and removal, if necessary, of channel spoil material and selected fluvial tailing, and construction of eight sediment dams within the channel and approximately 1.5 acres of wetlands along the channel.

On March 17, 2004, the EPA issued an Explanation of Significant Differences (ESD) deferring remedial activities at Fluvial Tailing Site 4/Oro City because of the historical significance of the Oro City area as an early mining camp. Spring runoff in the Oro City area is monitored as part of OU12, Site-wide water quality. Because the selected remedy in the 1998 OU4 ROD left wastes in place but did not include institutional controls (ICs), a second ESD was signed on July 29, 2013 to include ICs as part of the OU4 source control remedy for the Site.

OU4 Cleanup Standards

The 1998 OU4 ROD addressed potential source material contributing to surface water and groundwater contamination at the Site but did not contain numeric cleanup standards. As previously mentioned, the OU12 remedy addresses site-wide surface water and groundwater contamination and includes numeric cleanup standards.

OU4 Response Actions

The 1998 OU4 ROD identified the need for additional remedial actions in Whites Gulch (Printer Girl Waste Pile), Nugget Gulch Waste Rock, AY Minnie Waste Rock, Iron Hill Waste Rock, and Fluvial Tailing Site 4/Oro City. Resurrection/Newmont commenced these remedial actions in June 1998 and completed the work in February 2003. The major components of the remedial action included controlling erosion of contaminated materials into local watercourses, controlling leaching and migration of metals from contaminated materials into the surface water, and controlling leaching and migration of metals from contaminated materials into the groundwater.

OU4 Operation and Maintenance

Under the 1994 CD and a 2008 Consent Decree settlement (2008 CD) that replaced the 1994 CD, Resurrection/Newmont agreed to operate and maintain the OU4 remedy features. Resurrection/Newmont conducts inspections in accordance with the OU4, OU8, and OU10, Operations and Maintenance (O&M) Plan, California Gulch Superfund Site which can be found in Appendix D to the 2008 CD approved on August 29, 2008. Resurrection/Newmont findings are documented in the Annual California Gulch Superfund Site OU4, OU8 and OU10 Inspection Reports. These reports are available by contacting EPA Region 8.

Environmental covenants for Resurrection/Newmont's properties within OU4 were recorded with the Lake County Clerk and Recorder on July 31, 2012 and October 10, 2012. The environmental covenants provide the following Use Restrictions: (1) No Residential Use, Day Care Centers or Schools, Parks or Open Space that are designed or intended to provide play or recreation areas for children, (2) Restrictions on using untreated groundwater from wells, and (3) Restrictions on uses or activities that would disturb/interfere or have the potential to disturb/interfere with the protectiveness of the remedy and remedial components. On December 22, 2010, Lake County implemented ICs that covered all property within OU4 in the form of a local ordinance, a resolution amending the Lake County Land Development Code and adopting regulations that protect both engineered and non-engineered remedies at OU4. A best management practice handout is provided to all applicants applying for a building permit within OU4. In addition, any disruption of engineered or non-engineered remedies, and/or excavation of more than 10 cubic yards of soil off-site within OU4 requires written approval from the CDPHE. All of OU4 is zoned Industrial Mining by Lake County, which serves to limit future changes of land use without County approval and notification to the EPA and the CDPHE of such proposed changes.

OU5 Background and History

OU5 includes five smelter sites (Elgin Smelter, Grant/Union Smelter, Western Zinc Smelter, Arkansas Valley South Hillside Slag Pile (EGWA) and Arkansas Valley Smelter (AV), and one mill site known as Colorado Zinc-Lead Mill (CZL). A map of OU5 can be found in the docket at *www.regulations.gov* under Docket ID no. EPA–HQ–SFUND–1983–0002. One smelter and the mill are co-located as the AV/CZL sites, approximately 1.5 miles southwest of Leadville on the north bank of California Gulch. The combined area is approximately 70 acres. The entire AV/CZL sites lie above the 500-year floodplain of Lower California Gulch. The AV/CZL sites are also adjacent to portions of OU3 that includes the AV Slag Pile. The AV, which is part of the Leadville Historic Mining District, operated from 1879 until 1961. It was the longest-operating smelter in the Leadville area, processing a wide variety of ores and reprocessing slag to produce lead, silver and other metals during this time. The CZL operated intermittently from 1926 to 1938 using a custom flotation process to produce zinc, lead, gold, silver and some copper. Tailing, the byproduct of the mill operation was discharged below the mill presumably into the CZL Tailing Impoundment which is included as part of OU8. The mill closed in 1930 and was reopened in 1935. The mill processed ores from

several local mines and waste dumps between 1935 and 1938 when the operations ceased.

The Elgin Smelter, which operated intermittently from 1879 to 1903, is located in north-central Leadville on the south bank of Big Evans Gulch near the intersection of U.S. Highway 24 and State Highway 91. The Elgin Smelter works were leased and operated by several different companies between 1893 and 1902. The Grant/Union Smelter was actually two smelters: The Grant Smelter, which operated from 1878 to 1882, and the Union Smelter which operated from 1892 to 1900. Both smelters were located near the confluence of Georgia Gulch and California Gulch, northeast of the Colorado Mountain College campus. The Western Zinc Smelter, which operated from 1914 until 1926, is located in the western part of Leadville, approximately seventy five feet west of McWethy Drive and approximately one hundred feet south of the Lake County fairgrounds. The Western Zinc Mining and Reducing Company used the facility to extract zinc from ores.

Also referred to as the Tramway Slag Pile, the Arkansas Valley South Hillside Slag Pile is located south of U.S. Highway 24 on the hillside across from the AV site. It was perhaps used by the AV or the Grant/Union Smelter. The Arkansas Valley South Hillside Slag Pile site is estimated to consist of 16,000 cubic yards in two elongated piles of slag, extending approximately 2,000 feet parallel to California Gulch and U.S. Highway 24. There are no smelter remains or any other waste materials except slag at this site.

Prior to the remedial action, smelter debris, which consisted primarily of brick, concrete, metal, tile, wood and glass, as well as residual mine waste and smelter materials including slag, coke/charcoal, limestone, ore, matte, tailing and flue dust, covered OU5. After remedial action, the majority of the smelter and mill structures at the AV/CZL sites have been demolished, though some buildings and foundations remain preserved as cultural heritage properties. The EGWA sites are currently vacant.

Potential media of concern in OU5 include tailing, flue dust, and non-residential area soils at the AV/CZL sites and slag, non-residential soils, and residential area soils at the EGWA sites. Results of the Preliminary BRA and the Final BRA indicate that human receptors are expected to have minimal exposure to slag. Metals from former mining practices including lead, arsenic, cadmium, copper and zinc, presented a potential risk to human and ecological receptors. The majority of human health risks at the Site, generally, have been attributed to lead and arsenic. Therefore, these two contaminants were selected as indicator chemicals for remedial response.

Residential use of OU5 is currently limited to one residence, and future residential use is not expected. Otherwise, the AV/CZL and EGWA sites are currently vacant. Commercial, industrial, and recreational uses are the expected future uses at OU5. Therefore, receptors of concern at OU5 are commercial and industrial workers and recreational visitors. The Final BRA identified soil ingestion as the exposure pathway of concern for recreational visitors; ingestion of soil and dust was identified as the exposure pathway of concern for commercial/industrial workers. Exposure to other media (e.g., tailing, waste piles, slag) and exposure to soil/dust through other pathways (e.g., dermal) are considered of insignificant concern for workers and recreational users.

The soils at the AV Smelter were determined to contain levels of arsenic and lead above risk-based action levels for both the commercial/industrial land use scenarios (lead 6,100 mg/kg–7,700 mg/kg and arsenic 610 mg/kg–690 mg/kg) and the recreational land use scenario (lead 16,000 mg/kg and arsenic 1,400 mg/kg–3,200 mg/kg) identified in the Final BRA. The highest levels of contamination were detected in samples taken from the bag-house area. The CZL site had lead levels above the risk-based action level for commercial/industrial uses. The Elgin Smelter and the Grant/Union Smelter sampling had lead and arsenic levels above risk-based action levels for both commercial/industrial uses and recreational uses. Therefore, the contaminated media in OU5 posed a significant risk to human health.

As with OU4 above, the BARA and the ERA were the most pertinent in evaluating the risk to ecological receptors in OU5. Releases of contaminants from OU5 presented an unacceptable risk to aquatic and terrestrial ecological receptors and response actions were necessary at OU5 to control the release of contaminants and acidic water into the environment.

OU5 Remedial Investigations and Feasibility Study (RI/FS)

In September 1990, the EPA and ASARCO signed an Administrative Order on Consent for the performance of soils sampling and air monitoring at the Site. In 1991, the EPA issued a Unilateral Administrative Order that required ASARCO to conduct studies and complete RIs. In August 1994, ASARCO entered into a CD with the United States, State and other PRPs to perform certain remediation work in OU5, OU7 and OU9. The WAMP, included as Appendix D to the 1994 CD, defines the scope of work to be performed by ASARCO.

Several investigations have been conducted within the Site that have addressed the smelter/slag/mill sites. A Smelter Site Reconnaissance began in 1991 as part of the Smelter Remedial Investigation (Smelter RI), which was conducted in 1991 and 1992, and primarily focused on smelter-impacted soils but, also included sampling of discrete locations where smelter bag houses, dust chambers, or roasting furnaces may have been located. This study was initiated by ASARCO and included the Elgin Smelter, Grant/Union Smelter, Western Zinc Smelter sites, and Arkansas Valley Smelter sites.

A Surface Water RI (Surface Water RI) of the California Gulch Site was conducted in 1991 and 1992. The final Surface Water RI report was issued in 1996 describing the results of the surface water investigation. The study included surface water and sediment sampling in the Arkansas River and its tributaries, including California Gulch.

The 1996 Groundwater RI (Hydrogeologic RI) included installation of monitoring wells and piezometers, water level measurements, and groundwater sampling and analysis. The objectives of the Hydrogeologic RI were to investigate groundwater quality and flow directions, evaluate potential impacts to surface water receptors, and characterize background qroundwater quality.

Denver and Rio Grande Western Railroad, another PRP at the Site, undertook RIs of seven major lead slag piles including the Elgin Smelter and Grant/Union Smelter sites and one zinc slag pile, the Western Zinc slag pile. The Zinc Slag RI was performed concurrent with the Lead Slag Pile RI. Investigation activities during these two RIs focused mainly on the slag material that may have the potential to leach metals.

In 1993, the EPA conducted a Screening Feasibility Study (SFS) to initiate the overall CERCLA FS process at the California Gulch Site. The purpose of the SFS was to develop general response actions and identify an appropriate range of alternatives applicable to the various contaminant sources to be considered during feasibility studies for the California Gulch Site. Remedial alternatives retained in the SFS for tailing, flue dust, and non-residential area soils in OU5 for the AV/CZL sites were further

evaluated and screened during an FFS. The 2000 OU5 AV/CZL FFS provided a detailed analysis of the five retained alternatives from the SFS as applied to tailing, flue dust, and non-residential soils. The 1999 OU5 EGWA FS provided a detailed analysis of the two retained alternatives from the SFS as applied to slag and four alternatives from the SFS for non-residential area soils. IC were included in the feasibility studies for OU5 to provide future protectiveness.

The Proposed Plan describing the EPA's preferred alternatives was issued on July 27, 2000. The preferred alternative for the AV/CZL sites was Alternative 3, Consolidation/Containment (Flue Dust Repository and Soil Cover). For the EGWA sites, the preferred alternative was Alternative 2, Institutional Controls.

OU5 Selected Remedy

The EPA issued two RODs for OU5. The ROD for the AV/CZL sites on OU5 was issued on September 29, 2000. The ROD for the EGWA sites on OU5 was issued on October 31, 2000.

The RAOs established in the two RODs for OU5 include: (1) Control airborne transport of tailing particles, flue dust and soil, (2) Control erosion of tailing, flue dust and contaminated materials into local water courses, (3) Control leaching and migration of metals from tailing, flue dust and soil into surface water, (4) Control leaching and migration of metals from tailing, flue dust and soil into groundwater, (5) Control contamination exposure to humans, animals and aquatic life, and (6) Prevent direct exposure of population to elevated contaminant levels in surficial soil.

The remedy selected for the AV/CZL sites consisted of: (1) Excavation of flue dust and relocation to a single-lined, fully encapsulated repository, (2) Consolidation of tailing and non-residential soils and placement of an 18-inch vegetated soil cover over the consolidated pile, (3) Implementation of ICs such as deed notices or deed restrictions to provide notification that a barrier is in place and to restrict land uses incompatible with the remedy, and (4) Development of an O&M program during remedial design to include inspection and maintenance of the cover and surface water controls, as well as inspection for evidence of erosion, differential settlement of the cover and adequacy of vegetation.

The remedy selected for the EGWA sites consisted of implementation of ICs to warn of potential hazards and to maintain the effectiveness of the remedy by limiting access to or use of the property for current or potential future land use scenarios.

OU5 Cleanup Standards

The 2000 OU5 RODs for the EGWA sites and AV/CZL sites did not contain numeric cleanup standards, but were meant to address potential source material contributing to surface water and groundwater contamination. The OU12 remedy addresses site-wide surface water and groundwater contamination.

OU5 Response Actions

Implementation of the 2000 OU5 ROD for the AV/CZL sites began in June 2002. Some smelter structures were demolished, flue dust was excavated and the contaminated materials were transported to an on-site repository. Tailing and contaminated soil were consolidated on site and placed under eighteen inches of clean soil cover which was then vegetated. Diversion ditches to prevent run-on and ponding on the consolidated waste pile were also constructed. Remedial actions were initiated by ASARCO, but discontinued when ASARCO filed for bankruptcy. The EPA assumed lead responsibility for implementation of the remedy at OU5 through a settlement agreement signed between ASARCO and the federal government in 2008. The EPA completed AV/CZL OU5 remedial action in 2010. Both the OU5 RODs for the EGWA sites and the AV/CZL sites included implementation of ICs as part of the remedy. Lake County has adopted a local ordinance as an IC for the EGWA sites and AV/CZL sites. See the OU5 and OU7 Operations and Maintenance section below for information regarding O&M and ICs in OU5.

OU7 Background and History

OU7, the Apache Tailing Impoundments, consisted of four distinct tailing impoundments located on the southern edge of the City of Leadville adjacent to U.S. Highway 24. These impoundments are located in California Gulch, approximately 1,500 feet downstream from the Yak Tunnel Water Treatment Plant surge pond. A map of OU7 can be found in the docket at *http://www.regulations.gov* under Docket ID no. EPA–HQ–SFUND–1983–0002. Tailing, placed in the Main Impoundment and possibly the North Impoundment, was generated by a mill located on the hillside northeast of the Apache Tailing Impoundments known alternately as the Venir Mill, the California Gulch Mill, and the ASARCO Leadville Milling unit. The available historical information indicates that this mill operated between 1939 and 1956, producing approximately 630,000 cubic yards of tailing in the 11.3-acre Main Impoundment and an estimated 14,500 cubic yards of tailing in the 1.8-acre North Impoundment.

Apache Energy and Minerals Company operated the Apache Mill from the late 1970s into the 1980s. The Apache Mill reprocessed tailing from the Main Impoundment and deposited the remaining materials into Tailing Ponds No. 2 and No. 3, which were located west and downstream of the Main Impoundment and were about 1.5 and 0.5 acres in size, respectively. Tailing Ponds No. 2 and No. 3 were consolidated into the Main Impoundment under a removal action in 1997.

For human health risk issues at OU7, the Preliminary BRA and the Final BRA Part C, Evaluation of Worker Scenario and Evaluation of Recreational Scenarios, were most pertinent. The Preliminary BRA indicated that lead and arsenic are responsible for the majority of human health risks at the Site. Therefore, arsenic and lead were used as indicator contaminants for risk in the Final BRA. Residential use of OU7 does not currently occur, nor is future residential use reasonably anticipated. Commercial, industrial, and recreational uses are expected at OU7. Therefore, commercial and industrial workers and recreational visitors were considered as groups that were potentially at risk. The Final BRA identified soil ingestion as the exposure pathway of concern for recreational visitors and ingestion of soil and dust was identified as the exposure pathway of concern for commercial/industrial workers. Exposure to other media (e.g., slag piles) and exposure to soil/dust through other pathways (e.g., dermal) are considered an insignificant concern for workers and recreational users. The OU7 investigations showed that the concentrations of lead and arsenic in the surficial tailing were below risk-based action levels for both the commercial/industrial land use scenarios (lead 6,100 mg/kg–7,700 mg/kg and arsenic 610 mg/kg–690 mg/kg) and the recreational land use scenario (lead 16,000 mg/kg and arsenic 1,400 mg/kg–3,200 mg/kg) identified in the Final BRA. Therefore, the exposed tailing did not pose a significant risk to human health.

For ecological risks at OU7, the BARA and the ERA were the most pertinent. The BARA characterized the impacts of mine waste contamination on the aquatic ecosystem of the Site. Results of the BARA indicate that mine waste poses potential unacceptable risk to all aquatic species. The BARA states that Apache Tailing Impoundments as well

as other sources such as high metal waste rock piles, contribute to the metals entering California Gulch and, ultimately, the Arkansas River. Potential risks to the terrestrial ecosystem from mine waste contamination were characterized in the ERA. Risks to the blue grouse, mountain bluebird, and least chipmunk exceeded EPA acceptable levels for exposure to contaminants in tailing. Potential risks to plants and soil fauna from exposure to tailing were also indicated. Surface water ingestion may also result in a potential risk of some effect to terrestrial receptors. Action levels were not developed for terrestrial receptors. Thus, these releases of contaminants from OU7 presented an unacceptable risk to aquatic and terrestrial ecological receptors and response actions were necessary at OU7 to control the release of contaminants and acidic water into the environment.

OU7 Remedial Investigations and Feasibility Study (RI/FS)

The State, EPA and certain PRPs conducted various studies and investigations to evaluate the nature and extent of contamination within the Site generally and OU7 specifically. RIs that specifically addressed OU7 included the Tailing RI performed in the fall of 1991, a Supplemental RI conducted in 1996 and 1997 to respond to questions and issues that arose in response to the Draft Apache Tailing FS, issued in January 1996 and additional RI work performed between 1997 to 1999 that was reported in the final FFS (2000 FFS). The 2000 FFS assessed the general conditions of the Apache Tailing Impoundments area, evaluated and summarized the nature and extent of contamination within OU7, and evaluated remedial alternatives to address the risks and conditions identified at OU7.

The various RI studies concluded that loading from OU7 to groundwater (and not surface water) was the dominant process by which contaminants moved from OU7. This groundwater provides some loading to surface water downstream from OU7, which drains to California Gulch and ultimately to the Arkansas River.

Selected Remedy

The EPA issued the ROD for OU7 on June 6, 2000. The OU7 remedy was selected to eliminate or reduce potential threats to humans and the environment through the construction of a soil cover with a geosynthetic barrier and revegetation followed by implementation of ICs and a long-term monitoring plan.

The RAOs identified in the OU7 ROD for the Apache Tailing Impoundments were: (1) Control airborne transport of tailing particles; (2) Control erosion of tailing materials and deposition into local water courses; and (3) Control leaching and migration of metals from tailing into surface water and groundwater.

The selected remedy for OU7 included: (1) Surface water controls including the channelization of California Gulch through the southern portion of the Main Impoundment and diversion ditches to provide surface water run-on and runoff control; (2) Application of source surface controls to the impounded tailing, consisting of regrading the impoundment, placement of a multi-layer composite cover over the combined tailing area, and revegetating the covered surface; (3) ICs to warn of potential hazards and to maintain the effectiveness of the remedy by limiting access to or use of the property (current and future use scenarios) including temporary and permanent measures; and (4) A long-term monitoring program to assess the quality of surface water and groundwater following implementation of the remedy. The O&M Plan includes inspection and maintenance of the cover and surface water controls, including evidence of erosion, differential settlement of the cover, and vegetation monitoring.

Remedial action included: (1) Installation and maintenance of temporary sediment, diversion and storm water control structures in accordance with the Storm Water Management Plan and maintenance of such controls during construction activities; (2) Provision of dust control, as necessary, during all excavating, hauling, and placing operations; (3) Excavation of dispersed tailing and soil adjacent to the Main Impoundment to allow for the construction of temporary sedimentation ponds; (4) Demolition of the existing concrete foundations to the west of the Main Impoundment; (5) Relocation of a section of sanitary sewer line around the North Impoundment, connection to an existing sewer line at the east and west ends including two new sewer lateral connections, and abandonment of existing manholes and sewer line; (6) Regrading of the tailing impoundments as indicated on the drawings and placement of excavated material in fill areas between the Main and North Impoundments and on top of the Main Impoundment; (7) Removal and replacement of the overhead power line running east and west between the Main and North Impoundments; (8) Channelization of California Gulch through the southern portion of the Main Impoundment; (9) Installation of the multi-layer cover system consisting of a geosynthetic clay liner, geocomposite drainage layer, and an 18-inch soil cover over the regraded tailing impoundments; (10) Construction of permanent diversion ditches, berms and swales with appropriate erosion protection to provide surface water run-on and runoff control; (11) Extension or abandonment of monitoring wells or piezometers as necessary; (12) Revegetation of the tailing impoundments and other disturbed areas with specified seed mixture; and (13) Site cleanup and demobilization. ASARCO's Construction Complete Report is dated December 12, 2003. The long-term monitoring of water quality in OU7 is performed as part of the Site-wide Water, OU12 remedy.

OU7 Cleanup Standards

The 2000 OU7 ROD did not contain numeric cleanup standards but intended to address air transport of tailing material, erosion of tailing material in local waters, and potential source material contributing to surface water and groundwater contamination at the Site.

OU7 Response Actions

Multiple removal actions were conducted at OU7 between 1996 and 2000, including removal of Tailing Ponds No. 2 and No. 3, consolidation of material removed from Tailing Ponds No. 2 and No. 3 on the Main Impoundment, and placement of erosion protection along the toe of the southwest embankment of the Main Impoundment below the clay-tile culverts and wooden box culvert outfalls. The December 1997 Removal Action Completion Report describes the construction activities in detail.

OU5 and OU7 Operation and Maintenance

Per the 2008 CD settlement, ASARCO was relieved from the responsibility for implementing O&M activities at OU5 and OU7. The State is performing the O&M for OU5 and OU7 under an agreement with EPA. The State performs annual O&M monitoring, and periodic inspection and maintenance of the soil cover and surface water control features of OU5 and OU7. The O&M Plan was completed on March 20, 2014. O&M monitoring and maintenance occurs annually as directed by the O&M plan.

Lake County, on December 22, 2010 for OU7 and April 15, 2013 for OU5, and the City of Leadville, on May 7, 2013 for OU7, implemented ICs in the form of local ordinances, resolutions

amending the Land Development Codes and adopting regulations that protect both engineered and non-engineered remedies at OU5 and OU7. A best management practice handout is provided to all applicants applying for a building permit within OU5 and OU7. In addition, any disruptions of engineered or non-engineered remedies, and/or excavation of more than 10 cubic yards of soil off-site within OU5 and OU7 require written approval from the CDPHE.

Five-Year Review

The remedies at the entire Site, including OU4, OU5 and OU7 require ongoing five-year reviews in accordance with CERCLA section 121(c) and § 300.430(f)(4)(ii) of the NCP. The next five-year review for the California Gulch Site is planned for 2017.

In the 2012 five-year review dated September 27, 2012 for the Site, the OU4 remedy was determined to be protective in the short-term. However, there were concerns regarding continued long-term protectiveness because the requirement of ICs was not documented in a decision document, however ICs had already been implemented by the PRP and Lake County. An ESD dated July 29, 2013 resolved this concern. Environmental covenants for Resurrection/Newmont's properties within OU4 were recorded with the Lake County Clerk and Recorder on July 31, 2012 and October 10, 2012. On December 22, 2010, Lake County implemented ICs for all the property in OU4 in the form of a local ordinance, a resolution amending the Lake County Land Development Code and adopting regulations that protect both engineered and non-engineered remedies at OU4.

In the 2012 five-year review for the Site, the OU5 and OU7 remedies were determined to be protective in the short-term. However, there were concerns regarding continued long-term protectiveness because an O&M Plan was not in place. The State developed an O&M Plan for OU5 and OU7, which EPA accepted on March 20, 2014. O&M monitoring and maintenance is occurring annually under the O&M plan.

Pursuant to CERCLA section 121(c) and the NCP, EPA will conduct the next five-year review by September 27, 2017 to ensure the continued protectiveness of remedial actions where hazardous substances, pollutants, or contaminants remain at the Site above levels that allow for unlimited use and unrestricted exposure.

Community Involvement

Public participation activities have been satisfied as required in CERCLA section 113(k), 42 U.S.C. 9613(k) and CERCLA section 117, 42 U.S.C. 9617. During the courses of these operable units, comment periods were offered for proposed plans, five-year reviews, and other public meetings. The documents that the EPA relied on for the partial deletion of OU4, OU5, and OU7 from the California Gulch Superfund Site, are in the docket and are available to the public in the information repositories. A notice of availability of the Notice of Intent for Partial Deletion has been published in the Leadville Herald Democrat to satisfy public participation procedures required by 40 CFR 300.425 (e)(4).

The State, the Lake County Commissioners, the City of Leadville are supportive of the partial deletion of OU4, OU5 and OU7.

Determination That the Criteria for Deletion Have Been Met

EPA has consulted with the State, Lake County Commissioners, and the City of Leadville on the proposed partial deletion of OU4, OU5, and OU7 of the California Gulch Site from the NPL prior to developing this Notice of Partial Deletion. Through the five-year reviews, EPA has also determined that the response actions taken are protective of public health or the environment and, therefore, taking of additional remedial measures is not appropriate.

The implemented remedies achieve the degree of cleanup or protection specified in: For OU4, the 1995 and 1996 Non-Time Critical Removal Actions, the 1998 OU4 ROD, 2004 OU4 ESD and 2013 OU4 ESD; for OU5, the 2000 OU5 RODs for the EGWA and AV/CZL sites; and for OU7, the 1996 and 1997 Non-Time Critical Removal Actions and the 2000 OU7 ROD.

All selected removal and remedial action objectives and associated cleanup goals for OU4, OU5 and OU7 are consistent with agency policy and guidance. This partial deletion meets the completion requirements as specified in OSWER Directive 9320.22, Close Out Procedures for National Priority List Sites. All response activities at OU4, OU5, and OU7 of the Site are complete and the three operable units pose no unacceptable risk to human health or the environment. Therefore, EPA and CDPHE have determined that no further response is necessary at OU4, OU5, and OU7 of the Site.

V. Partial Deletion Action

The EPA, with concurrence of the State through the CDPHE has determined that all appropriate response actions under CERCLA, other than operation, maintenance, monitoring and five-year reviews, have been completed. Therefore, EPA is deleting all of OU4, Upper California Gulch; OU5, ASARCO Smelters/Slag/Mill Sites; and OU7, Apache Tailing Impoundment of the Site.

Because EPA considers this action to be non-controversial and routine, EPA is taking it without prior publication. This action will be effective October 14, 2014 unless EPA receives adverse comments by September 11, 2014. If adverse comments are received within the 30-day public comment period, EPA will publish a timely withdrawal of this direct final notice of partial deletion before the effective date of the partial deletion and it will not take effect. EPA will prepare a response to comments and continue with the deletion process on the basis of the notice of intent to partially delete and the comments already received. There will be no additional opportunity to comment.

List of Subjects in 40 CFR Part 300

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

Dated: July 31, 2014.

Shaun L. McGrath,

Regional Administrator, Region 8.

[FR Doc. 2014–18955 Filed 8–11–14; 8:45 am]

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

46 CFR Part 67

[Docket No. USCG–2010–0990]

RIN 1625–AB56

Vessel Documentation Renewal Fees

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is amending its regulations to separately list an annual fee for renewals of endorsements upon the Certificate of Documentation. We are required to establish user fees for services related to the documentation of vessels. This final rule will separately

list a fee of $26 to cover the current costs of the vessel documentation services provided by the Coast Guard.

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

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2010–0990 and are available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find this docket on the Internet by going to *http://www.regulations.gov,* inserting USCG–2010–0990 in the ''Keyword'' box, and then clicking ''Search.''

FOR FURTHER INFORMATION CONTACT: For information about this document, call or email Ms. Mary Jager, CG–DCO–832, Coast Guard, telephone 202–372–1331, email *Mary.K.Jager@uscg.mil.* For information about viewing or submitting material to the docket, call Ms. Cheryl Collins, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

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I. Abbreviations

CFR Code of Federal Regulations
COD Certificate of Documentation
DHS Department of Homeland Security
E.O. Executive Order
FR Federal Register
NVDC National Vessel Documentation Center
NPRM Notice of Proposed Rulemaking
OMB Office of Management and Budget
§ Section symbol
SBA Small Business Administration
U.S.C. United States Code

II. Regulatory History

On March 4, 2013, the Coast Guard published a notice of proposed rulemaking (NPRM) entitled ''Vessel Documentation Renewal Fees'' in the **Federal Register** (78 FR 14053). That NPRM contained the Coast Guard's proposed revision of 46 CFR part 67, setting forth proposed fees for services provided.

The Coast Guard received 2,720 comment responses on the proposed fees. Comments were received from individuals, law firms, commercial vessel documentation services, industry groups, and maritime corporations. We considered all comments in promulgating this final rule. The comments received in response to the proposed rule are discussed below in Section V. Discussion of Comments and Changes.

III. Basis and Purpose

The legal basis for this rule is found in 46 U.S.C. 2110. That section provides that the Secretary of the Department in which the Coast Guard is operating (Secretary) shall establish a fee or charge for a service or thing of value that is provided to the recipient or user of that service. The Secretary is empowered in 46 U.S.C. 2104 to delegate the authorities in 46 U.S.C. Subtitle II to the Coast Guard. The Secretary exercised that delegation authority for fees in Department of Homeland Security Delegation No. 0170.1(92)(a).

In establishing these fees, we are required to use the criteria found in 31 U.S.C. 9701. Under this provision the fees must be fair, and must be based on the costs to the government, the value of the service or thing to the recipient, and the public policy or interest served (see 31 U.S.C. 9701(b)).

The purpose of this rule is to increase the annual Certificate of Documentation (COD) renewal fee collections so that the fees we charge more accurately reflect the actual costs to the Coast Guard of providing the annual documentation renewal services. By doing so, we will comply with the law and continue to provide documentation services by charging fair-value user fees.

IV. Background

Section 10401 of the Omnibus Budget Reconciliation Act of 1990 (Pub. L. 101–508, Nov. 5, 1990, 104 Stat. 1388), codified at 46 U.S.C. 2110, requires that the Coast Guard establish user fees for Coast Guard vessel documentation services. One of the vessel documentation services the Coast Guard provides is renewal of endorsements upon a COD. A COD is required for the operation of a vessel in certain trades, serves as evidence of vessel nationality, and permits owners of vessels to benefit from preferred mortgages (46 CFR 67.1). An Endorsement means an entry that may be made on a COD, and, except for a recreational endorsement, is conclusive evidence that a vessel is entitled to engage in a specified trade (46 CFR 67.3).

The Coast Guard sets fees at an amount calculated to achieve recovery of the costs of providing the service, in a manner consistent with the general user-charges principles set forth in OMB Circular A–25. Under that OMB Circular, each recipient should pay a reasonable user charge for Federal Government services, resources, or goods from which he or she derives a special benefit, at an amount sufficient for the Federal Government to recover the full costs of providing the service, resource, or good (see OMB Circular A–25, sec. 6(a)(2)(a)).

We last promulgated our user fees for vessel documentation services on November 15, 1993 (58 FR 60256), found at 46 CFR part 67, subpart Y-Fees. The fees reflect the Coast Guard's program costs for 1993, with the cost of providing annual COD renewals included as part of overhead costs. Since then, the renewal costs have increased. The existing fees do not cover the operating and overhead costs associated with our vessel documentation and recording activities under 46 U.S.C. chapters 121 and 313.

The COD renewal fee will more accurately reflect the Coast Guard's current operating and overhead costs associated with providing this discrete set of services. While we previously included the cost of providing annual COD renewals as part of its overhead costs, the fees collected in relation to these costs do not nearly cover our operating and overhead costs associated with providing annual COD renewal services. Therefore, we will break out and separately charge an annual-renewal fee of $26 (shown in Table 67.550—Fees) to cover the cost of providing the required annual COD renewal services. The Coast Guard's fiscal year 2010 review of vessel documentation user charges, ''Vessel Documentation Biennial User Fee Review,'' recommended establishment of an annual fee for COD renewals. The Biennial User Fee Review is available in the docket as indicated under **ADDRESSES**. In accordance with our statutory obligations and this

recommendation, we proposed to break out and separately charge an annual renewal fee of $26 (shown in Table 67.550—Fees) to cover the cost of providing the required annual COD renewal services. After reviewing the comments, as discussed below, this rule adopts the proposed renewal fee without change.

The Biennial User Fee Review also recommended establishment of a fee for resubmitted requests for services such as applications, determinations, waivers, etc. We elected not to pursue the latter recommendation at this time, but will consider this fee in future studies and possibly in future rulemaking actions. Presently, we charge several other fees associated with vessel documentation and we anticipate that further review (as required by OMB Circular A–25) of these fees and the cost of service will result in additional proposed adjustments to reflect changes in cost and provision of services. Any of these additional proposed adjustments would be the subject of a separate rulemaking.

V. Discussion of Comments and Changes

Currently, the Coast Guard provides CODs to 265,000 vessels registered in the United States, with average annual renewals issued to 235,000 vessels. The Coast Guard received 2,720 responses to the NPRM, with a total of 4,943 discrete comments, ranging in issue from general support to alternative ways to impose the fee and questions about the fee structure. We grouped the comments into 7 categories of concern, which encompass 45 separate issues. Below, we summarize these categories and the Coast Guard's response to them. No public meeting was requested and none was held.

Eight comments submitted were unclear or duplicate comments, however because they were accompanied by other comments that were categorized, we were able to respond to at least part of the commenter's concerns. We received one submission where the commenter claimed that he already pays the Coast Guard $27.50 for an annual PIN fee. We thank the commenter for his submission, but we are not sure about the fee to which he refers. He also worded his comment such that it does not appear he has documented his vessel. Only one other submission couldn't be categorized, where the commenter stated he ''didn't care'' because his vessel was not documented, but followed up with the statement that he still paid an annual fee of about $26 to enter the United States from Canada each summer. The Coast Guard thanks these commenters for their submissions, but we have no response, as these are outside of the scope of this rulemaking.

A. General Support

Many commenters (536) responded positively to the proposed rule, including 459 comments in support of the proposed rule and 77 comments that praised the Coast Guard's work. The Coast Guard thanks those commenters for their supportive comments.

B. General Non-support

Nearly 1,500 (1499) comments expressed disapproval of the proposed rule. Many (228) wrote that they would no longer document their vessel if the rule became final. A further 1,271 referred to the user fee as the imposition of a new ''tax'' on the boating community. The Coast Guard appreciates this feedback and would like the opportunity to clarify the difference between imposing a tax versus a user fee.

First, a user fee is designed to defray the costs of a regulatory activity (or government service), while a tax is designed to raise general revenue. Second, a true user fee must be proportionate to the necessary costs of the service, whereas a tax may not be. Third, a user fee is charged for requested services, whereas a tax is not. The discussion in the Regulatory Analysis will expand on the costs of the Coast Guard providing the COD service, and demonstrate how the new fee will be proportionate to the cost of providing the service.

C. Fee Components

The Coast Guard received 412 comments related to the components of the fee and how the fee was calculated. Many commenters (202) suggested that the fee was not reflective of the cost of providing the service. Others (140) suggested that the initial fee paid for documentation was sufficient for service costs for the life of the vessel. Several commenters (55) asked what, if any, new benefits would be provided that required an additional fee. Only 13 commenters suggested that the fee was too low.

The Omnibus Budget Reconciliation Act of 1990 (46 U.S.C. 2110) requires the Coast Guard to charge a fee for services but limits charges to no more than the overall cost of program. The fee calculations are based on the full cost of providing the service. The cost methodology, including process and overhead costs used in the calculation, is available in the docket.

Each service provided for vessel documentation carries associated costs that are considered in that fee. The initial application fee covers that service only; the renewal fee covers services incurred while issuing the renewal and maintaining the information supporting the document.

The Coast Guard recognizes that Federal vessel documentation confers many financial benefits on the vessel owner. However, there are no new benefits as a result of the renewal fee. The renewal fee is only necessary to cover the costs of providing the service as noted in the previous paragraph.

One commenter suggested that there would be extra costs associated with Coast Guard boardings to enforce the fee. The Coast Guard does not charge fees for boardings nor conduct boardings to enforce fees. The fee discussed in this rule is based on the cost to the Coast Guard for issuing the renewal. One commenter suggested the Coast Guard add a lien review to the annual renewal. The Coast Guard disagrees with the idea of implementing a lien review. A lien review is a separate process not connected with annual renewal of endorsements on a COD.

D. Alternatives Suggested

The Coast Guard received 886 comments recommending alternative ways to charge for vessel documentation renewal services. Among those, the most frequent (243) comments suggested that the Coast Guard charge for vessel documentation renewals only under certain circumstances, such as if changes are made to the documentation or if renewals are late (late fees). Additional commenters within this grouping proposed making the COD a permanent document. By regulation, CODs expire one year after issuance, regardless of whether or not there are any changes in information. Similar to current motor vehicle registration renewal processes, (in that an owner must pay to obtain a valid registration, regardless of whether any change to information is necessary), valid documents must be obtained in order to legally operate vessels.

Several commenters also suggested that the Coast Guard add the cost of the renewal service to existing fees or pay for the service through taxes. For example, we received 84 comments that suggested we increase the initial documentation fee, instead of charging the renewal fee. We also received seven comments that suggested the Coast Guard combine these fees with the United States Customs and Border Protection decal fees, but that vessel owners should not have to do both.

Another seven comments suggested the Coast Guard recoup costs from fuel taxes.

The Coast Guard is required to charge a cost-based fee for all vessel documentation services provided. Renewal of endorsements on a COD is a service that incurs ongoing costs. Charging a separate fee for renewals allows the Coast Guard to fairly distribute those costs and allows flexibility to ensure the costs are recouped over the entire period of ownership. As discussed earlier taxes and user fees have separate purposes, user fees are charged for specific services, using taxes such as a fuel tax to cover COD expenses would create inequities by causing some boat owners to pay (via fuel charges) for services (COD renewals) that they did not use. Additionally, because the COD renewals are a separate and distinct effort from the Customs and Border Protection decal issuance, these fees cannot be combined.

Many commenters (91) suggested that the Coast Guard provide discounted rates for senior citizens, Auxiliary members, and non-profit organizations. While we understand the desire to provide a reduced rate, the current user fee covers the actual cost of processing a renewal; reducing fees for any one group would shift the cost to another group and this would not meet the fairness requirement of 31 U.S.C. 9701.

Other commenters suggested that documentation of recreational vessels be conducted by States. For example, 89 commenters suggested the Coast Guard do away with Federal COD and instead have States perform the service, or commented that they should not have to pay both Federal and State fees. One hundred ten commenters suggested that the Coast Guard charge States for use of the information the Coast Guard collects. We understand some owners do not want to pay both Federal and State fees; however, holding a valid Federal COD confers additional benefits beyond State registration. Furthermore, it is optional for recreational vessel owners. Recreational vessel owners are not required to request this service or to hold a Federal COD.

Forty-eight comments suggested that renewal fees apply only to commercial vessel owners. Obtaining a COD is already optional for recreational vessel owners. However, when the option to obtain a COD renewal is exercised, the cost of processing renewal CODs is the same, regardless of whether the vessel is operating with a commercial or recreational endorsement.

The Coast Guard also received a variety of comment submissions (197) that decried government size and waste and asserted the need for government spending cuts. Another 10 commenters suggested the Coast Guard privatize or outsource CODs. We note these comments, however they fall outside of the scope of the rulemaking. As noted, the Coast Guard provides this service and is required to charge a fee for incurred costs. The Coast Guard has and continues to minimize the costs and charges to provide this service.

E. Mechanics

The Coast Guard received 1,316 comments regarding the implementation of the new fee. The majority of these comments suggested the Coast Guard institute a multiyear renewal option program (757) and establish online payment capabilities (288). Others inquired about future adjustments to the fee. In particular, 199 commenters consider the proposed $26 fee too high, with many worried that the fee will continue to increase. Several commenters (30) queried if the fee could be determined by the class, size or value of the vessel. Another 29 commenters questioned the need to document vessels, indicating they had been forced into it.

The Coast Guard has provided annual renewals of endorsements on CODs to reduce the risk of maintaining outdated information and in response to vessel owner needs to maintain preferred mortgage status. The Coast Guard understands the efficiencies of multiyear renewals and will consider this in a future rule making. It cannot be implemented currently since this will require changes to processes, information systems, budgets, regulations and perhaps laws.

Currently, the Coast Guard offers online payment options for certain services, and, along with other Federal agencies, is looking for ways to expand and improve this service. The Coast Guard will continue to work to find efficiencies to reduce costs incurred and minimize fees charged. As processes, automation, information systems, and costs change, future adjustments of this fee will be made through regulation and based on the cost of providing the service.

One commenter requested to know when the fee would start. This regulation will become effective 90 days after the date of publication, on the date specified in the DATES section of this document. Therefore, the fees will start no earlier than 90 days after the date of publication of this regulation.

One commenter requested information on any requirements for renewal when the vessel's COD is ''on deposit.'' Currently a COD on deposit does not require an annual renewal. This will not change as a result of this rulemaking. This fee will apply only to renewals.

Two commenters requested clarification on endorsements and exemptions. These issues are beyond the scope of this rule. The respondents may contact the Coast Guard National Vessel Documentation Center (NVDC) directly for clarification. Contact and other helpful information is available through the NVDC Web site: *http://www.uscg.mil/nvdc/default.asp* or by calling 1–800–799–8362.

Two commenters suggested the Coast Guard refund fees when relinquishing CODs. This is not possible because the fee is being charged for services already performed at the time of renewal.

Four commenters suggested that all boaters, not just those holding a document, pay the fee. This is not possible because the Coast Guard may only charge a fee for requested services. The request for service is voluntary, not all boaters request the service. Therefore the Coast Guard has no authority to charge all boaters.

Four commenters asked about enforcement of renewing a COD. Renewal of a COD is a voluntary request. If a COD is not properly renewed, it expires and with it, the benefits conferred also expire.

F. Fee Use

The Coast Guard received 213 comments with suggestions or questions about how the fee should or would be used. Most of these comments (114) addressed how the fees would be used and the benefits to the owner. Many included suggestions about how the fees should be used for waterway maintenance (21), boating services and safety (23), and to improve the Great Lakes (1). Thirty seven commenters indicated that they would be supportive if the fees go towards the Coast Guard only. There were eight comments inquiring whether the fees would go towards improving service, and five who viewed the documentation service renewal fee as unnecessary. Four commenters questioned whether the location of their vessel would influence the fees charged, because there is no Coast Guard presence where their boat is kept.

The Coast Guard is limited by law as to how it may use the fees collected. Vessel documentation fees collected from commercial vessel owners are deposited in the general fund of the Treasury as offsetting receipts of the department in which the Coast Guard is operating and ascribed to the Coast

Guard activities. Vessel documentation fees collected from recreational vessel owners are used by the Coast Guard's NVDC to perform vessel documentation services for recreational vessel owners. Overall the fee collected through implementation of this rule is intended to provide additional funds to the NVDC for improvements to documentation service. The Coast Guard understands that the current backlog of requests for service particularly for recreational vessels is excessive and intends to apply the available fees collected from renewals to correct this problem.

The fee for renewing a COD will be the same regardless of the location of the vessel. There is no difference in cost associated with location when renewing a COD because the same documentation services are provided regardless of location of the vessel. Although some endorsements are requested for specific commercial purposes, the locations that a vessel may be used other than for that commercial purpose is not limited by the COD issued.

G. Government Benefits

The Coast Guard received 71 comments regarding the benefits the government would gain with the proposed user fee. We received 35 comments about the expected benefits to the government. A further 26 comments cited the Federal government's ability to contract with documented vessel owners for the use of their vessels during certain national emergencies. The respondents suggested that this resulted in a benefit to the government and should be considered when setting a fee for renewing a COD. Ten commenters suggested public safety would be negatively impacted, as some owners would choose not to hold or renew Federal documents.

For the Federal government to use a documented vessel in times of emergency the vessel must be acquired under a mutually agreed upon contract between the Federal government and the vessel owner. Because the vessel owner would be paid for the use of the vessel this was not a factor in setting the fee. The Coast Guard based the documentation fee on the cost of providing the service, not on benefits received or given by either the government or the vessel owner. The purpose of vessel documentation is to provide the vessel owner with specific benefits and is not intended as a public safety measure.

H. Final Rule

After considering all comments, the Coast Guard is finalizing the user fee as it was proposed. The Coast Guard appreciates all of the comments received. The Coast Guard is publishing the final rule without changing the requirements stated in the NPRM.

VI. Regulatory Analyses

We developed this final rule after considering numerous statutes and Executive Orders (E.O.s) related to rulemaking. Below, we summarize our analyses based on these statutes or E.O.s.

A. Regulatory Planning and Review

E.O.s 12866 (''Regulatory Planning and Review'') and 13563 (''Improving Regulation and Regulatory Review'') direct agencies to assess the 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). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule is not a significant regulatory action under section 3(f) of E.O. 12866 as supplemented by E.O. 13563, and does not require an assessment of potential costs and benefits under section 6(a)(3) of E.O. 12866. The Office of Management and Budget (OMB) has not reviewed it under E.O. 12866. Nonetheless, we developed an analysis of the costs and benefits of the rule to ascertain its probable impacts on industry.

We received no comments that would alter our assessment of the impacts presented in the NPRM. Further, we have found no additional data or information that would change our assessment of the impacts presented in the NPRM. As such, we have adopted the analysis in the NPRM for this rule as final. A summary of the analysis follows:

The cost to industry [1] outlined in this final rule would represent a transfer payment from the public to the government to offset the costs incurred by the U.S. Coast Guard to provide COD renewal services to those that paid. Transfer payments do not affect total resources available to society. The total social cost to society as a result of this final rule is zero. The following table summarizes the costs and benefits of this rule.

[1] The term ''industry'' in this context, refers to recreational, commercial and government vessel owners.

TABLE 1—COSTS AND BENEFITS OF THE RULE

Category	Estimate (millions)
Industry Costs	
Annual Monetized Costs (undiscounted rounded values).	$6.1
10-year Present Value Monetized Costs (rounded values, 7% discount rate, discounting begins in first year).	$42.9
Government Benefits	
Annual Monetized Benefits (undiscounted rounded values).	$6.1
10-year Present Value Monetized Benefits (rounded values, 7% discount rate, discounting begins in first year).	$42.9
Qualitative Benefits ...	This rule would allow the Federal Government to recoup its costs for administering COD renewals, enabling the Coast Guard to continue offering these services to the public.

As discussed above, this final rule requires an annual renewal fee for endorsement(s) on the CODs. This fee, which is based on the costs that the Federal Government currently incurs to process renewals, along with additional costs due to increased need in labor and capital costs, will cost each vessel owner $26 per renewal.

The renewal fee that will be charged to the public under this final rule is based on the full cost to the Federal Government to provide this service. The renewal fee will allow the Federal Government to recoup those costs. Specifically, the purpose of the renewal fee is to ensure that this service is self-sustaining. As such, the renewal fee was determined by dividing the full, annual cost of providing the service by the average number of renewals over the past 5 years. The full, annual cost of providing this service includes all current costs, such as labor, capital, and overhead, plus additional labor and capital costs that will be required to process the additional fees collected.

In 2011, we conducted a comprehensive study to more accurately

calculate the costs involved with the annual COD renewal process. Our ''Full Cost Study for Renewal of Endorsements on Certificates of Documentation'' focuses on the cost of annual COD renewals, updates the cost figures, and includes costs for the additional activities required to process collections. The cost study is available in the docket where indicated under the **ADDRESSES** section in the preamble.

The study indicated that the average number of annual renewals for 2006–2010 was 235,000. The renewals accounted for a subset of the approximately 65,000 commercial and 200,000 recreational vessels documented by the Coast Guard in 2010. Under this final rule, we anticipate that the cost for processing annual COD renewals and their associated fees will be approximately $6 million, as shown in Table 2. The full cost to provide the annual renewal service shown in Table 2 includes directly traced personnel costs calculated from timed activities, allocated personnel costs based on costs associated with personnel directly involved and in supporting roles, and other costs such as operating and administrative costs, facilities, and information systems costs.

The COD renewal and collection services are provided with enough frequency that we were able to reliably estimate the average time involved. We calculated personnel costs based on an hourly rate that represents the cost per hour or part thereof per employee. The employee cost is based on hourly rates found in COMDTINST 7310.1M, Coast Guard Reimbursable Standard Rates, available in the docket where indicated under **ADDRESSES**. The NVDC anticipates that the method for collecting fees will be similar to the current process for late renewals, with some additional activities for processing the payment (collections) in accordance with U.S. law and Federal guidance.[2] The total annual cost to operate the NVDC annual COD renewal program and collect fees is approximately $6 million; the final fee reflects this cost, and should close the current gap identified in the Biennial User Fee Review.

To calculate the annual renewal fee, we divided the total annual costs associated with the renewal program by the average number of annual renewals. We included directly traced personnel costs for those activities in a timed study. These activities represent a small, mostly automated portion of the full process. However, we could not include other direct and indirect costs, such as allocated personnel costs, in the time study due to the complexity of the activities. Some of these costs are based on additional steps necessary to process applications with payments, which, at least initially, will be a manual rather than automated process. Other costs are non-personnel operating and are also allocated costs. The allocated cost is based on a percent of standard personnel costs for positions based on relative volume of renewals produced. Table 2 shows these costs.

TABLE 2—COST INPUTS FOR RENEWAL FEE

	Total cost	Average number of renewals per year	Cost per renewal
Directly traced Personnel Costs	$2,044,500	235,000	$8.70
Allocated Personnel Costs	1,695,799	235,000	7.21
Other Costs	2,157,209	235,000	9.17
Total	5,898,508	235,000	25.08

Note: These numbers may not total due to rounding.

This total cost to the Coast Guard is shown by the following equation: the total cost divided by the average number of renewals ($5,898,508/235,000 CODs = $25.08/COD), which results in an annual renewal fee of $25.08, which is rounded up to the next dollar, $26. This allows us to recover the full cost of providing this service.

The following figure summarizes the annual cost estimate of the final rule.

Figure 1. Total Annual Industry Costs (Undiscounted)

Total Annual Cost = Renewal Fee × Average Number of Annual Renewals = $6.1 Million = $26 × 235,000 renewals.[3]

This final rule is estimated to cost industry $42.9 million over 10-years discounted at a 7 percent rate. Table 3 summarizes the total 10-year cost to industry.

TABLE 3—INDUSTRY COST FROM RENEWAL FEE

Year	Undiscounted	7%
1	$6,110,000	$5,710,280
2	6,110,000	5,336,711
3	6,110,000	4,987,580
4	6,110,000	4,661,290
5	6,110,000	4,356,346
6	6,110,000	4,071,351
7	6,110,000	3,805,001
8	6,110,000	3,556,076
9	6,110,000	3,323,435
10	6,110,000	3,106,014
Total	61,100,000	42,914,083

[2] The Department of Treasury publishes regulations and guidance for federal agency management of receipts (31 CFR part 206 and the Treasury Financial Manual (*www.fms.treas.gov/tfm/index.html*)).

[3] Value may not total due to rounding.

TABLE 3—INDUSTRY COST FROM RENEWAL FEE—Continued

Year	Undiscounted	7%
Annualized		6,110,000

This final rule provides benefits to both the Federal Government and vessel owners. Because the Coast Guard has not collected a fee for COD renewal in the past, the estimated $6.1 million in revenue that the government will collect from the fee will enable the Coast Guard to continue offering these services to the public, which will allow private and commercial vessel owners to continue to benefit from the program. These benefits include, but are not limited to: obtaining documentation for commercial use of vessels, obtaining private mortgages from financial lenders, and ability to travel internationally with evidence of vessel ownership for both private and commercial vessel owners.

When formulating the proposal, which is now being finalized, we also considered an alternate methodology to calculate the annual COD renewal fee. We derived this alternative fee by taking the average of the fees charged by each State (for vessel registration) on an annual basis. The average fee, on an annual basis, for the 50 States and the District of Columbia is approximately $42. This average, multiplied by the number of annual renewals, yields a value of approximately $10 million. We rejected this alternative because the annual collections under this methodology would exceed the Federal Government cost of providing the service, and the full-cost results provided a more reasonable fee.

B. Small Entities

Under the Regulatory Flexibility Act, 5 U.S.C. 601–612, we have considered whether this final rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

In the NPRM, we reviewed size and ownership data of affected entities by using data provided by the NVDC and public and proprietary data sources for company revenue and employee size data. We determined that there are approximately 18,164 entities owning 65,534 commercial vessels that would be impacted by this rule.[4] These entities include businesses and government jurisdictions. Privately-owned recreational vessels comprise the remaining vessel population and are not included in this regulatory flexibility analysis because these vessels are owned by individuals whom are not considered to be small entities for the purpose of the Regulatory Flexibility Act.

We did not receive any public comments following the issuance of the NPRM that would alter our analysis of the economic impact that this rule would have on small entities. Further, we found no additional data or information that would change our findings presented in the NPRM. As such, we have adopted our findings from the NPRM for this final rule. A summary of the analysis presented in the NPRM follows.

To conduct our analysis, we chose a random sample of 400 affected entities.[5] We were able to find revenue or employee size data for 88 of these entities using Web sites, such as MANTA and ReferenceUSA. This included 83 businesses and 5 government jurisdictions. We did not find any small not-for-profit organizations that are independently owned and operated and are not dominant in their fields.

To determine the size of the 83 businesses with available revenue or employee size data, we used the North American Industry Classification System (NAICS) codes to identify the line of business for the entities in our sample and compared the data found to the small business size standards determined by the Small Business Administration (SBA).[6] Of the entities with data, 70 are considered small by SBA size standards and 13 exceeded SBA size standards for small businesses. We also assume that those entities without data available are small.

To determine the size of the 5 affected government jurisdictions, we used the definition from the Regulatory Flexibility Act section 601(5), which classifies small government jurisdictions as jurisdictions with a population of less than 50,000. Of the 5 government jurisdictions, one has a population of less than 50,000, and would therefore be considered small.

As such, we estimate that more than 95 percent of all entities that would be affected by this final rule are small entities. We do not anticipate a significant economic impact to these small entities as a result of this final rule. This rule would require that all entities renewing the endorsements on their COD pay an annual renewal fee of $26 per documented vessel. This final rule impacts a diverse set of industry sectors with a wide range of fleet sizes and revenues. Table 4 provides example data for three affected small businesses that represent the upper, lower, and median values for revenue, fleet size, and cost found within the sample population. Our research shows that those entities with the largest fleets, and thus a greater incurred cost, also have the highest reported revenue in our sample.

TABLE 4—EXAMPLE REVENUE, VESSEL COUNT, AND COST FOR THREE AFFECTED SMALL ENTITIES

Category	Small entity representing lower bound	Small entity representing median	Small entity representing upper bound
Revenue per Entity	$15,000	$336,000	$12,000,000 *
Vessel Count	1	2	6

[4] Data provided by the National Vessel Documentation Center.

[5] A sample size of 400 provides a 95 percent confidence level at a confidence interval of 5.

[6] SBA has established a Table of Small Business Size Standards, which is matched to the North American Industry Classification System (NAICS) industries. A size standard, which is usually stated in number of employees or average annual receipts (''revenues''), represents the largest size that a business (including its subsidiaries and affiliates) may be to remain classified as a small business for SBA and Federal contracting programs. See *http://www.sba.gov/size.*

TABLE 4—EXAMPLE REVENUE, VESSEL COUNT, AND COST FOR THREE AFFECTED SMALL ENTITIES—Continued

Category	Small entity representing lower bound	Small entity representing median	Small entity representing upper bound
Costs per Entity	$26	$52	$156
Percent Impact of Renewal Fees on Revenues	Less than 0.2%	Less than 0.02%	Approximately 0.0013%

* Note: The small entity with this revenue is classified under NAICS 336611, Ship Building and Repairing, and has an SBA size standard of 1,000 employees. This means entities in this industry with 1,000 or fewer employees would be considered small. This entity has 54 employees and was determined small even though its annual revenues are $12 million.

By multiplying the renewal fee by the number of documented vessels owned by each entity analyzed from our sample, we were able to calculate the cost per entity of this final rule. We then used that cost to determine a percentage of revenue impact on the entity by dividing the total cost per entity by the revenue. This analysis showed that the impact from this final rule would be less than 1 percent of annual revenue for small businesses in the sample.

The one small government jurisdiction in our sample operated three vessels that would require COD renewals for a total of $78 in annual COD renewal fees. Given that the cost to this small government jurisdiction is only $78, we expect this final rule would not cause a significant economic impact.

Therefore, the Coast Guard certifies, under 5 U.S.C. 605(b), that this final rule will not have a significant economic impact on a substantial number of small entities.

C. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, we offered to assist small entities in understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking. If the final rule will affect your small business, organization, or governmental jurisdiction, and you have questions concerning its provisions or options for compliance, please consult Ms. Mary Jager, CG–DCO–832, Coast Guard; telephone 202–372–1331, email *Mary.K.Jager@uscg.mil.* The Coast Guard will not retaliate against small entities that question or complain about this final rule or any policy or action of the Coast Guard.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

D. Collection of Information

This final rule calls for no new collection of information under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520.

E. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, or on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this final rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132. Our analysis is explained below.

As explained above, 46 U.S.C. 2110 states that ''the Secretary shall establish a fee or charge for a service or thing of value provided by the Secretary under this subtitle.'' In doing so, it was the intent of Congress to grant the Coast Guard, via delegation from the Secretary, the exclusive authority to establish user fees for Coast Guard vessel documentation services. The Coast Guard has exercised its authority in this rulemaking by establishing annual fees for renewals of endorsements upon the Certificate of Documentation. Therefore, the establishment of user fees for Coast Guard vessel documentation services is within a field foreclosed from state or local regulation. In light of the analyses above, this final rule is consistent with the principles of federalism and preemption requirements in Executive Order 13132.

F. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531–1538, requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any 1 year. Though this final rule will not result in such an expenditure, we do discuss the effects of this final rule elsewhere in this preamble.

G. Taking of Private Property

This final rule will not cause a taking of private property or otherwise have taking implications under E.O. 12630 (''Governmental Actions and Interference with Constitutionally Protected Property Rights'').

H. Civil Justice Reform

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

I. Protection of Children

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

J. Indian Tribal Governments

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

K. Energy Effects

We have analyzed this final rule under E.O. 13211 (''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use''). We have determined that it is not a

''significant energy action'' under that E.O. because it is not a ''significant regulatory action'' under E.O. 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

L. Technical Standards

The National Technology Transfer and Advancement Act, codified as a note to 15 U.S.C. 272, directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through OMB, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

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

M. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have concluded that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded under section 2.B.2, figure 2–1, paragraph 34(a) of the Instruction. This rule involves regulations that are editorial or procedural. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES.**

List of Subjects in 46 CFR Part 67

Reporting and recordkeeping requirements, Vessels.

For the reasons discussed in the preamble, the Coast Guard amends 46 CFR part 67 as follows:

PART 67—DOCUMENTATION OF VESSELS

■ 1. The authority citation for 46 CFR part 67 continues to read as follows:

Authority: 14 U.S.C. 664; 31 U.S.C. 9701; 42 U.S.C. 9118; 46 U.S.C. 2103, 2107, 2110, 12106, 12120, 12122; 46 U.S.C. app. 841a, 876; Department of Homeland Security Delegation No. 0170.1.

§ 67.500 [Amended]

■ 2. In § 67.500, remove paragraph (b) and redesignate paragraphs (c) through (e) as paragraphs (b) through (d).

■ 3. Add § 67.515 to read as follows:

§ 67.515 Application for renewal of endorsements.

An application fee is charged for annual renewal of endorsements on Certificates of Documentation in accordance with subpart L of this part.

■ 4. Revise § 67.517 to read as follows:

§ 67.517 Application for late renewal.

In addition to any other fees required by this subpart, including a renewal fee, a fee is charged for a late renewal in accordance with subpart L of this part.

■ 5. In § 67.550, revise Table 67.550 to read as follows:

§ 67.550 Fee table.

* * * * *

TABLE 67.550—FEES

Activity	Reference	Fee
Applications:		
Initial Certificate of Documentation	Subpart K	$133.00
Exchange of Certificate of Documentation	do	84.00
Return of vessel to documentation	do	84.00
Replacement of lost or mutilated Certificate of Documentation	do	50.00
Approval of exchange of Certificate of Documentation requiring mortgagee consent	do	24.00
Trade endorsement(s):		
Coastwise endorsement	Subpart B	29.00
Coastwise Boaters endorsement	46 CFR part 68	29.00
Fishery endorsement	do	12.00
Registry endorsement	do	none
Recreational endorsement	do	none
Note: When multiple trade endorsements are requested on the same application, the single highest applicable endorsement fee will be charged, resulting in a maximum endorsement fee of $29.00.		
Evidence of deletion from documentation	Subpart L	15.00
Renewal fee	do	26.00
Late renewal fee	do	[1] 5.00
Waivers:		
Original build evidence	Subpart F	15.00
Bill of sale eligible for filing and recording	Subpart E	15.00
Miscellaneous applications:		
Wrecked vessel determination	Subpart J	555.00
New vessel determination	Subpart M	166.00
Rebuild determination—preliminary or final	do	450.00
Filing and recording:		
Bills of sale and instruments in nature of bills of sale	Subpart P	[2] 8.00
Mortgages and related instruments	Subpart Q	[2] 4.00
Notice of claim of lien and related instruments	Subpart R	[2] 8.00
Certificate of compliance:		
Certificate of compliance	46 CFR part 68	55.00
Miscellaneous:		
Abstract of Title	Subpart T	25.00
Certificate of ownership	do	125.00

TABLE 67.550—FEES—Continued

Activity	Reference	Fee
Attachment for each additional vessel with same ownership and encumbrance data	.....do	10.00
Copy of instrument or document	(3)	(3)

[1] Late renewal fee is in addition to the $26.00 renewal fee.
[2] Per page.
[3] Fees will be calculated in accordance with 6 CFR Part 5, Subpart A.

Dated: August 6, 2014.

J.C. Burton,

Captain, U.S. Coast Guard, Director of Inspections and Compliance.

[FR Doc. 2014–18999 Filed 8–11–14; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 140117052–4402–02]

RIN 0648–XD392

Fisheries of the Northeastern United States; Scup Fishery; Adjustment to the 2014 Winter II Quota

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

ACTION: Temporary rule; inseason adjustment.

SUMMARY: NMFS adjusts the 2014 Winter II commercial scup quota. This action complies with Framework Adjustment 3 to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan, which established a process to allow the rollover of unused commercial scup quota from the Winter I period to the Winter II period.

DATES: Effective November 1, 2014, through December 31, 2014.

FOR FURTHER INFORMATION CONTACT: Carly Bari, Fishery Management Specialist, (978) 281–9224.

SUPPLEMENTARY INFORMATION: NMFS published a final rule in the **Federal Register** on November 3, 2003 (68 FR 62250), implementing a process, for years in which the full Winter I commercial scup quota is not harvested, to allow unused quota from the Winter I period (January 1 through April 30) to be added to the quota for the Winter II period (November 1 through December 31), and to allow adjustment of the commercial possession limit for the Winter II period commensurate with the amount of quota rolled over from the Winter I period.

For 2014, the initial Winter II quota is 3,498,355 lb (1,587 mt), and the best available landings information indicates that 3,734,116 lb (1,694 mt) remain of the Winter I quota of 9,900,300 lb (4,491 mt). Consistent with the intent of Framework 3, the full amount of unused 2014 Winter I quota is transferred to Winter II, resulting in a revised 2014 Winter II quota of 7,232,471 lb (3,281 mt). Because the amount transferred is greater than 2,000,000 lb (907 mt), the possession limit per trip will increase from 12,000 lb (5,443 kg) to 18,000 lb (8,165 kg) during the Winter II quota period, consistent with the final rule that increased the Winter II trip limit, published on May 22, 2014 (79 FR 29371).

Classification

This action is required by 50 CFR part 648 and is exempt from review under Executive Order 12866.

The Assistant Administrator for Fisheries, NOAA (AA), has determined good cause exists pursuant to 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment on this in-season adjustment because it is impracticable and contrary to the public interest. The landings data upon which this action is based are not available on a real-time basis and, consequently, were compiled only a short time before the determination was made that this action is warranted. If implementation of this in-season action is delayed to solicit prior public comment, the objective of the fishery management plan to achieve the optimum yield from the fishery could be compromised; deteriorating weather conditions during the latter part of the fishing year will reduce fishing effort and could prevent the annual quota from being fully harvested. This would conflict with the agency's legal obligation under the Magnuson-Stevens Fishery Conservation and Management Act to achieve the optimum yield from a fishery on a continuing basis, resulting in a negative economic impact on vessels permitted to fish in this fishery.

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

Dated: August 6, 2014.

Emily H. Menashes,

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

[FR Doc. 2014–18963 Filed 8–11–14; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 79, No. 155
Tuesday, August 12, 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–2013–0460; Directorate Identifier 2012–NM–222–AD]

RIN 2120–AA64

Airworthiness Directives; Saab AB, Saab Aerosystems Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Supplemental notice of proposed rulemaking (NPRM); reopening of comment period.

SUMMARY: We are revising an earlier proposed airworthiness directive (AD) for all Saab AB, Saab Aerosystems Model 340B airplanes. The NPRM proposed to require an inspection of the stick pusher rigging and an adjustment to the correct setting if necessary. The NPRM was prompted by a report that the elevator position quoted in an aircraft maintenance manual is incorrect and a report that the trunnion at the lower part of the control column was installed incorrectly. This action revises the NPRM by proposing to require an inspection of the installation of the trunnion and the stick pusher rigging, and corrective actions if necessary. We are proposing this AD to correct the rigging of the elevator position of the stick pusher to reduce the probability of a negative effect on the handling quality during stall, which could result in reduced controllability of the airplane. Since these actions impose an additional burden over that proposed in the NPRM and at the request of a commenter, we are reopening the comment period to allow the public the chance to comment on these proposed changes.

DATES: We must receive comments on this proposed AD by September 26, 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 Saab AB, Saab Aeronautics, SE–581 88, Linköping, Sweden; telephone +46 13 18 5591; fax +46 13 18 4874; email *saab340techsupport@saabgroup.com;* Internet *http://www.saabgroup.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–2013–0460; 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 (telephone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Shahram Daneshmandi, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone (425) 227–1112; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2013–0460; Directorate Identifier 2012–NM–222–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.regulationsgov,* 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 issued an NPRM to amend 14 CFR part 39 by adding an AD that would apply to all Saab AB, Saab Aerosystems Model 340B airplanes. The NPRM published in the **Federal Register** on June 3, 2013 (78 FR 33010). The NPRM proposed to require actions intended to correct the rigging of the elevator position of the stick pusher to reduce the probability of a negative effect on the handling quality during stall, which could result in reduced controllability of the airplane.

Actions Since Previous NPRM (78 FR 33010, June 3, 2013) Was Issued

Since we issued the NPRM (78 FR 33010, June 3, 2013), it has been reported that on some airplanes, during implementation of Saab Service Bulletin 340–27–105, Revision 01, dated August 31, 2012, the trunnion at the lower part of the control column was installed incorrectly, which prevented proper inspection of the stick pusher rigging.

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2013–0253, dated October 18, 2013 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> The standard stick pusher maximum elevator position of a SAAB 340B, prior to delivery, is set at 7.5 degrees trailing edge down. It was recently discovered that this value has been incorrectly referenced in the SAAB 340B Aircraft Maintenance Manual (AMM), which quotes an elevator position of 4 degrees trailing edge down for all aeroplanes, which is the correct value for SAAB SF340A aeroplanes only.

If a SAAB 340B aeroplane has been re-rigged in accordance with current AMM procedure, there is a possibility that the deflection of the elevator will be less than intended.

This condition, if not corrected, will affect the stall characteristics on the outer part of the envelope at maximum flap setting and aft centre of gravity (CG) configuration, possibly resulting in reduced control of the aeroplane.

To address this potential unsafe condition, SAAB AB Aeronautics issued Service Bulletin (SB) 340–27–105 to reduce the probability of a negative effect on the handling quality during stall. Consequently, EASA issued AD 2012–0256 [*http://www.regulations.gov/#!documentDetail;D=FAA-2013-0460-0002*] to require a one-time inspection of the stick pusher rigging and, depending on findings, adjustment to the correct setting.

Since that [EASA] AD was issued, it has been reported that on some aeroplanes, during implementation of SB 340–27–105, the trunnion at the lower part of the control column was incorrectly installed. This prevents proper inspection of the stick pusher rigging.

Prompted by this finding, SAAB issued SB 340–27–115 with instructions for all aeroplanes, regardless whether SB 340–27–105 has been accomplished or not.

For the reasons described above, this AD retains the requirements of EASA AD 2012–0256, which is superseded, but requires the use of the improved and expanded instructions specified in SAAB SB 340–27–115.

The required actions include a detailed inspection of the installation of the trunnion at the lower part of the control column and the stick pusher rigging, and corrective actions if necessary. Corrective actions include adjusting to the correct setting, and repair. You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2013–0460.

Relevant Service Information

Saab AB, Saab Aerosystems has issued Service Bulletin 340–27–115, dated July 19, 2013. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

Comments

We gave the public the opportunity to comment on the NPRM (78 FR 33010, June 3, 2013). The following presents the comment received on the NPRM and the FAA's response to each comment.

Request To Delay Issuance of AD

Saab AB, Saab Aerosystems (Saab) requested that the issuance of the final rule be delayed until new service information is introduced.

As stated previously, Saab Service Bulletin 340–27–115, dated July 19, 2013, has been issued, which supersedes Saab Service Bulletin 340–27–114, dated July 8, 2013; and Saab Service Bulletin 340–27–105, Revision 01, dated August 31, 2012. We have revised paragraphs (g) and (h) of this SNPRM to refer to Saab Service Bulletin 340–27–115, dated July 19, 2013, as the appropriate source of service information for the proposed requirements.

FAA's Determination and Requirements of This SNPRM

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.

Certain changes described above expand the scope of the NPRM (78 FR 33010, June 3, 2013). As a result, we have determined that it is necessary to reopen the comment period to provide additional opportunity for the public to comment on this SNPRM.

''Contacting the Manufacturer'' Paragraph in This SNPRM

Since late 2006, we have included a standard paragraph titled ''Airworthy Product'' in all MCAI ADs in which the FAA develops an AD based on a foreign authority's AD.

The MCAI or referenced service information in an FAA AD often directs the owner/operator to contact the manufacturer for corrective actions, such as a repair. Briefly, the Airworthy Product paragraph allowed owners/operators to use corrective actions provided by the manufacturer if those actions were FAA-approved. In addition, the paragraph stated that any actions approved by the State of Design Authority (or its delegated agent) are considered to be FAA-approved.

In an NPRM having Directorate Identifier 2012–NM–101–AD (78 FR 78285, December 26, 2013), we proposed to prevent the use of repairs that were not specifically developed to correct the unsafe condition, by requiring that the repair approval provided by the State of Design Authority or its delegated agent specifically refer to the FAA AD. This change was intended to clarify the method of compliance and to provide operators with better visibility of repairs that are specifically developed and approved to correct the unsafe condition. In addition, we proposed to change the phrase ''its delegated agent'' to include a design approval holder (DAH) with State of Design Authority design organization approval (DOA), as applicable, to refer to a DAH authorized to approve required repairs for the proposed AD.

One commenter to the NPRM having Directorate Identifier 2012–NM–101–AD (78 FR 78285, December 26, 2013) stated the following: ''The proposed wording, being specific to repairs, eliminates the interpretation that Airbus messages are acceptable for approving minor deviations (corrective actions) needed during accomplishment of an AD mandated Airbus service bulletin.''

This comment has made the FAA aware that some operators have misunderstood or misinterpreted the Airworthy Product paragraph to allow the owner/operator to use messages provided by the manufacturer as approval of deviations during the accomplishment of an AD-mandated action. The Airworthy Product paragraph does not approve messages or other information provided by the manufacturer for deviations to the requirements of the AD-mandated actions. The Airworthy Product paragraph only addresses the requirement to contact the manufacturer for corrective actions for the identified unsafe condition and does not cover deviations from other AD requirements. However, deviations to AD-required actions are addressed in 14 CFR 39.17, and anyone may request the approval for an alternative method of compliance to the AD-required actions using the procedures found in 14 CFR 39.19.

To address this misunderstanding and misinterpretation of the Airworthy Product paragraph, we have changed the paragraph and retitled it ''Contacting the Manufacturer.'' This paragraph now clarifies that for any requirement in this SNPRM to obtain corrective actions from a manufacturer, the actions must be accomplished using a method approved by the FAA, the European Aviation Safety Agency (EASA), or Saab AB, Saab Aerosystems' EASA DOA.

The Contacting the Manufacturer paragraph also clarifies that, if approved by the DOA, the approval must include the DOA-authorized signature. The DOA signature indicates that the data and information contained in the document are EASA-approved, which is also FAA-approved. Messages and other information provided by the manufacturer that do not contain the DOA-authorized signature approval are not EASA-approved, unless EASA

directly approves the manufacturer's message or other information.

This clarification does not remove flexibility previously afforded by the Airworthy Product paragraph. Consistent with long-standing FAA policy, such flexibility was never intended for required actions. This is also consistent with the recommendation of the Airworthiness Directive Implementation Aviation Rulemaking Committee to increase flexibility in complying with ADs by identifying those actions in manufacturers' service instructions that are ''Required for Compliance'' with ADs. We continue to work with manufacturers to implement this recommendation. But once we determine that an action is required, any deviation from the requirement must be approved as an alternative method of compliance.

We also have decided not to include a generic reference to either the ''delegated agent'' or ''design approval holder (DAH) with State of Design Authority design organization approval,'' but instead we have provided the specific delegation approval granted by the State of Design Authority for the DAH throughout this SNPRM.

Costs of Compliance

We estimate that this SNPRM affects 109 airplanes of U.S. registry.

We estimate that it would take about 12 work-hours per product to comply with the basic requirements of this SNPRM. The average labor rate is $85 per work-hour. Required parts would cost about $10 per product. Based on these figures, we estimate the cost of this SNPRM on U.S. operators to be $112,270, or $1,030 per product.

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 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 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 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. Amend § 39.13 by adding the following new airworthiness directive (AD):

Saab AB, Saab Aerosystems: Docket No. FAA–2013–0460; Directorate Identifier 2012–NM–222–AD.

(a) Comments Due Date

We must receive comments by September 26, 2014.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Saab AB, Saab Aerosystems Model 340B airplanes, certificated in any category, all serial numbers.

(d) Subject

Air Transport Association (ATA) of America Code 27, Flight controls.

(e) Reason

This AD was prompted by a report that the elevator position quoted in an aircraft maintenance manual is incorrect and a report that the trunnion at the lower part of the control column was installed incorrectly. We are issuing this AD to correct the rigging of the elevator position of the stick pusher to reduce the probability of a negative effect on the handling quality during stall, which could result in reduced controllability of the airplane.

(f) Compliance

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

(g) Inspection

Within 24 months after the effective date of this AD, do a detailed inspection of the installation of the trunnion at the lower part of the control column and the stick pusher rigging, in accordance with the Accomplishment Instructions of Saab Service Bulletin 340–27–115, dated July 19, 2013.

(h) Corrective Actions

If, during the inspection required by paragraph (g) of this AD, an incorrect setting of the stick pusher maximum elevator position is found, or if the trunnion at the lower part of the control column is installed incorrectly, before further flight, accomplish all applicable corrective actions, in accordance with the Accomplishment Instructions of Saab Service Bulletin 340–27–115, dated July 19, 2013; except where Saab Service Bulletin 340–27–115, dated July 19, 2013, specifies to contact SAAB for corrective action, repair before further flight, using a method approved by the Manager, International Branch, ANM–116, Transport

Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA); or Saab AB, Saab Aerosystems' EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(i) Reporting Requirement

After accomplishing the corrective action as required by paragraph (h) of this AD, record any incorrect rigging value that was detected and send a report to: Saab AB, Business Area Support and Services, Air Division, Technical Support email: *Saab340.techsupport@saabgroup.com* Fax: +46 (0) 13 18 48 74, at the applicable time specified in paragraph (i)(1) or (i)(2) of this AD.

(1) If the corrective action was done on or after the effective date of this AD: Submit the report within 30 days after accomplishing the corrective action.

(2) If the corrective action was done before the effective date of this AD: Submit the report within 30 days after the effective date of this AD.

(j) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) Alternative Methods of Compliance (AMOCs): The Manager, ANM–116, International Branch, 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: Shahram Daneshmandi, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone (425) 227–1112; 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) Contacting the Manufacturer: For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA); or Saab AB, Saab Aerosystems' EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(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.

(k) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA Airworthiness Directive 2013–0253, dated October 18, 2013, for related information. This MCAI may be found in the AD docket on the Internet at *http://www.regulations.gov/#!documentDetail;D=FAA-2013-0460-0002.*

(2) For service information identified in this AD, contact Saab AB, Saab Aeronautics, SE–581 88, Linköping, Sweden; telephone +46 13 18 5591; fax +46 13 18 4874; email *saab340techsupport@saabgroup.com;* Internet *http://www.saabgroup.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 August 1, 2014.

Jeffrey E. Duven,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2014–19018 Filed 8–11–14; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2014–0526; Directorate Identifier 2013–NM–141–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all Airbus Model A318, A319, A320, and A321 series airplanes. This proposed AD was prompted by a determination that the maintenance actions for airplane systems susceptible to aging must be mandated. This proposed AD would require revising the maintenance or inspection program to incorporate more restrictive maintenance requirements and airworthiness limitations. We are proposing this AD to mitigate the risks associated with aging effects of airplane systems. Such aging effects could change the characteristics leading to an increased potential for failure, which could result in failure of certain life limited parts, and could reduce the structural integrity or reduce controllability of the airplane.

DATES: We must receive comments on this proposed AD by September 26, 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, Airworthiness Office—EIAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *account.airworth-eas@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–2014–0526; 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 (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA

98057–3356; telephone (425) 227–1405; 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–2014–0526; Directorate Identifier 2013–NM–141–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2013–0146, dated July 16, 2013 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> The airworthiness limitations for Airbus aeroplanes are currently published in Airworthiness Limitations Section (ALS) documents.
>
> The airworthiness limitations applicable to the Ageing Systems Maintenance (ASM) are given in Airbus A318/A319/A320/A320/A321 ALS Part 4, which is approved by [European Aviation Safety Agency] EASA.
>
> Revision 01 of AIRBUS A318/A319/A320/A321 ALS Part 4 introduces more restrictive maintenance requirements and/or airworthiness limitations. Failure to comply with these instructions could result in an unsafe condition.

* * * * *

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–2014–0526.

Relevant Service Information

Airbus has issued A318/A319/A320/A321 Airworthiness Limitations Section, ALS Part 4, ''Ageing Systems Maintenance,'' dated June 15, 2012. 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.

This proposed AD requires revisions to certain operator maintenance documents to include new or revised actions (e.g., inspections). Compliance with these actions is required by section 91.403(c) of the Federal Aviation Regulations (14 CFR 91.403(c)). For airplanes that have been previously modified, altered, or repaired in the areas addressed by these actions, an operator might not be able to accomplish the actions described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval of an alternative method of compliance (AMOC) in accordance with the provisions of paragraph (i) of this proposed AD. The request should include a description of changes to the required inspections that will ensure the continued operational safety of the airplane.

Difference Between This Proposed AD and the MCAI

The EASA AD specifies that if there are findings from the Airworthiness Limitations Section (ALS) inspection tasks, then corrective action must be accomplished in accordance with Airbus maintenance documentation. However, this proposed AD does not include that requirement because operators of U.S.-registered airplanes are required by general airworthiness and operational regulations to use FAA-acceptable methods when performing maintenance. We consider those methods to be adequate to address any corrective actions necessitated by the findings of ALS inspections required by this proposed AD.

''Contacting the Manufacturer'' Paragraph in This Proposed AD

Since late 2006, we have included a standard paragraph titled ''Airworthy Product'' in all MCAI ADs in which the FAA develops an AD based on a foreign authority's AD.

We have become aware that some operators have misunderstood or misinterpreted the Airworthy Product paragraph to allow the owner/operator to use messages provided by the manufacturer as approval of deviations during the accomplishment of an AD-mandated action. The Airworthy Product paragraph does not approve messages or other information provided by the manufacturer for deviations to the requirements of the AD-mandated actions. The Airworthy Product paragraph only addresses the requirement to contact the manufacturer for corrective actions for the identified unsafe condition and does not cover deviations from other AD requirements. However, deviations to AD-required actions are addressed in 14 CFR 39.17, and anyone may request the approval for an alternative method of compliance to the AD-required actions using the procedures found in 14 CFR 39.19.

To address this misunderstanding and misinterpretation of the Airworthy Product paragraph, we have changed the paragraph and retitled it ''Contacting the Manufacturer.'' This paragraph now clarifies that for any requirement in this proposed AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the FAA, the European Aviation Safety Agency (EASA), or Airbus's EASA DOA.

The Contacting the Manufacturer paragraph also clarifies that, if approved by the DOA, the approval must include the DOA-authorized signature. The DOA signature indicates that the data and information contained in the document are EASA-approved, which is also FAA-approved. Messages and other information provided by the manufacturer that do not contain the DOA-authorized signature approval are not EASA-approved, unless EASA directly approves the manufacturer's message or other information.

This clarification does not remove flexibility previously afforded by the Airworthy Product paragraph. Consistent with long-standing FAA policy, such flexibility was never intended for required actions. This is also consistent with the recommendation of the Airworthiness Directive Implementation Aviation Rulemaking Committee to increase flexibility in complying with ADs by identifying those actions in manufacturers' service instructions that are ''Required for Compliance'' with ADs. We continue to work with manufacturers to implement this recommendation. But once we determine that an action is required, any deviation from the requirement must be approved as an alternative method of compliance.

Costs of Compliance

We estimate that this proposed AD affects 851 airplanes of U.S. registry. We also estimate that it would take about 1 work-hour per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of this proposed AD on U.S. operators to be $72,335, or $85 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

3. Will not affect intrastate aviation in Alaska; and

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

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. Amend § 39.13 by adding the following new airworthiness directive (AD):

Airbus: Docket No. FAA–2014–0526; Directorate Identifier 2013–NM–141–AD.

(a) Comments Due Date

We must receive comments by September 26, 2014.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Airbus Model A318–111, –112, –121, and –122 airplanes; Model A319–111, –112, –113, –114, –115, –131, –132, and –133 airplanes; Model A320–111, –211, –212, –214, –231, –232, and –233 airplanes; and Airbus Model A321–111, –112, –131, –211, –212, –213, –231, and –232 airplanes, certificated in any category; all manufacturer serial numbers.

(d) Subject

Air Transport Association (ATA) of America Code 05, Time Limits/Maintenance Checks.

(e) Reason

This AD was prompted by a determination that the maintenance actions for airplane systems susceptible to aging must be mandated. We are issuing this AD to mitigate the risks associated with the aging effects of airplane systems. Such aging effects could change the characteristics leading to an increased potential for failure, which could result in failure of certain life limited parts, and could reduce the structural integrity of the airplane or reduce the controllability of the airplane.

(f) Compliance

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

(g) Revise Maintenance or Inspection Program

Within 30 days after the effective date of this AD: Revise the maintenance or inspection program, as applicable, to incorporate Airbus A318/A319/A320/A321 Airworthiness Limitations Section, ALS Part 4, ''Ageing Systems Maintenance,'' Revision 01, dated June 15, 2012. The initial compliance time for doing the actions is at the applicable time specified in A318/A319/A320/A321 Airworthiness Limitations Section, ALS Part 4, ''Ageing Systems Maintenance,'' Revision 01, dated June 15, 2012; or within 2 weeks after revising the maintenance or inspection program; whichever occurs later.

(h) No Alternative Actions or Intervals

After accomplishing the revision required by paragraph (g) of this AD, no alternative actions (e.g., inspections) or intervals may be used unless the actions or intervals are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (i) of this AD.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, 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: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone (425) 227–1405; 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) *Contacting the Manufacturer:* For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA); or Airbus's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(j) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA Airworthiness Directive 2013–0146, dated July 16, 2013, for related information. This MCAI may be found in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating it in Docket No. FAA–2014–0526.

(2) For service information identified in this AD, contact Airbus, Airworthiness Office—EIAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *account.airworth-eas@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.

Issued in Renton, Washington, on August 1, 2014.

Jeffrey E. Duven,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2014–19013 Filed 8–11–14; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2014–0527; Directorate Identifier 2014–NM–045–AD]

RIN 2120–AA64

Airworthiness Directives; Dassault Aviation Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Dassault Aviation Model Mystere-Falcon 50 airplanes. This proposed AD was prompted by a report of an untimely and intermittent indication of slat activity due to chafing of the electrical wiring under the glare shield and behind the flight deck front panel. This proposed AD would require installing two protective plates between the electrical wiring under the glare shield and the engine fire pull handles. We are proposing this AD to prevent chafing of the electrical wiring, which could result in a short circuit and generation of smoke in the cockpit, potential loss of several functions essential for safe flight, and consequent reduced controllability of the airplane.

DATES: We must receive comments on this proposed AD by September 26, 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 Dassault Falcon Jet, P.O. Box 2000, South Hackensack, NJ 07606; telephone 201–440–6700; Internet *http://www.dassaultfalcon.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–2014–0527; 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: Tom Rodriguez, Aerospace Engineer, International Branch, ANM 116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone (425) 227–1137; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2014–0527; Directorate Identifier 2014–NM–045–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2014–0024, dated January 23, 2014 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Dassault Aviation Model Mystere-Falcon 50 airplanes. The MCAI states:

> One operator experienced an untimely and intermittent indication of slat activity on his aeroplane. The results of the subsequent investigation revealed that electrical wiring under the glare shield and behind the flight deck front panel was chafing with hardware and was short-circuited to ground. This situation may have resulted from an incorrect installation of the wiring during a previous maintenance action in the area. A design review identified a lack of protection of the affected electrical wiring bundle, which would have prevented damage caused by chafing with aeroplane structural parts.
>
> This condition, if not corrected, might lead to an electrical short circuit and generation of smoke, possibly affecting operation of systems and resulting in reduced control of the aeroplane.
>
> To address this potential unsafe condition, Dassault Aviation issued [service bulletin] SB F50–530, providing instructions for installation of a protective plate on the electrical wiring.
>
> For the reasons described above, this [EASA] AD requires modification of the aeroplane by installing a protective plate on the electrical wiring.

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–2014–0527.

Relevant Service Information

Dassault has issued Service Bulletin F50–530, dated November 12, 2013. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Contacting the Manufacturer'' Paragraph in This Proposed AD

Since late 2006, we have included a standard paragraph titled ''Airworthy Product'' in all MCAI ADs in which the FAA develops an AD based on a foreign authority's AD.

The MCAI or referenced service information in an FAA AD often directs the owner/operator to contact the manufacturer for corrective actions, such as a repair. Briefly, the Airworthy Product paragraph allowed owners/operators to use corrective actions provided by the manufacturer if those actions were FAA-approved. In addition, the paragraph stated that any actions approved by the State of Design Authority (or its delegated agent) are considered to be FAA-approved.

In an NPRM having Directorate Identifier 2012–NM–101–AD (78 FR 78285, December 26, 2013), we proposed to prevent the use of repairs that were not specifically developed to correct the unsafe condition, by requiring that the repair approval provided by the State of Design Authority or its delegated agent specifically refer to the FAA AD. This change was intended to clarify the method of compliance and to provide operators with better visibility of repairs that are specifically developed and approved to correct the unsafe condition. In addition, we proposed to change the phrase ''its delegated agent'' to include a design approval holder (DAH) with State of Design Authority design organization approval (DOA), as applicable, to refer to a DAH authorized to approve required repairs for the proposed AD.

One commenter to the NPRM having Directorate Identifier 2012–NM–101–AD (78 FR 78285, December 26, 2013) stated the following: ''The proposed wording, being specific to repairs, eliminates the interpretation that Airbus messages are acceptable for approving minor deviations (corrective actions) needed during accomplishment of an AD mandated Airbus service bulletin.''

This comment has made the FAA aware that some operators have misunderstood or misinterpreted the Airworthy Product paragraph to allow the owner/operator to use messages provided by the manufacturer as approval of deviations during the accomplishment of an AD-mandated action. The Airworthy Product paragraph does not approve messages or other information provided by the manufacturer for deviations to the requirements of the AD-mandated actions. The Airworthy Product paragraph only addresses the requirement to contact the manufacturer for corrective actions for the identified unsafe condition and does not cover deviations from other AD requirements. However, deviations to AD-required actions are addressed in 14 CFR 39.17, and anyone may request the approval for an alternative method of compliance to the AD-required actions using the procedures found in 14 CFR 39.19.

To address this misunderstanding and misinterpretation of the Airworthy Product paragraph, we have changed the paragraph and retitled it ''Contacting the Manufacturer.'' This paragraph now clarifies that for any requirement in this proposed AD to obtain corrective actions from a manufacturer, the actions must be accomplished using a method approved by the FAA, the European Aviation Safety Agency (EASA), or Dassault Aviation's EASA DOA.

The Contacting the Manufacturer paragraph also clarifies that, if approved by the DOA, the approval must include the DOA-authorized signature. The DOA signature indicates that the data and information contained in the document are EASA-approved, which is also FAA-approved. Messages and other information provided by the manufacturer that do not contain the DOA-authorized signature approval are not EASA-approved, unless EASA directly approves the manufacturer's message or other information.

This clarification does not remove flexibility previously afforded by the Airworthy Product paragraph. Consistent with long-standing FAA policy, such flexibility was never intended for required actions. This is also consistent with the recommendation of the Airworthiness Directive Implementation Aviation Rulemaking Committee to increase flexibility in complying with ADs by identifying those actions in manufacturers' service instructions that are ''Required for Compliance'' with ADs. We continue to work with manufacturers to implement this recommendation. But once we determine that an action is required, any deviation from the requirement must be approved as an alternative method of compliance.

Costs of Compliance

We estimate that this proposed AD affects 250 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
Installation	26 work-hours × $85 per hour = $85	$96	$2,306	$576,500

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

3. Will not affect intrastate aviation in Alaska; and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Dassault Aviation: Docket No. FAA–2014–0527; Directorate Identifier 2014–NM–045–AD.

(a) Comments Due Date

We must receive comments by September 26, 2014.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Dassault Aviation Model Mystere-Falcon 50 airplanes, certificated in any category, as identified in paragraphs (c)(1) and (c)(2) of this AD.

(1) Airplanes with serial numbers 5, 7, 27, 30, 34, 36, 78, 132, and 251 through 352 inclusive.

(2) Airplanes with manufacturer serial numbers 2 through 250 inclusive, having Honeywell (formerly Allied Signal, Garrett AiResearch) TFE731–40–1C engines modified by Dassault Aviation Service Bulletin F50–280.

(d) Subject

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

(e) Reason

This AD was prompted by a report of an untimely and intermittent indication of slat activity due to chafing of the electrical wiring under the glare shield and behind the flight deck front panel. We are issuing this AD to prevent chafing of the electrical wiring, which could result in a short circuit and generation of smoke in the cockpit, potential loss of several functions essential for safe flight, and consequent reduced controllability of the airplane.

(f) Compliance

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

(g) Install Protective Plates

Within 74 months after the effective date of this AD, install two Rilsan protective plates between the glare shield electrical wiring and the engine fire pull handles, in accordance with the Accomplishment Instructions of Dassault Service Bulletin F50–530, dated November 12, 2013.

(h) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone (425) 227–1137; fax (425) 227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA); or Dassault Aviation's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(i) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA Airworthiness Directive 2014–0024, dated January 23, 2014, for related information. This MCAI may be found in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating it in Docket No. FAA–2014–0527.

(2) For service information identified in this AD, contact Dassault Falcon Jet, P.O. Box 2000, South Hackensack, NJ 07606; telephone 201–440–6700; Internet *http://www.dassaultfalcon.com.* You may 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 August 1, 2014.

Jeffrey E. Duven,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2014–19009 Filed 8–11–14; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms, and Explosives

27 CFR Part 478

[Docket No. ATF 40P; AG Order No. 3459–2014]

RIN 1140–AA41

Commerce in Firearms and Ammunition—Reporting Theft or Loss of Firearms in Transit (2007R–9P)

AGENCY: Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), Department of Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Justice proposes amending Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) regulations that concern firearms stolen or lost in transit. The proposed rule specifies that when a Federal firearms licensee (FFL) discovers a firearm it shipped was stolen or lost in transit, that sender/transferor FFL must report the theft or loss to ATF and to the appropriate local authority. The rule also reduces an FFL's reporting burden when a theft or loss involves a firearm registered under the National Firearms Act (NFA) and ensures consistent reporting to ATF's NFA Branch. In addition, the rule specifies that transferor/sender FFLs must reflect the theft or loss of a firearm as a disposition entry in their required records not later than 7 days following discovery of the theft or loss, and specifies that FFLs that report the theft or loss of a firearm and later discover its whereabouts must advise ATF that the firearm has been located and must re-enter the firearm into their required records as an acquisition or disposition entry as appropriate.

DATES: Written comments must be postmarked and electronic comments must be submitted on or before November 10, 2014. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after midnight Eastern Time on the last day of the comment period.

ADDRESSES: You may submit comments, identified by docket number (ATF 40P), by any of the following methods—

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 648–9741.
- *Mail:* Brenda Raffath Friend, Mailstop 6N–602, Office of Regulatory Affairs, Enforcement Programs and Services, Bureau of Alcohol, Tobacco,

Firearms, and Explosives, U.S. Department of Justice, 99 New York Avenue NE., Washington, DC 20226; *ATTN: ATF 40P.*

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to the Federal eRulemaking portal, *http://www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Brenda Raffath Friend, Office of Regulatory Affairs, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives, U.S. Department of Justice, 99 New York Avenue NE, Washington, DC 20226; telephone: (202) 648–7070.

SUPPLEMENTARY INFORMATION:

I. Background

The Gun Control Act of 1968 (GCA) requires each licensed importer, licensed manufacturer, licensed dealer, or licensed collector of firearms to report the theft or loss of a firearm from the licensee's inventory or collection to ATF and to the appropriate local authorities within 48 hours after the theft or loss is discovered. *See* 18 U.S.C. 923(g)(6) (requiring licensees to report thefts or losses to the Attorney General); 28 CFR 0.130(a) (delegating the Attorney General's authority to the Director of ATF).

The regulation that implements section 923(g)(6) is 27 CFR 478.39a. This section provides that each Federal firearms licensee must report the theft or loss of a firearm from the FFL's inventory (including any firearm which has been transferred from the FFL's inventory to a personal collection and held as a personal firearm for at least 1 year), or from the collection of a licensed collector, within 48 hours after the theft or loss is discovered. FFLs must report such thefts or losses by telephoning 1–888–930–9275 (nationwide ATF toll-free number) and by preparing a Federal Firearms Licensee Firearms Inventory Theft/Loss Report, ATF Form 3310.11 (Form 3310.11), in accordance with the instructions on the form. The FFL must also report the theft or loss of a firearm to the appropriate local authorities.

When there has been a theft or loss of a firearm registered under the National Firearms Act (NFA), 26 U.S.C. 5801 *et seq.,* such as a short-barreled rifle or shotgun, silencer, machinegun, or destructive device, 27 CFR 479.141 imposes a separate and additional reporting requirement. Section 479.141 states that whenever any registered NFA firearm is stolen or lost, the person losing possession thereof must, immediately upon discovery of such theft or loss, make a report to the Director of ATF showing the following: name and address of the person in whose name the firearm is registered; kind of firearm; serial number; model; caliber; manufacturer of the firearm; date and place of theft or loss; and complete statement of facts and circumstances surrounding such theft or loss. Accordingly, when an FFL loses possession of an NFA firearm, it has reporting obligations under both 27 CFR 479.141 and 27 CFR 478.39a.

Currently, an FFL reporting the theft or loss of a registered NFA firearm prepares and submits Form 3310.11 to ATF's National Tracing Center (NTC), the receiving office designated on the form, to meet 27 CFR 478.39a requirements. In addition, the FFL must submit a separate notification to the Director of ATF to meet the requirements of 27 CFR 479.141. Because no form is directly associated with this requirement, FFLs typically submit a letter to the NFA Branch of ATF, as directed in the ''Important Notice'' section of Form 3310.11. As a backup to this requirement, when NTC receives a completed Form 3310.11 involving the theft or loss of an NFA firearm, it currently forwards a copy of the completed form to the NFA Branch, as the completed form often contains more information than the letters FFLs submit to the NFA Branch. Form 3310.11 does not, however, address all required elements under 27 CFR 479.141 (i.e., the name and address of the person in whose name the firearm is registered). Therefore, the NFA Branch may not currently be receiving consistent and complete information regarding the theft or loss of a registered firearm.

The instructions on Form 3310.11 also provide that FFLs must reflect the theft or loss of a firearm as a disposition entry in the Record of Acquisition and Disposition required by subpart H of 27 CFR part 478. The disposition entry should indicate whether the incident is a theft or loss, the ATF issued Incident Report Number, and the Incident Number provided by the local law enforcement agency. The instructions further state that should any of the firearms be located, they should be re-entered into the Record of Acquisition and Disposition as an acquisition entry. In addition, the ''Important Notice'' section on Form 3310.11 provides that FFLs who report a firearm as missing and later discover its whereabouts should advise ATF that the firearms have been located.

Current regulations do not address reporting requirements arising from firearms stolen or lost in transit between FFLs, including whether the stolen or lost firearm is considered the inventory of the sending or receiving FFL, or whether the sending or receiving FFL is responsible for reporting the theft or loss of a firearm in transit.

These gaps in the regulations may result in no one reporting the theft or loss of a firearm stolen or lost in transit. Clarifying this responsibility is important to the effective administration of the GCA and the NFA. Congress delegated the authority to prescribe rules and regulations to carry out the provisions of the GCA and NFA to the Attorney General, who has delegated to ATF the authority to investigate, administer, and enforce those laws. 18 U.S.C. 926(a); 28 CFR 0.130(a).

II. Initial Notice of Proposed Rulemaking

On August 28, 2000, ATF published in the **Federal Register** a notice proposing several amendments to the firearms regulations (Notice No. 902, 65 FR 52054). Among those amendments, ATF proposed specifying that when a firearm is stolen or lost in transit between licensees, for reporting purposes, the firearm is considered stolen or lost from the transferor's/sender's inventory. ATF noted that, in Fiscal Year (FY) 1999, there were 1,271 crime gun traces in which an FFL claimed to have never received the firearm shipped to it and no one reported the theft or loss to ATF. As proposed in 2000, a firearm stolen or lost in transit between licensees, for reporting purposes, would be considered stolen or lost from the transferor's/sender's inventory. Further, as proposed, the transferor/sender of the stolen or missing firearm would have been required to report to ATF and to the appropriate local authorities the theft or loss of the firearm within 48 hours after the transferor/sender discovered the theft or loss. ATF determined that it was more logical to put the reporting burden on the transferor/sender, rather than on the transferee/buyer, because the transferor/sender was more likely to know the circumstances of when and how a firearm is shipped. Further, if a firearm is stolen or lost in transit, the notation in the transferor's/sender's acquisition and disposition book indicating the

firearm was disposed of to a particular transferee/buyer would be inaccurate. Therefore, as proposed in 2000, a transferor/sender would have been required to verify that the transferee/buyer received the shipped firearm in order to fulfill his or her statutory responsibility to maintain accurate records.

In addition, to enable the transferor/sender of the stolen or lost firearm to obtain the knowledge necessary to comply with the theft or loss reporting requirements, ATF proposed that the transferor/sender must have or establish commercial business practices that confirm whether the transferee/buyer of the firearm ultimately received the firearm. Notice No. 902 addressed other issues as well.

With the comments received in response to various issues addressed in the notice, the Department decided to study the issues further and it subsequently withdrew these proposals. *See* 69 FR 37757 (June 28, 2004).

III. Current Notice of Proposed Rulemaking

Theft or loss of firearms in transit continues to be a problem. In its earlier notice of proposed rulemaking on this issue, ATF stated that in FY 1999, there were 1,271 crime gun traces in which an FFL claimed to have never received the firearm shipped to it and no one reported the theft or loss to ATF. More recent data from NTC show that from FY 2008 through FY 2012, in an average of 1,525 crime gun traces per year, an FFL claimed to have never received the firearm allegedly shipped to it and no one reported the theft or loss to ATF. The omissions in the regulations regarding reporting the theft or loss of a firearm in transit adversely affect ATF's and local law enforcement's investigative and tracing capabilities. Therefore, the regulations should be amended to specify who is responsible for reporting the theft or loss of a firearm in transit.

The Department has concluded that the transferor/sender of a firearm should bear the responsibility of reporting the theft or loss of that firearm when the theft or loss occurs in transit. This proposed rule is consistent with the GCA, which regulates commerce in firearms through FFLs. The GCA's scheme relies on firearms dealers to control commerce in firearms. *Huddleston* v. *United States,* 415 U.S. 814, 824 (1975) (''The principal agent of federal enforcement is the dealer.'') Section 923(g)(6), in particular, places the burden of reporting stolen or lost firearms on licensees. Given that the statutory reporting obligation rests with licensees, and not with the common or contract carriers that transport firearms, it is reasonable to require by regulation that licensees report thefts or losses that occur in transit. The Department further believes that it should be the transferor/sender licensees, not the recipients, who bear the reporting obligations. The transferors/senders covered by this rule will be licensees who are subject to the reporting requirement under section 923(g)(6)—but not every recipient in firearms transactions will necessarily be a licensee. Placing the reporting obligation on the transferor/sender licensee accordingly assures that, for every firearms transaction covered by section 923(g)(6), there will be an FFL responsible for reporting the theft or loss of a firearm in transit. The Department believes that this will ensure consistent reporting of stolen or lost firearms, thereby fulfilling the GCA's purpose of ''strengthen[ing] Federal regulation of interstate firearms traffic,'' H.R. Rep. 90–1577 (1968), reprinted in 1968 U.S.C.C.A.N. 4410, 4412. Accordingly, this proposed rule specifies that, when a firearm is stolen or lost in transit on a common or contract carrier, for reporting purposes it is considered stolen or lost from the transferor's/sender's inventory. Therefore, the transferor/sender of the stolen or missing firearm must report the theft or loss to ATF and to the appropriate local authorities within 48 hours after the transferor/sender discovers the theft or loss.

With respect to firearms stolen or lost in transit between FFLs, the Department considered but did not adopt the Uniform Commercial Code's (UCC) variable approach to the transfer of title for risk of loss purposes. In the absence of State law governing the transfer of a firearm between seller and buyer, the UCC allows a seller and buyer to establish contractually when title to items sold passes from seller to buyer. If the sales contract requires the seller to deliver the goods to a particular destination, the risk of loss passes to the buyer when the buyer receives or is able to accept delivery of the goods. In this situation, the seller assumes the risk of goods stolen or lost in transit. If the contract does not require the seller to deliver the goods to a particular destination, the risk of loss passes to the buyer when the seller delivers the goods to a common or contract carrier for shipment. In this situation, the buyer assumes the risk of goods stolen or lost in transit. Had the Department chosen to adopt the UCC's variable risk of loss approach, the seller of the firearms would generally assume the risk of loss of firearms stolen or lost in transit when the contract requires the seller to deliver the firearms to a particular destination.

In any event, the Department has decided not to propose the variable UCC approach, which governs risk of loss, in the different context of allocating the responsibility for reporting to ATF the theft of loss of firearms in transit. Adopting the variable UCC approach for reporting firearms stolen or lost in transit would be problematic for FFLs to apply and for ATF to enforce. Rather than following a single, consistent rule holding the transferor/sender FFL responsible for reporting stolen or lost firearms, an FFL would need to examine each individual contract to determine who has reporting responsibility. For this same reason, it would be impracticable for ATF to ensure regulatory reporting compliance under the variable UCC approach. The UCC approach focuses on the ownership of the goods being shipped and allocating the risk of loss, but the primary focus of the GCA and its implementing regulations is, instead, the acquisition and disposition of firearms. Accordingly, the GCA theft or loss reporting and recordkeeping requirements must be complied with regardless of whether the seller or buyer has title to, or bears the risk of loss of, shipped firearms stolen or lost in transit.

Therefore, the Department proposes to assign the theft/loss reporting requirement to the transferor/sender FFL, who would know how and when any firearms sent to the transferee were shipped. The transferee has an incentive to notify the transferor about any discrepancies because the transferee will not want to pay for an item the transferee did not actually receive. Upon being contacted by the transferee about a shipment discrepancy, the transferor is then in the best position to verify the theft or loss by reviewing his or her transaction records and the shipping information from the carrier the transferor had utilized. The transferor may also discover that the discrepancy is due to a recordkeeping or other human error. Whether the transferee or transferor arranges the shipment, the transferor would know how and when the firearms were shipped, and reporting of the theft or loss remains with the transferor/sender FFL.

The proposed rule also applies to transfers from a licensee to a nonlicensee, including interstate shipments for firearms repair and replacement. In such transactions, the transferor/seller is the only FFL involved in the transaction, and

accordingly the FFL must assume responsibility for reporting to ATF if the shipment is lost or stolen in transit before the transferee acquires possession.

The proposed rule allows a transferor/sender to rely on notification from the transferee/buyer that the shipment was not received, and such notification triggers the reporting requirement. To ensure that a transferee/buyer receives a shipped firearm, the Department is soliciting comment on whether a transferor/sender should be required to obtain from the carrier that delivers the firearm a written or electronic confirmation of the shipment and receipt of the firearm showing the date, time, and place of receipt, and the name of the individual who accepted receipt. In addition, the Department seeks comments on whether the transferor/sender should be required to retain the confirmation with the transferor's/sender's required records.

The Department is also soliciting comment on the costs and benefits of requiring the transferor/sender to obtain from the carrier a confirmation of the shipment and retaining the confirmation in their records. How many shipments occur annually? To what extent do FFLs as part of their regular business practices already arrange to obtain a written or electronic confirmation from the common carrier or other shipper for such shipments? How often do FFLs retain records of confirmation currently? How might such requirements be developed so as to minimize any additional burden by meshing with the FFL's regular business practices?

The proposed rule retains most of the current procedures for licensees reporting the theft or loss of firearms subject to the GCA, in accordance with the instructions on Form 3310.11. For example, instruction 7 on Form 3310.11 provides that FFLs must reflect the theft or loss of a firearm as a disposition entry in the Record of Acquisition and Disposition that is required by subpart H of part 478. It also provides that the disposition entry should indicate whether the incident is a theft or loss, the ATF Issued Incident Report Number, and the Incident Number provided by the local law enforcement agency. The proposed rule sets out these procedures in new paragraph (e) of 27 CFR 478.39a with two modifications: (1) It prescribes a time period to reflect the theft or loss of a firearm as a disposition entry (i.e., not later than 7 days following discovery of the theft or loss; and (2) it requires, rather than recommends, that the disposition entry include specified information. The new, seven-day time-period for reporting is similar to the firearms receipt and disposition reporting requirement for licensed dealers in 27 CFR 478.125(e), which requires the ''sale or other disposition of a firearm'' to be recorded not later than 7 days following the date of such transaction. The Department considers a theft or loss to be a disposition that must be reported within this time period.

In addition, the ''Important Notice'' section of Form 3310.11 provides that licensees who report firearms as missing and later discover their whereabouts should advise ATF that the firearms have been located, and instruction 8 provides that licensees should re-enter these located firearms into the Record of Acquisition and Disposition as an acquisition entry. The proposed rule combines and sets out these procedures in new paragraph (f) of 27 CFR 478.39a with three modifications: (1) It changes the ''should advise ATF'' to ''shall advise the [ATF] Director''; (2) changes the ''should re-enter'' to ''shall re-enter''; and (3) specifies that the re-entry could be an acquisition or disposition entry as appropriate. Making mandatory both the advising of ATF and the re-entry of the located firearm into the Record of Acquisition and Disposition will help to improve the accuracy of NTC data, which will greatly assist law enforcement in solving violent crimes and enhancing public safety.

The proposed rule reduces a licensee's reporting burden to ATF for the theft or loss of a registered NFA firearm by allowing submission of one Form 3310.11 to meet the requirements of 27 CFR 478.39a and 27 CFR 479.141. Currently, as discussed in section I, if a licensee's registered NFA firearm is lost or stolen, the licensee prepares and submits Form 3310.11 to ATF's NTC to comply with 27 CFR 478.39a requirements, which specify that Form 3310.11 be used. The licensee also provides to ATF's NFA Branch a separate notification—typically in the form of a letter—to comply with 27 CFR 479.141. This proposed rule revises 27 CFR 478.39a to stipulate that a licensee's submission of a completed Form 3310.11 to ATF for the theft or loss of a registered NFA firearm satisfies the notification requirements pursuant to 27 CFR 478.39a and 27 CFR 479.141. This will reduce the licensee's reporting burden and help to ensure that information about the lost or stolen registered NFA firearm is consistently reported to the NFA Branch. As part of this rulemaking process, ATF proposes to revise Form 3310.11, and the corresponding instructions, to denote whether the firearm being reported as lost or stolen is a registered NFA firearm and to include the name and address of the person in whose name the firearm is registered. The Office of Management and Budget will review the proposed revisions to the form during the final rulemaking process, during which the public will have opportunity to comment on the paperwork burdens associated with the form.

IV. Statutory and Executive Order Reviews

A. Executive Orders 12866 and Executive Order 13563—Regulatory Review

This proposed rule has been drafted and reviewed in accordance with Executive Order 12866, ''Regulatory Planning and Review,'' section 1(b), The Principles of Regulation, and in accordance with Executive Order 13563, ''Improving Regulation and Regulatory Review,'' section 1(b), General Principles of Regulation.

The Department of Justice has determined that this proposed rule is a ''significant regulatory action'' under Executive Order 12866, section 3(f), and accordingly this proposed rule has been reviewed by the Office of Management and Budget. However, this proposed rule will not have an annual effect on the economy of $100 million or more; nor will it 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. Accordingly, this proposed rule is not an ''economically significant'' rulemaking under Executive Order 12866.

Executive Orders 12866 and 13563 both 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. The Department has assessed the costs and benefits of this proposed regulation and believes that the regulatory approach selected maximizes net benefits.

Under section 923(g)(6) of the GCA and its current implementing regulation, 27 CFR 478.39a, each FFL must report the theft or loss of a firearm from the licensee's inventory or collection within 48 hours after the theft or loss is discovered. The licensee must report the

theft or loss of a firearm to ATF and to the appropriate local authorities. Current regulations do not address reporting and recordkeeping requirements for firearms lost or stolen while in transit. This proposed rule specifies that when a firearm is stolen or lost in transit, for reporting purposes it is considered stolen or lost from the transferor's/sender's inventory.

The GCA and the current implementing regulations have long required that a licensee must report the theft or loss of a firearm. This proposed rule specifies the licensee required to submit the required report if a firearm is lost or stolen in transit on a common or contract carrier from a licensee to another person. This proposed rule retains most of the existing requirements under 27 CFR part 478, subpart H, and the instructions for Form 3310.11 with respect to how FFLs are to record the theft or loss of firearms from their inventories in the Record of Acquisition and Disposition.

The proposed rule would reduce the current reporting burden on licensees when the theft or loss involves a registered NFA firearm. Currently, as discussed in section I, licensees submit Form 3310.11 to NTC to comply with 27 CFR 478.39a, and, if the licensee is the person who lost the firearm, provide additional notification to the NFA Branch to comply with 27 CFR 479.141. In this proposed rule, a licensee, to meet 27 CFR 478.39a requirements, completes and submits Form 3310.11 to NTC. If the theft/loss involves a registered NFA firearm; NTC would notify the NFA Branch. This would satisfy 27 CFR 479.141 notification requirements; licensees would no longer have to submit additional notification to ATF.

Although there is no definitive count of the total number of firearms that were lost or stolen in transit, ATF can provide some sense of volume based on tracing data. From FY 2008 through FY 2012, there was an average of 1,525 crime gun traces per year where the firearm was traced back to an FFL that claimed it never received the firearm allegedly shipped to it, but no theft or loss was reported to ATF. These numbers reflect only those cases in which a firearms trace was initiated. The full count of firearms lost or stolen in transit that are not being reported to ATF is likely significantly higher than those traced. That ATF and local authorities do not have timely information about lost or stolen firearms adversely affects their investigation and tracing capabilities, and therefore poses public safety risks.

Pursuant to the instructions on Form 3310.11, a separate form is required for each theft/loss. ATF estimates that it takes an FFL 24 minutes to complete Form 3310.11; the postage cost to mail the form to NTC is 49 cents. If an FFL completed a separate Form 3310.11 for each of the average of 1,525 firearms that tracing data indicates are lost or stolen yearly but are not currently being reported,[1] ATF estimates the total burden hours to be 610 (1,525 × 24/60), and the current estimated cost is $20,005. (Cost of completing the form = 24 minutes at $31.57 per hour × 1,525 = $19,258; Cost of mailing the form = $.49 × 1,525 = $747). ATF estimated the cost of the time for an FFL to complete Form 3310.11 using employee compensation data for December 2013 as determined by the U.S. Department of Labor, Bureau of Labor Statistics (BLS). *See* Bureau of Labor Statistics, Employer Costs for Employee Compensation—December 2013, available at *http://www.bls.gov/news.release/pdf/ecec.pdf.* The BLS determined the hourly compensation (which includes wages, salaries, and benefits) for civilian workers to be $31.57.

The instructions on Form 3310.11 also provide that FFLs must report firearms thefts/losses by telephone to ATF. ATF estimates that it takes an FFL 24 minutes to call and provide the requisite information to ATF. If an FFL called ATF for each of the average of 1,525 firearms that tracing data indicates are lost or stolen yearly but are not currently being reported,[2] ATF estimates the total burden hours to be 610 (1,525 × 24/60), and the current estimated cost is $19,258 (24 minutes at $31.57 per hour × 1,525).

Therefore, the combined total estimated burden hours for submitting Form 3310.11 and calling ATF are 1,220 (610 + 610). The combined total estimated costs for fulfilling those same two requirements are $39,263 ($20,005 + $19,258).

Alternatives, such as the UCC variable approach discussed in Section III of this **SUPPLEMENTARY INFORMATION**, are more burdensome than the approach taken in this proposed rule. The UCC variable approach would be more burdensome for FFLs because, in each case, the FFLs would need to examine the terms of the individual contracts to determine how the contract allocates the risk of loss as between the two parties. In contrast, the proposed rule provides a simple, consistent rule so there is no basis for uncertainty or a need for additional review. For reporting purposes, the proposed rule assigns the theft/loss reporting requirement to the transferor/sender.

In addition, this proposed rule alleviates reporting burdens on licensees in that licensees need only report the theft or loss of a registered NFA firearm once to ATF, instead of reporting separately to NTC and the NFA Branch. As the licensee is basically providing the same information for both reporting requirements, ATF estimates that it takes the same amount of time and cost for postage, and uses the same hourly compensation as listed above (i.e., 24 minutes for time, 49 cents for postage, and $31.57 for hourly compensation). Currently, the NFA Branch receives notification on the theft/loss of a registered NFA firearm from approximately 60 licensees annually. ATF estimates the total burden hours to be 24 (60 × 24/60) and the total cost to be $787. (Cost of submitting the notification = 24 minutes at $31.57 per hour × 60 = $758; Cost of mailing the notification = $.49 × 60 = $29.00). Therefore, ATF estimates the savings to be these amounts.

B. Executive Order 13132

This proposed rule will not 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. Therefore, in accordance with section 6 of Executive Order 13132, ''Federalism,'' the Attorney General has determined that this proposed regulation does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

C. Executive Order 12988

This proposed rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, ''Civil Justice Reform.''

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 605(b)) 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

[1] As noted above, the full count of firearms lost or stolen in transit that are not being reported to ATF is likely significantly higher than the number discovered through tracing data. ATF nonetheless relies on the average of 1,525 firearms per year for this cost calculation because it is the best information available.

[2] See Footnote 1.

jurisdictions. The Attorney General has reviewed this proposed regulation and, by approving it, certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities.

Under section 923(g)(6) of the GCA and its implementing regulation, 27 CFR 478.39a, each FFL must report the theft or loss of a firearm from the licensee's inventory or collection within 48 hours after the theft or loss is discovered. The licensee must report the theft or loss of a firearm to ATF and to the appropriate local authorities. This proposed rule clarifies that when a firearm is stolen or lost in transit, for reporting purposes, it is considered stolen or lost from the transferor's/sender's inventory.

As discussed in section I, the current regulation requires that an FFL report thefts/losses telephonically to ATF and complete and submit to NTC a separate Form 3310.11 for each theft/loss. ATF estimates the time to complete the form as 24 minutes; the time for the telephone call as 24 minutes; and the postage cost as 49 cents. If an FFL called ATF to report the theft/loss, and completed a separate Form 3310 for each of the average of 1,525 firearms that tracing data indicates are lost or stolen yearly but are not currently reported, ATF estimates the total cost of completing and mailing the form and calling ATF to be $39,263. *See* section IV.A. for a full discussion of these costs. Therefore, this proposed rule will not impose a significant impact.

E. Small Business Regulatory Enforcement Fairness Act of 1996

This proposed rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. This proposed rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

F. Unfunded Mandates Reform Act of 1995

This proposed rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995. 2 U.S.C. 1532(a) and 1533(a).

G. Paperwork Reduction Act

This proposed rule would revise an existing reporting and recordkeeping requirement under the Paperwork Reduction Act. It also proposes to eliminate an existing reporting requirement. The current regulation at 27 CFR 478.39a provides that each FFL must report the theft or loss of a firearm from the licensee's inventory or collection within 48 hours after the theft or loss is discovered. Licensees must report to ATF such thefts or losses both telephonically and by preparing Form 3310.11. The licensee must also report the theft or loss of a firearm to the appropriate local authorities.

Pursuant to 27 CFR 479.141 and according to the instructions on Form 3310.11, licensees reporting the theft or loss of a registered NFA firearm must provide additional notification to ATF. As discussed previously in section I, no form exists for this purpose, and the person reporting typically submits a letter with the required information to the NFA Branch. As part of this rulemaking, ATF is proposing to revise Form 3310.11 to capture the information required by 27 CFR 479.141. Therefore, a licensee would be able to satisfy the required notification to the NFA Branch by submitting Form 3310.11 to NTC, and NTC will notify the NFA Branch. Submitting Form 3310.11 will satisfy both requirements under 27 CFR 478.39a and 27 CFR 479.141 with one notification.

In addition, Form 3310.11 instructions indicate that a licensee must reflect the theft or loss of a firearm as a disposition entry in the Record of Acquisition and Disposition required by subpart H of part 478. These instructions further state that the disposition entry should indicate whether the incident is a theft or loss, the ATF-issued Incident Report Number, and the Incident Number provided by the local law enforcement agency. Finally, the instructions indicate that should any of the firearms be located, they should be re-entered into the Record of Acquisition and Disposition as an acquisition entry. The proposed rule adds both sets of these instructions to the regulatory text in 27 CFR 478.39a with modifications. See section III for full discussion of these revisions.

The collections of information contained in 27 CFR 478.39a relate to Form 3310.11 and have been approved by the Office of Management and Budget under control number 1140–0039. This proposed rule specifies that when a firearm is stolen or lost in transit, for reporting purposes, it is considered stolen or lost from the transferor's/sender's inventory.

ATF is submitting a request to revise currently approved OMB control number 1140–0039. ATF requests public comments on all aspects of this proposed revised collection, including comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- enhance the quality, utility, and clarity of the information to be collected; and
- minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

The estimated total annual burden hours and related information (number of respondents, frequency of responses, costs, etc.) for the proposed revisions to Form 3310.11 appear below.

OMB No.: 1140–0039.

Estimated total annual reporting and/or recordkeeping burden: 2,210 hours.

Estimated average burden hours per respondent and/or recordkeeper: 24 minutes.

Estimated number of annual respondents and/or recordkeepers: 1,525.

Estimated annual frequency of responses: 1.

Public Participation

A. Comments Sought

ATF is requesting comments on the proposed rule from all interested persons. ATF is also specifically requesting comments on the clarity of this proposed rule and how it may be made easier to understand.

Comments submitted in response to ATF's previous proposed rule relating to firearms stolen or lost in transit (Notice No. 902, August 28, 2000, 65 FR 52054), if applicable, must be resubmitted for purposes of this rulemaking proceeding.

All comments must reference this document docket number (ATF 40P), be legible, and include your name and mailing address. ATF will treat all comments as originals and will not acknowledge receipt of comments.

Comments received on or before the closing date will be carefully considered. Comments received after that date will be given the same consideration if it is practical to do so, but assurance of consideration cannot be given except as to comments received on or before the closing date.

B. Confidentiality

Comments, whether submitted electronically or in paper, will be made available for public viewing at ATF, and on the Internet as part of the eRulemaking initiative, and are subject to the Freedom of Information Act. Commenters who do not want their name or other personal identifying information posted on the Internet should submit their comment by mail or facsimile, along with a separate cover sheet that contains their personal identifying information. Both the cover sheet and comment must reference this docket number. Information contained in the cover sheet will not be posted on the Internet. Any personal identifying information that appears within the comment will be posted on the Internet and will not be redacted by ATF.

Any material that the commenter considers to be inappropriate for disclosure to the public should not be included in the comment. Any person submitting a comment shall specifically designate that portion (if any) of his comments that contains material that is confidential under law (e.g., trade secrets, processes, etc.). Any portion of a comment that is confidential under law shall be set forth on pages separate from the balance of the comment and shall be prominently marked ''confidential'' at the top of each page. Confidential information will be included in the rulemaking record but will not be disclosed to the public. Any comments containing material that is not confidential under law may be disclosed to the public. In any event, the name of the person submitting a comment is not exempt from disclosure.

C. Submitting Comments

Comments may be submitted in any of three ways:

• *Mail:* Send written comments to the address listed in the **ADDRESSES** section of this document. Written comments must appear in minimum 12-point font size (.17 inches), include your mailing address, be signed, and may be of any length.

• *Facsimile:* You may submit comments by facsimile transmission to (202) 648–9741. Faxed comments must:

(1) Be legible and appear in minimum 12-point font size (.17 inches);

(2) Be on 8½″ × 11″ paper;

(3) Contain a legible, written signature; and

(4) Be no more than five pages long. ATF will not accept faxed comments that exceed five pages.

• *Federal eRulemaking Portal:* To submit comments to ATF via the Federal eRulemaking portal, visit *http://www.regulations.gov* and follow the instructions for submitting comments.

D. Request for Hearing

Any interested person who desires an opportunity to comment orally at a public hearing should submit his or her request, in writing, to the Director of ATF within the 90-day comment period. The Director, however, reserves the right to determine, in light of all circumstances, whether a public hearing is necessary.

Disclosure

Copies of this proposed rule and the comments received will be available for public inspection by appointment during normal business hours at: ATF Reading Room, Room 1E–062, 99 New York Avenue NE., Washington, DC 20226; telephone: (202) 648–8740.

Drafting Information

The author of this document is Brenda Raffath Friend, Office of Regulatory Affairs, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives.

List of Subjects in 27 CFR Part 478

Administrative practice and procedure, Arms and ammunition, Authority delegations, Customs duties and inspection, Domestic violence, Exports, Imports, Law enforcement personnel, Military personnel, Nonimmigrant aliens, Penalties, Reporting and recordkeeping requirements, Research, Seizures and forfeitures, Transportation.

Authority and Issuance

Accordingly, for the reasons discussed in the preamble, 27 CFR part 478 is proposed to be amended as follows:

PART 478—COMMERCE IN FIREARMS AND AMMUNITION

■ 1. The authority citation for 27 CFR part 478 is revised to read as follows:

Authority: 5 U.S.C. 552(a); 18 U.S.C. 921–931; 44 U.S.C. 3504(h).

■ 2. Revise § 478.39a to read as follows:

§ 478.39a Reporting theft or loss of firearms.

(a)(1) Each licensee shall report the theft or loss of a firearm from the licensee's inventory (including any firearm which has been transferred from the licensee's inventory to a personal collection and held as a personal firearm for at least 1 year), or from the collection of a licensed collector, within 48 hours after the theft or loss is discovered.

(2) When a firearm is stolen or lost in transit on a common or contract carrier, it is considered stolen or lost from the transferor's/sender's inventory for reporting purposes. Therefore, the transferor/sender of the stolen or missing firearm shall report the theft or loss of the firearm within 48 hours after the transferor/sender discovers the theft or loss.

(b) Each licensee shall report the theft or loss by telephoning ATF at 1–888–930–9275 (nationwide toll free number), and by preparing and submitting to ATF a Federal Firearms Licensee Theft/Loss Report, ATF Form 3310.11, in accordance with the instructions on the form. The original of the report shall be retained by the licensee as part of the licensee's required records.

(c) When a licensee submits to ATF a Federal Firearms Licensee Theft/Loss Report, ATF Form 3310.11, for the theft or loss of a firearm registered under the National Firearms Act, this also satisfies the notification requirement under § 479.141 of this chapter.

(d) Theft or loss of any firearm shall also be reported to the appropriate local authorities.

(e) Licensees shall reflect the theft or loss of a firearm as a disposition entry in the Record of Acquisition and Disposition required by subpart H of this part, not later than 7 days following discovery of the theft or loss. The disposition entry shall record whether the incident is a theft or loss, the ATF-issued Incident Report Number, and the Incident Number provided by the local law enforcement agency.

(f) Licensees who report the theft or loss of a firearm and later discover its whereabouts shall advise the Director that the firearm has been located, and shall re-enter the firearm in the Record of Acquisition and Disposition as an acquisition or disposition entry as appropriate.

Dated: August 4, 2014.

Eric H. Holder, Jr.,

Attorney General.

[FR Doc. 2014–18874 Filed 8–11–14; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket Number USCG–2014–0636]

RIN 1625–AA08

Special Local Regulations for Marine Events, Patuxent River; Solomons, MD

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to temporarily change the enforcement periods of special local regulations for a recurring marine event in the Fifth Coast Guard District. These regulations apply to the Chesapeake Challenge power boat race, a recurring marine event, and would be effective from October 4, 2014, to October 5, 2014. Special local regulations are necessary to provide for the safety of life on navigable waters during the event. This action is intended to restrict vessel traffic in a portion of the Patuxent River at Solomons, MD during the event.

DATES: Comments and related material must be received by the Coast Guard on or before September 11, 2014.

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

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

(2) *Fax:* 202–493–2251.

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

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

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Mr. Ronald Houck, U.S. Coast Guard Sector Baltimore, MD; telephone 410–576–2674, email *Ronald.L.Houck@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Cheryl Collins, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

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

A. Public Participation and Request for Comments

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

1. Submitting Comments

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

To submit your comment online, go to *http://www.regulations.gov,* type the docket number [USCG–2014–0636] in the ''SEARCH'' box and click ''SEARCH.'' Click on ''Submit a Comment'' on the line associated with this rulemaking.

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

2. Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number (USCG–2014–0636) in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

3. Privacy Act

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

4. Public Meeting

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

B. Regulatory History and Information

This marine event is regulated at 33 CFR 100.501. The dates of the event as published are September 2nd, 3rd or 4th (Friday, Saturday and Sunday).

C. Basis and Purpose

The legal basis and authorities for this rulemaking establishing a special local regulation are found in *33 U.S.C. 1233*, which authorize the Coast Guard to establish and define special local regulations. The Captain of the Port Baltimore is establishing a special local regulation for the waters of the Patuxent River, near Solomons, MD to protect event participants, spectators and transiting vessels. Entry into this area is prohibited unless specifically authorized by the Captain of the Port Baltimore or designated representative.

D. Discussion of Proposed Rule

Marine events are frequently held on the navigable waters within the boundary of the Fifth Coast Guard District. The activities that typically comprise marine events include but are not limited to sailing regattas, power boat races, swim races and holiday parades. The regulation listing annual marine events within the Fifth Coast Guard District and their regulated dates

is 33 CFR 100.501. The Table to § 100.501 identifies marine events by Captain of the Port zone. For a description of the geographical area of each Coast Guard Sector—Captain of the Port Zone, please see 33 CFR 3.25.

Event planners notified the Coast Guard of date changes for the ''Chesapeake Challenge'' marine event that is listed at 33 CFR 100.501, Table to § 100.501. This regulation temporarily changes the enforcement periods for this marine event for 2014 only. The enforcement dates for 2014 are October 4, 2014, and October 5, 2014.

The annual ''Chesapeake Challenge,'' marine event is sponsored by the Chesapeake Bay Powerboat Association; and takes place on the waters of the Patuxent River at Solomons, MD. The regulation at 33 CFR 100.501 is effective annually for the Chesapeake Challenge marine event. The event consists of power boat racing on the waters of the Patuxent River at Solomons, MD. Participants operate on a marked course with sponsor-provided support craft. Therefore, to ensure the safety of participants and support vessels, 33 CFR 100.501 is enforced for the duration of the event. During the enforcement period vessels may not enter the regulated area unless they receive permission from the Coast Guard Patrol Commander. Vessel traffic may contact the Coast Guard Patrol Commander to request permission to pass through the regulated area. If permission is granted, vessels must pass directly through the regulated area at safe speed and without loitering. Spectators are only allowed inside the regulated area if they remain within the designated spectator area.

E. Regulatory Analyses

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

1. Regulatory Planning and Review

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

The economic impact of this rule is not significant for the following reasons: (i) The regulated area will be in effect for a limited duration; (ii) the regulated area has been narrowly tailored to impose the least impact on general navigation, yet provide the level of safety deemed necessary; and (iii) advance notifications will be made to the maritime community via marine information broadcasts and local notices to mariners, so mariners can adjust their plans accordingly. Additionally, this rulemaking does not change the permanent regulated areas that have been published in 33 CFR 100.501, Table to § 100.501. In some cases, vessel traffic may be able to transit the regulated area when the Coast Guard Patrol Commander grants permission to do so. For the above reasons, the Coast Guard does not anticipate any significant economic impact.

2. Impact on Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered the impact of this proposed rule on small entities. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule will not have a significant economic impact on a substantial number of small entities.

This rule may affect the following entities, some of which may be small entities: The owners or operators of vessels intending to enter, transit through, anchor in, or remain within the area where the marine event is being held. This regulation will not have a significant impact on a substantial number of small entities because it will be enforced only during a marine event that has been permitted by the Coast Guard Captain of the Port. The Captain of the Port will ensure that small entities are able to operate in the area where the event is occurring by requesting permission from the Coast Guard Patrol Commander. Vessels may transit through the regulated area with the permission of the Patrol Commander. In some cases, vessels will be able to safely transit around the regulated area. Before the enforcement period, the Coast Guard will issue maritime advisories so mariners can adjust their plans accordingly.

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

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT**, above. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

4. Collection of Information

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

5. Federalism

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

6. Protest Activities

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

7. Unfunded Mandates Reform Act

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

8. Taking of Private Property

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

Constitutionally Protected Property Rights.

9. Civil Justice Reform

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

10. Protection of Children From Environmental Health Risks

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

11. Indian Tribal Governments

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

12. Energy Effects

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

13. Technical Standards

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

14. Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves implementation of regulations within 33 CFR Part 100 applicable to organized marine events on the navigable waters of the United States that could negatively impact the safety of waterway users and shore side activities in the event area. The category of water activities includes but is not limited to sail boat regattas, boat parades, power boat racing, swimming events, crew racing, canoe and sail board racing. This rule is categorically excluded from further review under paragraph 34(h) of Figure 2–1 of the Commandant Instruction. A preliminary environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 100

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

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

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

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

Authority: 33 U.S.C. 1233.

■ 2. In § 100.501:

■ a. In the Table to § 100.501, temporarily suspend line No. (b.)20; and

■ b. Add temporary line No. (b.)24 to the Table to § 100.501 to read as follows:

§ 100.501 Special Local Regulations; Marine Event in the Fifth Coast Guard District.

* * * * *

TABLE TO § 100.501

[All coordinates listed in the Table to § 100.501 reference Datum NAD 1983]

No.	Date	Event	Sponsor	Location
*	*	*	*	* * *
Coast Guard Sector Baltimore—COTP Zone				
*	*	*	*	* * *
24.	October 4 and 5, 2014.	Chesapeake Challenge.	Chesapeake Bay Powerboat Association.	All waters of the Patuxent River, within boundary lines connecting the following positions; originating near north entrance of MD Route 4 bridge, latitude 38° 19′ 45″ N, longitude 076° 28′ 06″ W, thence southwest to south entrance of MD Route 4 bridge, latitude 38° 19′ 24″ N, longitude 076° 28′ 30″ W, thence south to a point near the shoreline, latitude 38° 18′ 32″ N, longitude 076° 28′ 14″ W, thence southeast to a point near the shoreline, latitude 38° 17′ 38″ N, longitude 076° 27′ 26″ W, thence northeast to latitude 38° 18′ 00″ N, longitude 076° 26′ 41″ W, thence northwest to latitude 38° 18′ 59″ N, longitude 076° 27′ 20″ W, located at Solomons, MD, thence continuing northwest and parallel to shoreline to point of origin.
*	*	*	*	* * *

Dated: July 28, 2014.

M.M. Dean,

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

[FR Doc. 2014–19072 Filed 8–11–14; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2014–0511; FRL– 9915–04–Region 3]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; Removal of Two Operating Permits and a Consent Agreement for the Potomac River Generating Station From the State Implementation Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) proposes to approve the State Implementation Plan (SIP) revision submitted by the Commonwealth of Virginia removing from the Virginia SIP two operating permits and a consent agreement for GenOn Potomac River, LLC's Potomac River Generating Station which was formerly owned by Potomac Electric Power Company. In the Final Rules section of this **Federal Register**, EPA is approving the Commonwealth's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

DATES: Comments must be received in writing by September 11, 2014.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2014–0511 by one of the following methods:

A. *www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *Email: fernandez.cristina@epa.gov.*

C. *Mail:* EPA–R03–OAR–2014–0511, Cristina Fernandez, Associate Director, Office of Air Quality Planning, Mailcode 3AP30, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2014–0511. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

FOR FURTHER INFORMATION CONTACT: Gregory Becoat, (215) 814–2036, or by email at *becoat.gregory@epa.gov.*

SUPPLEMENTARY INFORMATION: For further information, please see the information provided in the direct final action, with the same title, that is located in the ''Rules and Regulations'' section of this **Federal Register** publication.

Dated: July 29, 2014.

W.C. Early,

Acting Regional Administrator, Region III.

[FR Doc. 2014–18927 Filed 8–11–14; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–HQ–SFUND–1983–0002; FRL–9914–91–Region 8]

National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List: Partial Deletion of the California Gulch Superfund Site

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule; notice of intent.

SUMMARY: The Environmental Protection Agency (EPA) Region 8 is issuing a Notice of Intent to Delete the Operable Unit 4, (OU4) Upper California Gulch; Operable Unit 5 (OU5), ASARCO Smelters/Slag/Mill Sites; and Operable Unit 7 (OU7), Apache Tailing Impoundment, of the California Gulch Superfund Site (Site), located in Lake County, Colorado, from the National Priorities List (NPL) and requests public comments on this proposed action. The NPL, promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended, is an appendix of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). The EPA and the State of Colorado, through the Colorado Department of Public Health and the Environment, have determined that all appropriate response actions at OU4, OU5 and OU7 under CERCLA, other than operation, maintenance, and five-year reviews, have been completed. However, this deletion does not preclude future actions under Superfund.

This partial deletion pertains to all of OU4, OU5 and OU7. Operable Unit 2 (OU2), Malta Gulch Tailing Impoundments and Lower Malta Gulch Fluvial Tailing; Operable Unit 8 (OU8), Lower California Gulch; Operable Unit 9 (OU9), Residential Populated Areas; and Operable Unit 10 (OU10), Oregon Gulch, were previously partially deleted from the NPL. Operable Unit 1 (OU1), the Yak Tunnel; Operable Unit 3 (OU3), D&RGW Slag Piles and Easement; Operable Unit 6 (OU6), Stray Horse Gulch; Operable Unit 11 (OU11), Arkansas River Floodplain; and Operable Unit 12 (OU12), Site-wide Surface and Groundwater Quality, are not being considered for deletion as part of this action and will remain on the NPL.

DATES: Comments must be received by September 11, 2014.

ADDRESSES: Submit your comments, identified by Docket ID no. EPA–HQ–SFUND–1983–0002, by mail to Linda Kiefer, Remedial Project Manager, Environmental Protection Agency, Region 8, Mail Code 8EPR–SR, 1595 Wynkoop Street, Denver, CO 80202–1129. Comments may also be submitted electronically or through hand delivery/courier by following the detailed instructions in the **ADDRESSES** section of the direct final rule located in the rules section of this **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Linda Kiefer, Remedial Project Manager, Environmental Protection Agency, Region 8, Mail Code 8EPR–SR, 1595 Wynkoop Street, Denver, CO 80202–1129, (303) 312–6689, email: *kiefer.linda@epa.gov*.

SUPPLEMENTARY INFORMATION: In the ''Rules and Regulations'' Section of today's **Federal Register**, we are publishing a direct final Notice of Partial Deletion for all of OU4, OU5 and OU7 of the California Gulch Superfund Site without prior Notice of Intent for Partial Deletion because EPA views this as a noncontroversial revision and anticipates no adverse comment. We have explained our reasons for this partial deletion in the preamble to the direct final Notice of Partial Deletion, and those reasons are incorporated herein. If we receive no adverse comment(s) on this partial deletion action, we will not take further action on this Notice of Intent for Partial Deletion. If we receive adverse comment(s), we will withdraw the direct final Notice of Partial Deletion and it will not take effect. We will, as appropriate, address all public comments in a subsequent final Notice of Partial Deletion based on this Notice of Intent for Partial Deletion. We will not institute a second comment period on this Notice of Intent for Partial Deletion. Any parties interested in commenting must do so at this time.

For additional information, see the direct final Notice of Partial Deletion which is located in the Rules section of this **Federal Register**.

List of Subjects in 40 CFR Part 300

Environmental protection, Reporting and recordkeeping requirements, Superfund.

Authority: 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601–9657; E.O. 13626, 77 FR 56749, 3 CFR, 2013 Comp., p.306; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p.351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p.193.

Dated: July 31, 2014.

Shaun L. McGrath,

Regional Administrator, Region 8.

[FR Doc. 2014–18954 Filed 8–11–14; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

48 CFR Parts 1536 and 1537

[EPA–HQ–OARM–2013–0370; FRL–9915–11–OARM]

Acquisition Regulation; Update to Construction and Architect-Engineer and Key Personnel Requirements

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) proposes to amend the EPA Acquisition Regulation (EPAAR) to remove the evaluation of contracting performance and incorporate flexibility to identify the required number of days of key personnel commitment during the early stages of contractor performance under the Key Personnel clause. The proposed rule also provides for minor edits of an administrative nature.

DATES: Comments must be received on or before September 11, 2014.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OARM–2013–0370, by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *Email: humphries.daniel@epa.gov*
- *Mail:* EPA–HQ–OARM–2013–0370, OEI Docket, Environmental Protection Agency, 2822T, 1200 Pennsylvania Ave. NW., Washington, DC 20460. Please include a total of three (3) copies.
- *Hand Delivery:* EPA Docket Center-Attention OEI Docket, EPA West, Room B102, 1301 Constitution Ave. NW., Washington, DC 20004. 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–OARM–2013–0370. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket, and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment, and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties, and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the docket are listed in the *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 Office of Environmental Information (OEI) Docket, EPA/DC, EPA West, 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 EPA Docket Center is (202) 566–1752. This Docket Facility is open from 8:30 a.m. to 4:30 p.m. Monday through Friday, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT:

Daniel Humphries, Policy, Training, and Oversight Division, Office of Acquisition Management (3802R), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: (202) 564–4377; email address: *humphries.daniel@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

1. *Submitting CBI.* Do not submit this information to EPA through *www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI, and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- 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. Background

EPA is updating the EPAAR to remove section 1536.201 on the evaluation of contractor performance under construction contracts and the incorporation of flexibilities provided by a class deviation to the Key Personnel requirements under part 1537. Upon review of the EPAAR, it was determined that the EPAAR requirement for the evaluation of construction contracts should be removed as it was superseded by FAR 42.1502. Additionally, under EPAAR 1552.237–72, EPA proposes to provide contracting officers with the flexibility to identify the required number of days of key personnel commitment during the early stages of contractor performance. The length of time will be based on the requirements of individual acquisitions when continued assignment is essential to the successful implementation of the program's mission. Contracting officers may include a different number of days in excess of the ninety (90) days included in the clause, if approved at one level above the Contracting Officer. And finally, the proposed rule provides minor administrative edits in the EPAAR sections identified.

III. Proposed Rule

This proposed rule includes the following content changes: (1) Removes 1536.201 Evaluation of contracting performance. (2) Provides administrative updates and adds Chief of the Contracting Office (CCO) to 1536.209(c). (3) Under 1536.521, updates the term ''small purchases'' with ''simplified acquisition threshold.'' (4) Under 1537.110(b) the term ''contracting officer's technical representative(s)'' is replaced by ''Contracting Officer's Representative(s).'' (5) Amends 1537.110(c) to incorporate the flexibilities provided by a class deviation to the Key Personnel requirements. (6) Remove ''CFR 48'' from 1537.110.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

This action is not a ''significant regulatory action'' under the terms of Executive Order (EO) 12866 (58 FR 51735, October 4, 1993) and therefore, not subject to review under the EO.

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.* No information is collected under this action.

C. 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 Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative 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 impact of this rule on small entities, ''small entity'' is defined as: (1) A small business that meets the definition of a small business found in the Small Business Act and codified 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 this rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This action revises a current EPAAR provision and does not impose requirements involving capital investment, implementing procedures, or record keeping. This rule will not have a significant economic impact on small entities.

D. 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.

This rule contains no Federal mandates (under the regulatory provisions of the Title II of the UMRA) for State, Local, and Tribal governments or the private sector. The rule imposes no enforceable duty on any State, Local or Tribal governments or the private sector. Thus, the rule is not subject to the requirements of sections 202 and 205 of the UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), 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.''

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

F. Executive Order 13175: Consultation and 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 rule does not have tribal implications as specified in Executive Order 13175.

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

Executive Order 13045, entitled ''Protection of Children from Environmental Health 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 12886, and (2) concerns an environmental health or safety risk that may have a proportionate effect on children. This rule is not subject to Executive Order 13045 because it is not an economically significant rule as defined by Executive Order 12866, and because it does not involve decisions on environmental health or safety risks.

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

This proposed rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use'' (66 FR 28335, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act of 1995 (NTTAA)

Section 12(d) (15 U.S.C. 272 note) of NTTA, Public Law 104–113, 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. The NTTA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering 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 proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. This proposed rulemaking does not involve human health or environmental effects.

List of Subjects in 48 CFR Parts 1536 and 1537

Environmental protection, Government procurement.

Dated: August 5, 2014.

John R. Bashista,

Director, Office of Acquisition Management.

Therefore, 48 CFR Chapter 15 is proposed to be amended as set forth below:

PART 1536—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

■ 1. The authority citation for part 1536 continues to read as follows:

Authority: 5 U.S.C. 301; Sec. 205 (c), 63 Stat. 390, as amended, 40 U.S.C. 486(c); and 41 U.S.C. 418b.

1536.201 [Removed]

■ 2. Remove 536.201.

1536.209 [Amended]

■ 3. Amend 1536.209, paragraph (c), by removing the acronyms ''CCO'' and ''RAD'' and adding, in their place, the words ''Chief of the Contracting Office''.

■ 4. Revise 1536.521 to read as follows:

1536.521 Specifications and drawings for construction.

The Contracting Officer shall insert the clause at 1552.236–70, Samples and Certificates, in solicitations and contracts when a fixed price construction contract is expected to exceed the simplified acquisition threshold. The clause may be inserted in solicitations and contracts when the contract is expected to be within the simplified acquisition threshold.

PART 1537—SERVICE CONTRACTING

■ 5. The authority citation for part 1537 continues to read as follows:

Authority: Sec. 205 (c), 63 Stat. 390, as amended, 40 U.S.C. 486(c).

■ 6. Amend 1537.110 by revising paragraphs (b) and (c) and, in paragraph (f), by removing the phrase ''48 CFR'' to read as follows:

1537.110 Solicitation provisions and contract clauses.

* * * * *

(b) The Contracting Officer shall insert a clause substantially the same as the clause in 1552.237–71, Technical Direction, in solicitations and contracts where the Contracting Officer intends to delegate authority to issue technical direction to the Contracting Officer's Representative(s).

(c) The Contracting Officer shall insert the clause at 1552.237–72, Key Personnel, in solicitations and contracts when it is necessary for contract performance to identify Contractor key personnel. Contracting Officers have the flexibility to identify the required number of days of key personnel commitment during the early stages of

contractor performance. The length of time will be based on the requirements of individual acquisitions when continued assignment is essential to the successful implementation of the program's mission. Therefore, Contracting Officers may use a clause substantially the same as in EPAAR 1552.237–72, regarding substitution of key personnel. Contracting Officers may include a different number of days in excess of the ninety (90) days included in this clause, if approved at one level above the Contracting Officer.

* * * * *

[FR Doc. 2014–19028 Filed 8–11–14; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 105, 107, and 171

[Docket No. PHMSA–2012–0260 (HM–233E)]

RIN 2137–AE99

Hazardous Materials: Special Permit and Approvals Standard Operating Procedures and Evaluation Process

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: PHMSA is proposing to address certain matters identified in the Hazardous Materials Transportation Safety Act of 2012 related to the Office of Hazardous Materials Safety's Approvals and Permits Division. Specifically, we propose to revise the regulations to include the standard operating procedures and criteria used to evaluate applications for special permits and approvals. These proposed amendments do not change previously established special permit and approval policies. This rulemaking also proposes to provide clarity regarding what conditions need to be satisfied to promote completeness of the applications submitted. An application that contains the required information reduces processing delays that result from rejection, and further facilitates the transportation of hazardous materials in commerce while maintaining an appropriate level of safety.

DATES: Comments must be received by October 14, 2014. To the extent possible, PHMSA will consider late-filed comments as a final rule is developed.

ADDRESSES: You may submit comments by identification of the docket number (PHMSA–2012–0260 (HM–233E)) by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Operations, U.S. Department of Transportation, West Building, Ground Floor, Room W12–140, Routing Symbol M–30, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* To Docket Operations, Room W12–140 on the ground floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the agency name and docket number for this notice at the beginning of the comment. All comments received will be posted without change to the Federal Docket Management System (FDMS), including any personal information.

Docket: For access to the dockets to read background documents or comments received, go to *http://www.regulations.gov* or DOT's Docket Operations Office (see **ADDRESSES**).

FOR FURTHER INFORMATION CONTACT: Donald Burger, Office of Hazardous Materials Safety, Approvals and Permits Division, (202) 366–4535 or Eileen Edmonson, Office of Hazardous Materials Safety, Standards and Rulemaking Division, (202) 366–8553, Pipeline and Hazardous Materials Safety Administration (PHMSA), 1200 New Jersey Avenue SE., Washington, DC 20590.

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I. Executive Summary

On July 6, 2012, the President signed the Moving Ahead for Progress in the 21st Century Act (MAP–21), which includes the Hazardous Materials Transportation Safety Improvement Act of 2012 (HMTSIA) as Title III of the statute. See Public Law 112–141, 126 Stat. 405, July 6, 2012. Under § 33012 of HMTSIA, Congress directed the U.S. Department of Transportation (Department or DOT) to issue a rulemaking to provide:

- Standard operating procedures (SOPs) to support the administration of the special permit and approval programs; and
- Objective criteria to support the evaluation of special permit and approval applications.

In this NPRM, we are proposing to provide the public with notice and an opportunity to comment on the procedures PHMSA currently uses to support the administration of its special permits and approvals programs with the intent of eventually adding these procedures to a new Appendix A to Part 107, Subpart B of the 49 CFR. Incorporation of SOPs and objective criteria to support the evaluation of special permits and approvals accomplishes the mandate under § 33012 of MAP–21.

The benefits of this NPRM include: increasing the public's understanding of the special permit and approval application and renewal process, improving the quality of information and completeness of applications submitted, and improving application processing times. This NPRM does not impose any additional costs on industry. This proposed rule would affect only agency procedures; therefore, we assume no change in current costs or benefits.

II. Background

A. MAP–21

To assist PHMSA with managing its special permit and approval programs, Federal hazardous materials (hazmat) transportation law (law) requires PHMSA to ''. . . issue regulations that establish—(1) standard operating procedures to support administration of the special permit and approval programs; and (2) objective criteria to support the evaluation of special permit and approval applications.'' See 49 U.S.C. 33012(a)(1) and (a)(2). PHMSA established a work group in July 2012 to examine ways to streamline the fitness review process while maintaining an acceptable level of safety, and to define and determine the adequacy of criteria that should be used to initiate fitness reviews. As a result of this workgroup's efforts, PHMSA is proposing in this NPRM to add updated SOP and evaluation criteria we currently use to process special permit and approval applications into the Hazardous Materials Regulations (HMR; 49 CFR Parts 171–180).

The HMR prescribe regulations for the transportation of hazardous materials in commerce. PHMSA issues variances from the HMR in the form of a ''special permit.'' It also provides written consent to perform a function that requires prior consent under the HMR in the form of an ''approval.'' These variances are designed to accommodate innovation, provide consent, and allow alternatives that meet existing transportation safety standards and/or ensure hazardous materials transportation safety. Federal hazmat law directs the Department to determine if the actions specified in each application for a special permit establish a level of safety that meets or exceeds that already present in the HMR, or if not present in the HMR establish a level of safety that is consistent with the public's interest. PHMSA, through the HMR, applies these same conditions to the issuance of an approval. Due to the unique features that may exist in each application, PHMSA issues special permits and approvals on a case-by-case basis.

The HMR currently define a special permit as ''a document issued by the Associate Administrator [for Hazardous Materials Safety, herein described as 'Associate Administrator'], or other designated Department official, under the authority of 49 U.S.C. 5117 permitting a person to perform a function that is not otherwise permitted under'' the regulations ''or other regulations issued under 49 U.S.C. 5101 *et seq.* (e.g., Federal Motor Carrier Safety routing requirements).'' (See 49 CFR 105.5, 107.1, and 171.8.) An approval is currently defined in the HMR as ''written consent from the Associate Administrator or other designated Department official, to perform a function that requires prior consent under'' the HMR. (See § 171.8.) Applicants who apply for a special permit must do so in conformance with the requirements prescribed in §§ 107.101 to 107.127. Applicants who apply for an approval must do so in conformance with the requirements prescribed in §§ 107.401 to 107.404, and §§ 107.701 to 107.717. In the following section, we describe the history of PHMSA's SOPs for its special permit and approval programs and the evaluation criteria we currently use to process special permit and approval applications.

B. Standard Operating Procedures

In the mid-2000's, PHMSA, in conjunction with the DOT's Office of the Secretary, conducted an internal agency review of its special permit and approval program practices. This review indicated that some active special permit holders that were no longer in business had used their special permit in locations not designated in the application, changed company names and locations without informing the agency, or otherwise used their special permit in ways not authorized in the special permit. The Department determined that PHMSA's current practices for assessing the fitness of its special permit and approval holders needed improvement. During the mid and late 2000's, PHMSA experienced an increase in special permit and approval applications while it simultaneously revised its computer software for processing these applications.

In 2009, PHMSA revised its procedures for processing and evaluating special permits and converted them into SOPs for its Special Permits Program. In 2011, PHMSA revised its SOPs for its Approvals Program. As a result of ongoing program evaluation, PHMSA has periodically updated these SOPs to include recommendations, refine its processes, increase uniformity, and respond to upgrades to its data management systems. Further, we discontinued the practice of allowing party status (also referred to as ''party-to'' status) to an applicable special permit to large associations, instead requiring each holder to apply separately for party status. Party status is granted to a person who intends to offer for transportation or transport a hazardous material, or perform an activity subject to the HMR, in the same manner as the original applicant. We have also issued several rulemakings to incorporate into the HMR special permits that are generally applicable and have a safe performance history. Although PHMSA has incorporated more special permits into the HMR in recent years, requiring individual persons to apply for party status on existing special permits has increased the number of special permit applications received and, thus, the time needed to process them. PHMSA receives approximately 3,000 special permit applications and approximately 20,000 approval applications annually.

To avoid additional processing delays for the special permit and approvals programs, PHMSA has revised its SOPs to change how it manages incomplete applications from the practice of ''retaining them while requesting and waiting for missing information'' to ''rejecting incomplete applications.'' Applicants who would like to have their applications reconsidered must resubmit the entire application along with the requested missing information. PHMSA informs applicants in writing of the reason for the rejection and what information is missing from their applications. In the past, some individuals in receipt of rejected applications communicated to PHMSA that the materials they received did not explain how or exactly what was to be resubmitted, which led to more incomplete submissions and processing delays. PHMSA seeks comments on ways to improve the effectiveness of its communications and the completeness of applications it receives.

If, according to the HMR, a special permit or approval application is complete but PHMSA requires an on-site review or additional information to make an appropriate determination, PHMSA may make this request within 30 days of its receipt of an application for a special permit, modification of a special permit, or party to a special permit, and within 15 days of PHMSA's receipt of an application for renewal of a special permit (see § 107.133(a)). The applicant has 30 days from the day it

receives this request in writing to provide the information. If the applicant does not respond to a written request for additional information within 30 days of the date the request was received, PHMSA may deem the application incomplete and deny it. However, if the applicant responds in writing within the 30-day period requesting an additional 30 days within which it will gather the requested information, the Associate Administrator may grant the 30-day extension. Over the past year, PHMSA has received fewer complaints from applicants about this phase of the special permit and approval review processes.

C. Fitness

In 1996, PHMSA amended the HMR so that it *may* [emphasis added] issue a special permit and/or approval upon finding that ''the applicant is fit to conduct the activity authorized'' by the special permit and/or approval, and the special permit's or approval's renewal or modifications. See Docket No. HM–207C, 61 FR 21084. We later revised these provisions on January 5, 2011, in a final rule, entitled ''Hazardous Materials Transportation: Revisions of Special Permits Procedures,'' issued under Docket HM–233B (76 FR 454). The final rule clarified existing requirements in the special permits application procedures. It also required additional, more detailed information in each application so PHMSA could strengthen its oversight of the special permits program. Specifically, the final rule established regulations that:

- Authorized electronic service for all special permit and approval actions;
- Replaced the obsolete word ''exemption'' with ''special permit'' and removed language stating these terms were equivalent;
- Revised the requirements to submit an application for party-to status and to renew, modify, reconsider, and appeal a special permit;
- Revised the requirements to process, evaluate, modify, suspend, or terminate a special permit; and
- Provided applicants with an online application option to promote flexibility and reduce the paperwork burden on applicants.

In addition, § 107.113(f)(5) was revised in the Docket No. HM–233B final rule to state that a fitness ''assessment may be based on information in the application, prior compliance history of the applicant, and other information available to the Associate Administrator.'' As a result of these activities, stakeholders expressed concerns regarding the fitness assessment process and requested a rulemaking with a notice and comment period to address how fitness is determined under the HMR.

D. Public Meetings

On February 29, 2012, PHMSA hosted a public meeting at the Department's Washington, DC, headquarters. The goals of the meeting were to ascertain the concerns of special permit and approval stakeholders, examine what conditions may be used to successfully assess an applicant's ability to operate under a special permit or approval, solicit comments on past changes, and hear ideas regarding process improvement. Eighteen stakeholders spoke at the meeting. These stakeholders expressed interest in becoming involved in PHMSA's process to resolve special permit and approval processing concerns, but were especially concerned with the special permit process. Representatives from the following companies provided comments and/or asked questions:

- American Chemistry Council
- American Coatings Association
- Arrowhead Industrial Services
- Association of Hazmat Shippers
- Chlorine Institute
- Citizens for All Transit Chemical Contamination
- Council on Safe Transportation of Hazardous Articles, Inc. (COSTHA)
- Dangerous Goods Advisory Council
- Gases and Welding Distributors Association
- Institute of Makers of Explosives
- Industrial Packaging Alliance of North America
- Labelmaster Services
- National Private Truck Council
- North American Transportation Consultants, Inc.
- Nuclear Information and Resource Service
- Praxair, Inc.
- Teledyne Consulting Group
- United Parcel Service

You may review the meeting's transcript at ''*http://regulations.gov*'' under Docket No. PHMSA–2012–0260 (HM–233E). Key issues raised during the public meeting are summarized below.

i. *PHMSA's Basis for Fitness Review*—Under § 107.113(f)(5), the HMR authorize PHMSA to consider evidence of an applicant's fitness, i.e., the applicant's demonstrated and documented knowledge and capability to conduct the activity the special permit would authorize, when deciding whether to issue or deny an application. Most attendees at the meeting were concerned about what types of criteria would be used to determine fitness and if these criteria would fairly assess an applicant's ability to perform the tasks authorized in the special permit. Some attendees requested PHMSA spend less time assessing an applicant's fitness and more time evaluating the application for its safe (technical) merit, the assumption being that using a safe design would inherently be safe because of the user's knowledge of the tasks required in a special permit, regardless of the user's safe performance and/or incident history. PHMSA disagrees. The establishment of safe practices and procedures is an essential part of each special permit and approval. However, PHMSA and DOT's internal review and on-site inspections of how special permits were applied revealed in many instances that special permits were not being used in ways authorized in the special permit. Further, PHMSA found reliance on the requirements in the special permit alone was inadequate to determine an applicant's ability to carry out these tasks, who was performing the tasks, or where these tasks were being done. In addition, tasks and procedures requested in special permit and approval applications vary and must be considered on a case-by-case basis. As a result, PHMSA needed additional information to determine the applicant's ability to satisfactorily complete required tasks. PHMSA revised its previous system for making these determinations to include a fitness requirement in the HMR in response to the March 4, 1995 Presidential Memorandum entitled ''Regulatory Reinvention Initiative,'' which directed the federal government, in part, to partner with people and other federal agencies ''to issue sensible regulations that impose the least burden without sacrificing rational and necessary protections.'' PHMSA then developed SOPs in guidance documents, as mentioned earlier in this preamble, to further explain how PHMSA managed the fitness review process. In this NPRM, PHMSA proposes to revise its SOPs to clarify what phases in the review process are used based on the type of application submitted.

Several attendees suggested that fitness assessments should be based only on a risk evaluation of number and type of incidents, reports, approvals, independent inspection agencies, and the high degree of risk of the activities requested in each special permit application. Many supported limiting the assessment criteria to those incidents involving death and serious injury, stating that this position is consistent with the original intent of PHMSA's fitness assessment

requirements. One attendee suggested different criteria should be established for large and small operators due to the differences in their exposure to events that can cause an incident, and stated the ''one-size fits all'' approach PHMSA is proposing is inappropriate and unfair. A few attendees recommended that fitness reviews be based on the ability of the applicant to perform the functions requested in the special permit or approval application. Another attendee recommended an applicant's fitness be evaluated for new or alternative operations only because the successful performance of these tasks is ''heavily dependent'' on the applicant's ability to perform them. Cynthia Hilton, Institute of Makers of Explosives, recommended that PHMSA use the following procedural and fitness criteria to make this assessment: (1) ''a standardized look-back period of four years. . .the typical duration of a special permit, (2) fitness reviews not . . . triggered by the filing of an application but periodically performed'' and designed to ''expire after four years unless revoked or suspended due to subsequent findings of imminent hazard or a pattern of knowing or willful non-compliance,'' (3) when processing applications to make determinations of fitness ''start with a presumption of applicant fitness rather than . . . a position that an applicant must establish fitness,'' (4) combine evaluation tasks, (5) undertake ''site visits by Field Operations only . . . where fitness cannot be demonstrated by some other means,'' (6) do not select an applicant ''for additional scrutiny solely because they're moving a Table 1 [§ 172.504(e)] material,'' and (7) do not include ''errors on shipping papers, minor leaks in packaging, inadequacies in test reports'' when determining ''a finding of unfitness'' but do include ''a flagrant pattern of serious violations affecting safety. . . .''

PHMSA agrees with many of the recommendations of these attendees. In this NPRM, PHMSA has revised its SOPs to base its fitness evaluation and safety profile reviews on the ability of each applicant to perform the tasks authorized in a special permit or approval. Further, PHMSA's approach for detecting applicant incidents and/or violations is designed to detect flagrant patterns *and* serious violations in the four years prior to submitting an application. In addition, applicants must have two or more incidents to trigger a review; they are not subject to review just because they are moving a § 172.504(e) Table 1 material. To the extent possible, PHMSA has combined evaluation tasks. For example, the automatic and technical reviews are performed concurrently. However, PHMSA also disagrees with some of the attendees' suggestions. For example, PHMSA disagrees with the attendee's suggestion that an applicant's fitness be evaluated for new or alternative operations only. Historically, PHMSA has found an applicant's pattern of minor violations could reveal larger problems, such as with training. PHMSA initially processes each application automatically by computer. As a result, this process does not presume innocence or guilt and cannot be limited to a six-month time period before another automatic review is done. However, after the automatic review is complete, for new applications PHMSA may consider only fitness data since the last fitness review. For new companies with no performance history, PHMSA will assess their training records. In addition, companies that handle special permit and approval packagings without opening them typically may reship these packaging when in conformance with the terms of the special permit or approval. PHMSA requests public comment on how to assess hazmat manufacturers that do not ship.

PHMSA finds the suggestion to ignore minor leaks in packaging may not be inconsequential depending on the risks contained in the material, and, therefore, may not eliminate this as a consideration in a fitness evaluation. Regarding the elimination of on-site visits or performing such visits as a last resort, PHMSA disagrees because an on-site review is part of the process to determine if a fitness determination is accurate. PHMSA has found some information can only be determined by visiting the applicant at its facility because the agency or appropriate Department official is in the best position to determine what packagings and/or operations requested in the application are safe under the HMR and what appropriate operational controls or limitations may be needed. On-site visits are also used to clear up misunderstandings or inaccuracies. A special permit provides an equivalent level of safety or consistency with the public interest in a manner that will adequately protect against the risks to life and property inherent in transporting hazardous materials. A negative fitness determination may suggest that an applicant has not demonstrated or documented its knowledge and capabilities to assure that it has an appropriate level of safety and performance. Although the automated review PHMSA is proposing does not include variations weighted for company size, based on our history with making fitness determinations, PHMSA believes the SOPs proposed in this NPRM will be effective in determining the safety of the tasks requested in the application and the applicant's ability to perform these tasks safely under the HMR.

One attendee recommended PHMSA perform fitness determinations of each special permit holder every one or two years, or on the basis of another determining factor, so that holders will know when a review is coming and, presumably, can plan for it accordingly. PHMSA disagrees as it conducts reviews for new or renewal applicants at the time of application. Further, PHMSA does not have sufficient resources or funds to perform this task.

One attendee suggested fitness evaluations include determining if employees are hazmat trained in conformance with 49 CFR Part 172, Subpart F, are able to demonstrate that they can follow the requirements authorized under the special permit and HMR, and perform their assigned tasks. This attendee also recommended the fitness evaluation include determining if the applicant has a quality assurance program. Another attendee suggested PHMSA use the fitness review process to ensure the applicant is properly registered under PHMSA's Hazardous Materials Registration program prescribed in 49 CFR Part 107, Subpart G. PHMSA agrees. Each applicant's registration, if required, will be assessed during the safety profile review, and hazmat training will be assessed during the on-site inspection, if one is conducted.

One attendee suggested applicants requesting party-to status for an existing special permit be excepted from a fitness evaluation because they will be manufacturing the same package that is successfully manufactured by others already party to that special permit. PHMSA disagrees. A fitness review is different from a safety equivalency evaluation. When an applicant applies for party status to an existing special permit, the technical review is not repeated since PHMSA has already determined what provisions in the special permit will provide an adequate level of safety. However, PHMSA has found historically that applicants vary in their ability to perform the tasks required in a special permit and must be individually assessed to ensure the safe execution of the special permit.

One attendee asked if an applicant has more than one location, will PHMSA perform a fitness assessment on each individual location or will a single

location be used to determine the assessment for the entire company. PHMSA will review companies with multiple locations as one organization, placing an emphasis on its examination of the company's locations where the requested actions and/or processes are being performed. If deficiencies are noted, it is the company's responsibility to correct these deficiencies throughout its organization.

ii. *Data Accuracy*—PHMSA uses its own incident history and compliance information as well as that from other sources, e.g., federal and state agencies, to assist in determining which applicant is subject to a fitness assessment. Some attendees stated that this information is either inaccurate or reflects incidents that do not correspond with special permit performance, such as technical errors on shipping papers, minor leaks, or inadequacies in test reports. Some attendees questioned the accuracy of information in other agencies' databases, and how these inaccuracies may affect PHMSA's use of this information when determining if an applicant will be subject to a fitness assessment. Stakeholders also questioned if using data not intended for PHMSA's purposes could lead to inaccurate determinations. Other attendees were concerned about the age of the incidents in the database and whether companies with recorded incidents had corrected problems. One attendee suggested PHMSA use the Federal Motor Carrier Safety Administration's (FMCSA) Compliance, Safety, and Accountability (CSA) program data as a more accurate example of information that represents a 6-month time frame. If PHMSA did use older information, one attendee suggested it use a fixed time period. Robyn Heald, Chlorine Institute, stated ''an applicant's capability can best be judged by its past and current performance and compliance with the current regulations. PHMSA should continue to review an applicant's level of fitness in cases of new or alternative operations prior to considering approval. Based on the background PHMSA provided,. . . it appears that when all is said and done the majority of applicants are determined to be fit.''

PHMSA enters the applicant's information into the Hazmat Intelligence Portal (HIP), a web-based application that provides an integrated information source to identify hazardous materials safety trends through the analysis of incident and accident information. HIP incorporates data from the Hazardous Materials Information System (HMIS), which maintains and provides access to comprehensive information on hazardous materials incidents, special permits and approvals, enforcement actions, and other elements that support PHMSA's regulatory program. HIP also incorporates data from FMCSA's Safety Fitness Electronic Records (SAFER) System to evaluate an applicant's fitness, which provides company safety data and related services to the industry and public. This information is readily available through PHMSA's database search and FMCSA's portal system and SAFER. These databases only provide triggers for a safety review. Determinations are made only after a safety profile review or on-site inspection is complete. At this time, PHMSA has determined that less than one percent of special permit applications are found unfit.

Many sources for this information are self-reporting and vary on the type and quantity of information collected. As a result, the data collected may contain errors or inconsistencies, such as reporting multiple spills from one packaging in one incident as separate incidents, reporting the same type of event differently, or providing gathered data that may be too dissimilar to provide an adequate comparison. We know some information from other databases used in HIP does not meet all the conditions in PHMSA's special permit and approval programs but has merit as a tool to show areas where potential problems may exist. PHMSA normalizes this data during the safety profile review by contacting the applicant to obtain the number of hazardous materials shipments and the applicant's hazardous materials incident ratio. PHMSA or the Operating Administration (OA) also evaluate incident reports during the safety profile review to determine if any incidents are attributable to the applicant or a package, or if the incident reports contain errors. In this NPRM, PHMSA is reducing the number of incident categories that trigger a review from five to three, focusing on death and injury and high-consequence incidents only. PHMSA is removing low-level incident data from its fitness determination process. In addition, triggers have been raised by 50 percent in two of the categories. PHMSA notes that errors in other agency databases must be corrected by contacting the agency or authority in charge of that database directly. PHMSA has no authority to change their information. However, we are always trying to improve the quality of our data and invite public comment on how to improve this information. Specifically, PHMSA requests public information on how long it takes applicants to get incorrect incident information recorded in databases corrected.

iii. *Streamline the Special Permit Review Process*—As a part of the HMTSIA directive to issue SOPs that support how the special permit and approval programs are administered, PHMSA is looking at ways to improve how applicants' submissions are processed. The majority of attendees supported PHMSA's efforts to streamline its fitness assessment procedures, but differed in how they believed results should be achieved. One attendee indicated that the length of time PHMSA takes to process and issue a special permit or approval adversely impacts the competition of U.S. industry, and recommended that all evaluation criteria be risk-based. Another attendee suggested PHMSA would make the special permit and approval application process more effective and efficient if it differentiated between how it processes applications concerning packaging design and those concerning operations. This attendee recommended applications concerning packaging design should concern only the merits of the design itself, because a safer, better performing design stands on its own merit and should not be affected by an applicant's performance history. One attendee suggested the review process would be more efficient if PHMSA checked to determine if an applicant is hazmat registered, if applicable, under PHMSA's program specified in Subpart G of 49 CFR Part 107 (Registration of Persons Who Offer or Transport Hazardous Materials).

PHMSA is continually improving its database capabilities, and in this NPRM is restructuring its fitness program to increase efficiency. To capture faulty behaviors that may prevent the safe transportation of hazardous materials in commerce, PHMSA applies the same fitness criteria to hazmat packaging designs and operations. However, this process cannot consider all impacts. PHMSA relies on the expertise of the modal agencies to clarify the risks associated with each material and procedure the applicant requests for use in a specific transportation mode. PHMSA also shares its databases with the modal and other hazmat-related agencies to run in their own programs for their use to alert them to potential problem areas. PHMSA proposes in this NPRM to use information generated four years prior to submission of the application and to limit its information to exclude lessor incidents. PHMSA believes limiting the fitness review to a fixed time period and excluding lessor

incidents will improve the timeliness of its review process. FMCSA uses information generated in the last 24 months of motor carrier data. PHMSA also seeks public comment for ways to improve the processing of its special permit and approval application processes, and to improve the clarity of its communications with the applicants to ensure they know how, where, and what type of information to submit to improve PHMSA or the OA's processing of their applications.

iv. *Adjudication, Resolutions, and Denials*—PHMSA is proposing in this NPRM to clarify its process for issuing adjudications, resolutions, and denials to include determinations of an applicant's fitness. Several attendees were concerned with how PHMSA will adjudicate, resolve, or deny its determinations of special permit applicants as unfit. One attendee suggested that PHMSA not deny an application for a single criterion unless there is an imminent hazard. This same attendee also requested that PHMSA create a process where an applicant can show cause why the agency should not revoke, suspend, or deny the application. Another suggestion was for PHMSA to give applicants a corrective action plan and an opportunity to perform in compliance with the HMR for six months, similar to a type of probation.

By proposing to limit its special permit and approval review processes to eliminate lower level risks, all applicants are presumed fit unless a minimum level of fitness criteria indicates the application has triggered additional review. Further, all denials are based on on-site inspections or modal criteria. PHMSA's reconsideration process allows applicants to provide corrective actions to document compliance following a denial. Problems with recordkeeping to keep applications accurate and intact require that PHMSA requests each applicant to submit the entire application again, including any missing or requested information, for a denied or rejected application to be reconsidered. PHMSA requests public comment on how this process may be improved, and if letters requesting additional information clearly describe what information is needed to make the application complete and the process for resubmission.

v. *Develop the Fitness Program Through the Rulemaking Process*—As mentioned earlier in this preamble, the HMR have required PHMSA to review an applicant's fitness to perform the tasks requested in a special permit or approval application since 1996. In this NPRM, PHMSA proposes to promote clarity by explaining in the SOPs the factors the agency uses to conduct a fitness review.

Most attendees requested that PHMSA issue a notice and comment rulemaking on its proposal to incorporate SOPs and fitness criteria into the HMR for processing special permits. This rulemaking satisfies that request. Another attendee expressed the belief that incorporating the SOPs and fitness criteria through a rulemaking would promote greater accountability and transparency, as well as encourage HMR compliance. PHMSA agrees, and for several years has undertaken many rulemaking projects to incorporate special permits and approvals with a safe performance history and tasks with general applicability into the HMR. Once special permits and approvals are incorporated into the HMR, their fitness will be evaluated with all other HMR regulations based on the percentage of incidents. In addition, PHSMA believes that by clarifying how it proposes to process these applications through this NPRM, applicants will be able to substantially reduce the processing times for their applications.

Additional attendees indicated that incorporating an elaborate review system into the HMR for assessing special permit applications would be extremely difficult to apply to the wide range of applicants. PHMSA agrees that a cumbersome review system is not beneficial, and therefore is proposing to incorporate a more straightforward, user-friendly review system in this NPRM. Attendees also requested that PHMSA limit withholding special permits except in those cases involving egregious violations or willful negligence. PHMSA disagrees. As stated earlier in this preamble, historically PHMSA has found an applicant's pattern of minor violations may reveal larger problems that could adversely affect transportation safety.

vi. *Modal or Hazardous Material Regulatory Agencies and Other Country Competent Authorities*—When appropriate and based on current agreements between the OAs, PHMSA coordinates the special permit and approval applications it receives with the applicable modal (e.g., Federal Aviation Administration (FAA), Federal Motor Carrier Safety Administration (FMCSA), Federal Railroad Administration (FRA), or U.S. Coast Guard (USCG)) or hazardous material regulatory agencies (e.g., International Atomic Energy Agency (IAEA), Nuclear Regulatory Commission (NRC), Department of Health and Human Services Centers for Disease Control and Prevention (CDC), etc.). By coordinating review of special permit and approval applications with the appropriate subject-matter expert or experts, PHMSA better ensures safe performance of the tasks requested in the application and improves efficiency through the sharing of information. Further, the HMR permit, in various sections, some federal agencies limited authority to directly issue certain types of approvals because of the proven safety of the type of action and/or process requested in the approval, and the subject matter expertise each agency can provide regarding hazardous materials transportation. This is discussed in greater detail later in this preamble. Approvals issued by authorized federal agencies under the HMR are independent actions by these agencies; however, PHMSA may be asked to review such approvals. It should be noted that these agencies are not subject to the actions PHMSA is required to perform under this proposed rulemaking, but may choose to do so. In addition, PHMSA typically acknowledges hazardous materials approvals issued by competent authorities of other countries.

Attendees offered varied positions on how PHMSA should coordinate with other modal and international agencies. One attendee indicated that coordination with other modal agencies would streamline the fitness assessment process. Another attendee questioned the necessity and costs incurred by other modal agencies to provide PHMSA with their incident information. Two attendees requested that PHMSA accept and recognize similar hazardous materials transportation relief granted by other competent authorities, but did not suggest how PHMSA would make this determination. One attendee requested that PHMSA not allow Department modal agencies to use PHMSA's fitness procedures to impose more stringent fitness requirements than already exist in their modal regulations, and that PHMSA should not use the fitness assessment process to impose its regulations on the modal agencies as to whom is a fit carrier.

E. Notice No. 12–5

On July 5, 2012, PHMSA issued a notice to clarify and provide further guidance on its policy of conducting initial fitness reviews of applicants for classification approvals under Docket No. PHMSA–2012–0059; Notice No. 12–5 (77 FR 39798). In the notice, PHMSA established that it will no longer carry out Initial Fitness Reviews (IFR) as part of the process for classification approvals, including those for fireworks,

explosives, organic peroxides, and self-reactive materials. PHMSA has found that the use of available agency information in the HIP and FMCSA SAFER databases is focused on transportation and does not adequately indicate a company's capability to manufacture the approved product in conformance with the application submitted to PHMSA. Therefore, PHMSA will continue to review the fitness of applicants for classification approvals through application evaluation, inspection, oversight, and intelligence received from PHMSA and/or another OA (e.g., FRA, FAA, FMCSA, and USCG).

III. Special Permit and Approval Standard Operating Procedures

The hazardous materials community is a leader in developing new materials, technologies, and innovative ways of moving materials. Because not every transportation situation can be anticipated and built into the regulations, special permits and approvals enable the hazardous materials industry to quickly, effectively, and safely integrate new products, technologies, and procedures into production and transportation. Before they are authorized by this agency, the applicant must prove that the relief requested is of a safety level that is at least equivalent to that provided in the HMR, or demonstrates an alternative consistent with the public interest that will adequately protect against the risks to life and property inherent in the transportation of hazardous materials. Further, unlike approvals, special permits can occasionally have hundreds of party status holders. As mentioned earlier in this preamble, party status is granted to a person who intends to offer for transportation or transport a hazardous material, or perform an activity subject to the HMR, in the same manner as the original applicant. Historically, PHMSA has found that the new methods introduced in special permits and approvals promote increased transportation efficiency and productivity, and help to ensure our nation's global competitiveness.

Special permits and approvals also reduce the volume and complexity of the HMR by addressing unique or infrequent transportation situations that would be difficult to accommodate in regulations intended for use by a wide range of shippers and carriers. The discussion below provides an overview of the existing procedures involved in the processing of special permit and approval applications, as well as their implementation.

PHMSA's Approvals and Permits Division manages special permit and approval application processing, application completeness, and coordination of their technical and modal agency reviews. This Division also processes modifications to, suspensions of, and terminations of special permits and approvals. By proposing to include its SOPs into the HMR, it is the goal of the Approvals and Permits Division to fulfill the requirements of MAP–21 and improve each applicant's understanding of the special permits and approvals application process.

The SOPs for the administration of the Approvals and Permits Program are summarized below. These procedures support the timely and accurate processing of approvals and special permits, including New and Modification special permit applications (§ 107.105), Renewals (§ 107.109), Party Status (§ 107.107), as well as New, Renewal, or Modification approval applications (§§ 107.705 and 107.709).

PHMSA assesses all special permit and approval applications in four phases, which it calls the ''Application Review Process.'' We describe these phases—Completeness, **Federal Register** Publication, Evaluation, and Disposition—in greater detail in sections A through D that follow. PHMSA may reject an application if it is incomplete or insufficient (i.e., it does not conform to the requirements of the applicable subpart). Further, PHMSA will process reconsiderations and appeals in the same manner that the HMR require for new applications. Specific practices for each may be found in the Approvals and Permits guides posted on the PHMSA Web page at ''*http://www.phmsa.dot.gov/hazmat/regs/sp-a*''.

A. *Completeness Phase.* During the completeness review, PHMSA determines if the application contains all of the information required in 49 CFR Part 107, and if this information is sufficient to determine the safety level of the relief the applicant is requesting. For a special permit, the purpose of the completeness phase is to determine if the applicant submitted the information required by §§ 107.105, 107.107, or 107.109, and as provided in § 107.113(f). PHMSA then must analyze this information to assess whether the action and/or process the applicant requests is sufficient to provide a level of safety equal to that of the HMR, or demonstrates an alternative consistent with the public interest that will adequately protect against the risks to life and property inherent in the transportation of hazardous materials, in conformance with § 107.105(d)(3). For an emergency special permit, the purpose of the completeness phase is to determine if the applicant submitted the information required by § 107.117 to justify emergency status, as well as the full application required by § 107.105, as provided in § 107.117(d). The purpose of an approval's completeness phase is to determine if the applicant submitted the information required by §§ 107.402 or 107.705 and as provided in §§ 107.709.

B. ***Federal Register*** *Publication*

i. *Special Permit*—When a special permit application is sufficient and complete, a summary of the application will be published in the **Federal Register,** as required by § 107.113(j), for 30 days to allow for public comment.

ii. *Emergency Special Permit*—Within 90 days of an emergency special permit being issued, the application will be published in the **Federal Register**, as required by § 107.117(g), for 30 days to allow for public comment.

iii. *Approval*—New approvals that are issued are not required to be published in the **Federal Register;** however, PHMSA will publish them on the PHMSA Web site.

C. *Evaluation Phase.* During the evaluation phase, if the tasks or procedures requested in each special permit or approval application are determined to provide an equivalent level of safety to that required in the HMR or, if a required safety level does not exist, that they provide a level of safety that demonstrates an alternative consistent with the public interest that will adequately protect against the risks to life and property inherent in the transportation of hazardous materials. PHMSA also evaluates the applicant to determine its fitness to operate under a special permit or approval.

If PHMSA completes its initial evaluation and determines that the tasks or procedures the applicant requests are mode specific, precedent setting, or meet federal criteria for a ''significant economic impact,'' PHMSA coordinates the application's evaluation with the appropriate OA. PHMSA will also coordinate an application evaluation with an OA if the OA specifically requests participation. All other applications not meeting these criteria are evaluated within PHMSA. Whenever possible, coordination of an application occurs within an electronic system to maintain awareness of the document's location as well as version control.

As part of the evaluation phase, PHMSA and/or the OA conducts technical analyses of the risks that may

be associated with transporting a hazardous material using the proposed packaging or operation in the specific mode or modes of transportation the applicant is requesting. Some of the research areas considered include package integrity; risk assessment, management and mitigation; emerging technologies; and human factors that may affect safety. In addition, an OA evaluation provides mode-specific feedback, particularly regarding operational controls, and provides mode-specific information and recommendations concerning task and/or procedure equivalency with the HMR and the applicant's fitness. PHMSA also coordinates discussions with an OA to resolve any differences concerning these assessments. Based on these analyses, the OHMS Associate Administrator (AA), or the approving official to which the AA has delegated this responsibility, such as an authorized OA official, determines whether the requested proposal meets the required criteria. If the application meets the criteria, the Approvals and Permits Division staff or delegated approving official issues the special permit or approval, along with the agency-specified modifications, if applicable, and documents the results of the evaluation and cause for approval. If the AA or delegated approving official determines that the application does not meet the required criteria, the Approvals and Permits Division staff and, if the application was coordinated, the OA, documents the results of the evaluation and the cause for denial.

i. *Special Permit*—The purpose of the evaluation phase is to: (1) Determine if the application is complete and the actions or processes it requests demonstrate a level of safety at least equal to the HMR or that is consistent with the public interest, and (2) assess if an applicant is fit to operate under a special permit, as provided in §§ 107.113(f)(4) and 107.113(f)(5). Applicants applying for a renewal or party status to an existing authorized special permit are not subject to an evaluation of the tasks requested in the special permit, but are subject to a fitness review to determine the applicant's ability to carry out these tasks.

ii. *Emergency Special Permit*—The purpose of the evaluation phase is to determine if the application is complete and in conformance with the requirements prescribed in § 107.117, and if an applicant is fit to operate under a special permit, as provided in §§ 107.113(f)(4) and 107.113(f)(5). When PHMSA finds that an emergency basis does exist for the issuance of a special permit, in the same manner as with a non-emergency special permit, PHMSA will determine a schedule responsive to the timing needs and/or associated risks of the emergency. If PHMSA finds that an emergency does not exist, the application will be processed in the same manner as a non-emergency special permit.

iii. *Approval*—The purpose of the evaluation phase is to determine if the application is complete and: (1) If an approval is necessary for the type of activity the applicant wants to perform; (2) if the activity requested is safe and complies with the regulations for its specific approvals category; and (3) if the applicant or registered user is qualified to hold and successfully carry out the tasks prescribed in an approval, as provided in §§ 107.402, 107.709(d)(4) or 107.709(d)(5).

D. *Disposition Phase.* PHMSA issues the following final dispositions to the applicant in writing: (1) ''Reject,'' if the application is incomplete or insufficient to determine an equal level of safety or demonstrate an alternative consistent with the public interest that will adequately protect against the risks to life and property inherent in the transportation of hazardous materials; (2) ''Deny,'' if the application does not provide an equal level of safety or the applicant is not fit to operate under a special permit or approval; or (3) ''Issue,'' if the application is approved and the special permit or approval is issued, with appropriate guidance for its safe operation if applicable.

i. *Special Permit*—Once a decision has been made to issue or deny a special permit, the applicant will be notified in writing with the Document or Denial Letter, as provided in § 107.113(g). If PHMSA denies an application for a special permit, the applicant may request reconsideration as provided in § 107.123 and, if PHMSA denies the reconsideration, the applicant may appeal, as provided in § 107.125. Reconsiderations and appeals must state, in detail, any errors in the denial, provide additional information that may impact the disposition, and state the modification of the final decision sought. PHMSA will process special permit reconsiderations and appeals in the same manner that the HMR require for new applications.

ii. *Approval*—Once a decision has been made to issue or deny an approval, the applicant will be notified in writing with the Approval or Denial Letter as provided in §§ 107.403 and 107.709(f). If PHMSA denies an application for an approval, the applicant may request reconsideration as provided in § 107.715 and, if the reconsideration is denied, may appeal as provided in § 107.717. Reconsiderations and appeals must state, in detail, any errors in the denial, provide additional information that may impact the disposition, and state the modification of the final decision sought. PHMSA will process approval reconsiderations and appeals in the same manner that the HMR require for new applications.

IV. Special Permit and Approval Application Evaluation Criteria

PHMSA currently uses a variety of methods to assess the safety level of each applicant's request and the applicant's fitness. These include a detailed technical review of the information in each application, telephone and/or in-person interviews with the applicants or their representative, and/or inspections. PHMSA also uses incident reports received from industry, safety and performance data from other federal, state, and local agencies, and information from scientific and technical handbooks, journals, and texts.

As mentioned earlier in this preamble, to fulfill this assessment responsibility, PHMSA coordinates the review of special permit and approval applications with the appropriate OA if the tasks requested in the application meet specific criteria, or if the OA specifically requests participation. The OA's review the application materials, conduct a technical evaluation, and provide their comments and recommendations, which may include recommendations for operational restrictions or limitations for the special permit. If an OA does not concur, the Project Officer works with that OA to resolve any issues. If the agency PHMSA or the HMR designates as responsible for making this determination finds that as a result of these analyses the requested proposal meets the safety conditions prescribed in the HMR, it documents the results of the evaluation and advances the application for further processing; otherwise it documents the results of the evaluation and the cause for denial.

PHMSA's Field Operations Division and/or the appropriate OA are responsible for conducting HMR compliance inspections and investigations. The Field Operations Division is also responsible for conducting safety profile reviews and determining an applicant's fitness following the safety profile review. Similar to the initial review process of a special permit or approval application, PHMSA coordinates special permit and approval safety profile reviews and fitness determinations with the

appropriate OA for its subject-matter expertise and to improve process efficacy. The Field Operations Division or OA may recommend audits of the applicant's operations when determining the applicant's fitness. The Field Operations Division is also responsible for taking enforcement actions for violations of the HMR (such as issuing warning letters and tickets, and recommending civil and criminal penalties), and providing training.

Prior to 2010, PHMSA's methods for evaluating special permits and approval applicants did not allow us to easily assess the fitness of all parties authorized to use a special permit, such as parties to special permits issued to large organizations like industry groups and associations for the use of their members, single holders with multiple facility locations, or new or smaller businesses with little or no hazmat incident or field inspection histories. Without this information, PHMSA principally relied on the safe practices inherent in each special permit to maintain the safety of the hazardous materials transported under their authorization. An internal review found this method to be insufficient to ensure public safety and determine an applicant's fitness. As a result, PHMSA no longer issues special permits to industry associations and limits a special permit's scope to a specific location.

Since 2010, PHMSA has conducted approximately 12,250 special permit fitness evaluations. The following lists the number of applications PHMSA denied over the last four years:

- 2010: 126
- 2011: 429
- 2012: 119
- 2013: 42.

As of June 20, 2013, these include applications PHMSA denied for being technically unjustified and for applicants PHMSA denied for being unfit.

Since 2010, PHMSA has conducted approximately 105,000 approval fitness evaluations, and denied the following approval applications, listed by type and year.

TABLE 1—DENIED APPROVALS

[Date Run: 6/21/2013]

Effective calendar year	Approval type	Number of approvals
2010	COMPETENT AUTHORITY	56
2010	EXPLOSIVE	453
2010	FIREWORK	6,699
2010	MANUFACTURER SYMBOL	1
2010	REQUALIFIER	9
2011	COMPETENT AUTHORITY	47
2011	EXPLOSIVE	15
2011	FIREWORK	6,227
2011	REQUALIFIER	12
2012	COMPETENT AUTHORITY	37
2012	EXPLOSIVE	70
2012	FIREWORK	4,656
2012	REQUALIFIER	6
2013	COMPETENT AUTHORITY	16
2013	CYLINDER REQUALIFIER (VISUAL)	1
2013	EXPLOSIVE	52
2013	FIREWORK	2,342
2013	REQUALIFIER	3

Based on information gathered while evaluating special permit and approval applications and during field inspections, PHMSA determined there was a gap in our oversight and fitness review process. To address this concern and improve the overall efficiency of the fitness review, PHMSA established a Fitness Restructuring Team and assigned it the following tasks:

- Define what criteria PHMSA should use to trigger fitness reviews;
- Evaluate the adequacy of the current three-tier fitness review system; and
- Recommend processes that will improve efficiency and eliminate or prevent future fitness evaluation backlogs exceeding 60 days.

This team also clarified and revised the fitness evaluation process to include these items:

- All applications receive an automated review;
- The technical review runs concurrently with the automated review;
- Use four years of data for all determinations;
- Conduct a safety profile review based on the triggers in Table 2, entitled ''Safety Profile Review and On-Site Inspection Triggers'' (which appears later in this preamble);
- Conduct an On-Site Inspection based on the triggers in Table 2; and
- Establish conditions under which an applicant may be capable of complying with the approval or special permit, and what safety deficiencies may cause a determination of ''Unfit.''

The team developed a risk model that mandates the automated initial fitness review described in this paragraph. If an applicant does not pass, a safety profile review and/or on-site inspection, as appropriate, will be conducted by PHMSA's Field Operations Division staff or a modal partner. To ensure the correct company is assessed, each application is assigned a unique identifier (currently the organization's Data Universal Numbering System (DUNS) number). In this model, PHMSA uses automated processing to compare an applicant's performance history to our inspection data and make a determination based on the risk model shown in Table 2 below. This automated review flags entities that meet one or more of the triggers identified in Table 2. If any item in the left column of Table 2 is identified during the automated review, a safety profile review is triggered. If any item in the right column of Table 2 is identified during the automated review or safety profile review, an on-site inspection is triggered. If PHMSA previously

conducted a safety profile review of a company, the new safety profile review will start from the date after the last safety profile review was completed. After a review or inspection of an applicant is complete, including modal coordination if appropriate, PHMSA's Field Operations Division staff will submit a fitness memorandum with a recommendation of fit or unfit, with justification, to the Approvals and Permits Division. PHMSA believes, based on the results of this effort, that the revised SOPs it is proposing in this rulemaking will offer a more effective way to determine an applicant's potential fitness to operate under a special permit or approval.

TABLE 2—SAFETY PROFILE REVIEW AND ON-SITE INSPECTION TRIGGERS

Trigger for safety profile review	Trigger for on-site inspection *
Death or Injury:	
§ 172.504(e) Table 1 (Placarding) material AND Two or more Incidents.	Any incident attributable to the applicant or package (not driver error).
Bulk AND Three or more Incidents.	
Two or More Prior Enforcement Case Referrals	Insufficient Corrective Actions on any enforcement case OR Independent Inspection Agency (IIA) Items (Except when reinspected with no violations noted).
Foreign Cylinder Manufacturer Or Requalifier	Never Inspected under current criteria (2010).

* The Fitness Coordinator assesses and applies these triggers.

V. Miscellaneous Proposals

i. Clarifying the Definitions for Special Permits and Approvals

The current definitions in 49 CFR 105.5, 107.1, and 171.8 for ''special permits'' and ''approvals'' state that other designated Department officials may also issue these documents under the HMR on behalf of PHMSA's Associate Administrator for Hazardous Materials Safety. This is not entirely correct. As stated earlier in this preamble, 49 U.S.C. 5117(a) of the Federal hazmat law gives the Secretary of Transportation the authority to issue, modify, or terminate a special permit that varies from 49 U.S.C. Chapter 51, entitled ''Transportation of Hazardous Materials,'' or a regulation prescribed under 49 U.S.C. 5103(b), 5104, 5110, or 5112. These regulations apply to a person who performs a function regulated by the Secretary under § 5103(b)(1) in a way that achieves a safety level at least equal to the safety level required under 49 U.S.C. Chapter 51, or that is consistent with the public interest and chapter 51, if a required safety level does not exist. PHMSA is the administration within DOT that is primarily responsible for implementing the Federal hazmat law and, through the HMR, issuing special permits.

Under the Federal hazmat law, the Secretary has general regulatory authority to issue competent authority approvals or to designate this authority to PHMSA's Associate Administrator. Since PHMSA's inception as the Materials Transportation Board, and later as the Research and Special Programs Administration, it has served as the Department's Competent Authority for the transportation of hazardous materials and, through the HMR, has issued approvals concerning the transportation of hazardous materials. In the HMR, PHMSA also delegates limited authority to other Department modal agencies to issue approvals in specific situations. To reflect this delegation of authority, PHMSA is proposing to revise the definitions in §§ 105.5, 107.1, and 171.8 for ''special permits'' and ''approvals'' to clarify that an approval and special permit may be issued only by the Associate Administrator, the Associate Administrator's designee, or as otherwise prescribed in the HMR. In addition, PHMSA proposes minor editorial revisions to the approval's definition in § 105.5 to make it identical with the definition for an approval in § 171.8.

ii. Clarifying That an Approval Application Is Subject to the HMR When Submitted to Other Agencies

Through several sections in the HMR, PHMSA authorizes that certain types of approval requests can be submitted directly to other Department and federal agencies.[1] Some of these agencies have reported the volume of approval applications they receive can be substantial. For example, the FRA reports that it processed approximately 5,500 One-Time Movement approvals in 2013 and expects to process a similar number in 2014. The FRA also issues approvals for hazardous materials in trailer-on-flat-car (TOFC) and container-on-flat-car (COFC) service, alternative inspection procedures, and railcars with gross weight loads up to 286,000 pounds. Also, PHMSA has learned from our modal agency partners that approval applications they receive often are not complete and, therefore, do not comply with the requirements prescribed in § 107.701. These agencies report processing incomplete approval applications is administratively burdensome and delays their issuance. PHMSA emphasizes that § 107.701(b) specifically states the procedures prescribed for approvals under Subpart H of Part 107 ''. . . are in addition to any requirements in subchapter C of this chapter applicable to a specific approval, registration or report.'' These procedures apply to all approval applications submitted to perform a function that requires prior consent under the HMR, regardless of the authorized agency. Section 107.701(b) also states ''if compliance with both a specific requirement of subchapter C of this chapter and a procedure of this subpart is not possible, the specific requirement applies.'' However, approval registrations issued under 49 CFR Part 107, Subpart F (Registration of Cargo Tank and Cargo Tank Motor Vehicle Manufacturers, Assemblers, Repairers, Inspectors, Testers, and Design Certifying Engineers) and G (Registration of Persons Who Offer or Transport Hazardous Materials) are not subject to these procedures (see § 107.701(c)). PHMSA invites the public to recommend ways to convey this requirement to applicants who apply for approvals through other agencies, as authorized under the HMR.

VI. Summary Review of Proposed Amendments

In this NPRM, PHMSA is proposing to revise §§ 105.5, 107.1, 107.113, 107.117, 107.709; add a new Appendix A to 49 CFR Part 107, entitled ''Standard Operating Procedures for Special Permits and Approvals;'' and revise § 171.8 to incorporate its existing administrative procedures for

[1] See §§ 173.301, 173.471, 174.50, 174.63, 175.9, 179.13, 180.417, and 180.509.

processing special permits and approval applications. These proposed actions are summarized below.

§ 105.5

In § 105.5, we propose to revise the definitions for ''approval'' and ''special permit'' to clarify that an approval and special permit may be issued by the Associate Administrator, the Associate Administrator's designee, or as otherwise prescribed in the HMR.

§ 107.1

In § 107.1, we propose to revise the definitions for ''approval'' and ''special permit'' to clarify that an approval and special permit may be issued by the Associate Administrator, the Associate Administrator's designee, or as otherwise prescribed in the HMR. In addition, we propose to add for clarity new definitions for ''applicant fitness,'' ''fit or fitness,'' ''fitness coordinator,'' and ''insufficient corrective action.''

§ 107.113

In § 107.113(a), we propose that the Associate Administrator will review all special permit applications in conformance with standard operating procedures proposed in new 49 CFR Part 107, Appendix A.

§ 107.117

In § 107.117(e), we propose that the Associate Administrator will review all emergency special permit applications in conformance with standard operating procedures proposed in new 49 CFR Part 107, Appendix A.

§ 107.709

In § 107.709(b), we propose that the Associate Administrator will review all approval applications in conformance with standard operating procedures proposed in new 49 CFR Part 107, Appendix A.

49 CFR Part 107, Appendix A

In 49 CFR Part 107, we propose to add new Appendix A to incorporate PHMSA's existing Standard Operating Procedures for processing special permits and approval applications.

§ 171.8

In § 171.8, we propose to revise the definitions for ''approval'' and ''special permit'' to clarify that an approval and special permit may be issued by the Associate Administrator, the Associate Administrator's designee, or as otherwise prescribed in the HMR.

VII. Regulatory Analyses and Notices

A. Statutory/Legal Authority for This Rulemaking

This NPRM is published under the authority of 49 U.S.C. 5103(b) which authorizes the Secretary to prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce. 49 U.S.C. 5117(a) authorizes the Secretary of Transportation to issue a special permit from a regulation prescribed in §§ 5103(b), 5104, 5110, or 5112 of the Federal Hazardous Materials Transportation Law to a person transporting, or causing to be transported, hazardous material in a way that achieves a safety level at least equal to the safety level required under the law, or is consistent with the public interest, if a required safety level does not exist. This NPRM is also established under the authority of § 33012(a) of MAP–21 (Pub. L. 112–141, July 6, 2012). Section 33012(a) requires that no later than July 6, 2014, the Secretary of Transportation issue a rulemaking to provide notice and an opportunity for public comment on proposed regulations that establish standard operating procedures (SOPs) to support administration of the special permit and approval programs, and objective criteria to support the evaluation of special permit and approval applications. In this NPRM, PHMSA is addressing the provisions in the Act.

B. Executive Order 12866, 13563, and DOT Regulatory Policies and Procedures

This proposed rule is considered a significant regulatory action under § 3(f) of Executive Order 12866 and was reviewed by the Office of Management and Budget (OMB). The proposed rule is considered a significant rule under the Regulatory Policies and Procedures order issued by the Department of Transportation [44 FR 11034]. Executive Order 13563 supplements and reaffirms the principles governing regulatory review that were established in Executive Order 12866, Regulatory Planning and Review of September 30, 1993. These two Executive Orders require agencies to regulate in the ''most cost-effective manner,'' to make a ''reasoned determination that the benefits of the intended regulation justify its costs,'' and to develop regulations that ''impose the least burden on society.''

In this notice, PHMSA proposes to amend the HMR to incorporate SOPs for processing and issuing special permit and approval applications. Incorporating these provisions into regulations of general applicability will provide shippers and carriers with clarity and flexibility to comply with PHMSA's initial review and, as needed, subsequent renewal or modification process. In addition, the proposed rule would reduce the paperwork burden on industry and this agency resulting from delays when processing incomplete applications. Taken together, the provisions of this proposed rule would improve the efficacy of the special permit and approval application and issuance process, which will promote the continued safe transportation of hazardous materials, while reducing transportation costs for the industry and administrative costs for the agency.

The impact of this proposed rule is presumed to be minor. It intends to provide clarity by reducing applicant confusion regarding the special permit and approval application and renewal process, and improve the quality of information and completeness of the application submitted. This will ease the administrative costs of submitting a special permit and approval application and improve processing times. Although it is difficult to quantify the savings, many special permits and approvals have economically impacted companies by improving the efficacy and safety of their operations in a manner that meets or exceeds the requirements prescribed in the HMR. Some examples of positive economic impacts include allowing the use of less expensive non-specification packages, reducing the number of tasks, or other methods that reduce costs incurred before the approval or special permit is issued. As a result, PHMSA calculates that this NPRM does not impose any costs on industry. Although a slight reduction in the costs associated with processing delays may provide nominal benefits, generally, this proposed rule affects only agency procedures; therefore, we assume no change in current industry costs or benefits.

C. Executive Order 13132

This proposed rule was analyzed in accordance with the principles and criteria contained in Executive Order 13132 (''Federalism''). This proposed rule would preempt state, local and Indian tribe requirements but does not propose any regulation that has substantial direct effects on the states, the relationship between the national government and the states, or the distribution of power and responsibilities among the various levels of governments. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply. Federal hazardous material

transportation law, 49 U.S.C. 5101–5128, contains an express preemption provision (49 U.S.C. 5125(b)) preempting state, local and Indian tribe requirements on certain covered subjects. The covered subjects are:

(1) The designation, description, and classification of hazardous materials;

(2) The packing, repacking, handling, labeling, marking, and placarding of hazardous materials;

(3) The preparation, execution, and use of shipping documents related to hazardous materials and requirements related to the number, contents, and placement of those documents;

(4) The written notification, recording, and reporting of the unintentional release in transportation of hazardous materials; and

(5) The designing, manufacturing, fabricating, inspecting, marking, maintaining, reconditioning, repairing, or testing a package, container or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce.

This proposed rule addresses covered subject items (1), (2), (3), and (5) and would preempt any State, local, or Indian tribe requirements not meeting the ''substantively the same'' standard. 49 U.S.C. 5125(b)(2) states that if PHMSA issues a regulation concerning any of the covered subjects, it must determine and publish, in the **Federal Register**, the effective date of Federal preemption. The effective date may not be earlier than the 90th day following the date of issuance of the final rule, and not later than two years after the date of issuance. PHMSA proposes the effective date of federal preemption will be 90 days from publication of the final rule in this matter in the **Federal Register**.

D. Executive Order 13175

This proposed rule was analyzed in accordance with the principles and criteria contained in Executive Order 13175 (''Consultation and Coordination with Indian Tribal Governments''). Because this proposed rule does not have tribal implications and does not impose substantial direct compliance costs on Indian tribal governments, the funding and consultation requirements of Executive Order 13175 do not apply.

E. Regulatory Flexibility Act, Executive Order 13272, and DOT Procedures and Policies

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires an agency to review regulations to assess their impact on small entities. An agency must conduct a regulatory flexibility analysis unless it determines and certifies that a rule is not expected to have a significant impact on a substantial number of small entities. Incorporation of these SOPs into regulations of general applicability will provide shippers and carriers with additional flexibility to comply with established safety requirements, thereby reducing transportation costs and increasing productivity. Entities affected by the proposed rule conceivably include all persons—shippers, carriers, and others—who offer and/or transport in commerce hazardous materials. The specific focus of the proposed rule is to incorporate standard procedures to assess an applicant's fitness to perform the required tasks to receive the relief from the HMR that each applicant is requesting. Overall, this proposed rule will reduce the compliance burden on the regulated industries by clarifying PHMSA's informational requirements for a special permit and approval application. We expect that the applicant will be better able to provide this information and, as a result, PHMSA can improve application processing and issuance times. Therefore, we certify that this NPRM will not have a significant economic impact on a substantial number of small entities.

This proposed rule has been developed in accordance with Executive Order 13272 (''Proper Consideration of Small Entities in Agency Rulemaking'') and DOT's procedures and policies to promote compliance with the Regulatory Flexibility Act to ensure that potential impacts of draft rules on small entities are properly considered.

F. Paperwork Reduction Act

PHMSA has analyzed this proposed rule in accordance with the Paperwork Reduction Act of 1995 (PRA). The PRA requires federal agencies to minimize the paperwork burden imposed on the American public by ensuring maximum utility and quality of federal information, ensuring the use of information technology to improve government performance, and improving the federal government's accountability for managing information collection activities. This NPRM's benefits include reducing applicant confusion about the special permit and approval application and renewal processes; improving the quality of information and completeness of applications submitted; and improving applicant processing times. This NPRM does not impose any additional costs on industry. Although a slight reduction in the costs associated with processing delays may provide nominal benefits, generally, this proposed rule affects only agency procedures; therefore, this proposed rule contains no new information collection requirements subject to the PRA. Further, this NPRM does not include new reporting or recordkeeping requirements.

As stated earlier in this preamble, PHMSA is not aware of any information collection and recordkeeping burdens for the hazardous materials industry associated with the requirements proposed in this rulemaking. Thus, PHMSA has not prepared an information collection document for this rulemaking. However, if any regulated entities determine they will incur information and recordkeeping costs as a result of this NPRM, PHMSA requests that they provide comments on the possible burden developing, implementing, and maintaining records and information these proposed requirements may impose on businesses applying for a special permit or approval.

Because PHMSA determined this proposed rule does not result in information collection and recordkeeping burdens, PHMSA did not assess its potential information collection costs. However, if information on this matter should become available or if commenters have questions concerning information collection on this NPRM, please direct your comments or questions to Steven Andrews, Deborah Boothe, or T. Glenn Foster, Standards and Rulemaking Division, Pipeline and Hazardous Materials Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590–0001, Telephone (202) 366–8553.

Address written comments to the Dockets Unit as identified in the **ADDRESSES** section of this rulemaking. We must receive comments regarding information collection burdens prior to the close of the comment period identified in the **DATES** section of this rulemaking. In addition, you may submit comments specifically related to the information collection burden to the PHMSA Desk Officer, Office of Management and Budget, at fax number (202) 395–6974.

G. Regulation Identifier Number (RIN)

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document may be used to cross-reference this action with the Unified Agenda.

H. Unfunded Mandates Reform Act of 1995

This proposed rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It does not result in costs of $141.3 million or more to either state, local or tribal governments, in the aggregate, or to the private sector, and is the least burdensome alternative that achieves the objective of the proposed rule.

I. Environmental Assessment

The National Environmental Policy Act, 42 U.S.C. 4321–4375, requires that federal agencies analyze proposed actions to determine whether the action will have a significant impact on the human environment. The Council on Environmental Quality (CEQ) regulations require federal agencies to conduct an environmental review considering the need for the proposed action, alternatives to the proposed action, probable environmental impacts of the proposed action and alternatives, and the agencies and persons consulted during the consideration process. 40 CFR 1508.9(b).

The Need for the Proposed Action

This Notice proposes to revise the HMR to include the standard operating procedures and criteria used to evaluate applications for special permits and approvals. This rulemaking also proposes to provide clarity for the applicant as to what conditions need to be satisfied to promote completeness of the applications submitted.

Hazardous materials are capable of affecting human health and the environment if a release were to occur. The need for hazardous materials to support essential services means transportation of highly hazardous materials is unavoidable. These shipments frequently move through densely populated or environmentally sensitive areas where the consequences of an incident could entail loss of life, serious injury, or significant environmental damage. Atmospheric, aquatic, terrestrial, and vegetal resources (for example, wildlife habitats) could also be affected by a hazardous materials release. The adverse environmental impacts associated with releases of most hazardous materials are short-term impacts that can be greatly reduced or eliminated through prompt clean-up of the incident scene. Improving the process by which the agency assesses the ability of each applicant to perform the tasks issued in a special permit improves the chance that each special permit issued will be performed safely. Therefore, we do not anticipate any significant positive or negative impacts on the environment by incorporating these SOPs into the HMR.

Alternatives to the Proposed Action

The purpose and need of this NPRM is to establish criteria for evaluating applications for approvals and special permits based on the HMR, including assessing an applicant's ability to operate under the approval or special permit. More information about benefits of this NPRM action can be found in the preamble to this NPRM. The alternatives considered in the analysis include: (1) The proposed action, that is, incorporation of SOPs to evaluate applications for approvals and special permits based on the HMR, including assessing an applicant's ability to operate under the approval or special permit into the HMR; and (2) incorporation of some subset of these proposed requirements (i.e., only some of the proposed requirements or modifications to these requirements in response to comments received to this NPRM) as amendments to the HMR; and (3) the ''no action'' alternative, meaning that none of the NPRM actions would be incorporated into the HMR.

Analysis of the Alternatives

(1) Incorporate Special Permit and Approval Processing Standard Operating Procedures

We are proposing clarifications to certain HMR requirements to include those methods for assessing the ability of new special permit and approval applicants, and those applying for renewals of special permits and approvals, to perform the tasks they have requested for transporting hazardous materials. The process through which special permits and approvals are evaluated requires the applicant to demonstrate that the requested approval, the alternative transportation method, or proposed packaging provides an equivalent level of safety as that provided in the HMR. Implicit in this process is that the special permit or approval must provide an equivalent level of environmental protection as that provided in the HMR or demonstrate an alternative consistent with the public interest that will adequately protect against the risks to life and property inherent in the transportation of hazardous materials. Thus, incorporating SOPs to assess the performance capability of special permit and approval applicants should maintain or exceed the existing environmental protections built into the HMR.

(2) Incorporation of Some, But Not All, of the Proposed Requirements or Modifications to These Requirements in Response to Comments Received

The changes proposed in this NPRM are designed to promote clarity and ease of the administration of special permits and approvals during the application review process. Since these changes may make it easier for special permit and approval applicants to successfully apply to PHMSA for authorized variances from the HMR, incorporation of the special permit and approval SOPs into the HMR may result in an increased number of applicants transporting hazardous materials under these types of variances. Because PHMSA will have determined the shipping methods authorized under these new variances to be at least equal to the safety level required under the HMR or, if a required safety level does not exist, consistent with the public interest, PHMSA expects that these additional shipments will not result in associated environmental impacts. Incorporating only some of these changes will help to obscure the informational requirements of the special permit and approval application process, confuse the regulated public by providing a partial understanding of the information needed to submit a complete special permit or approval application, and possibly further delay application review times. PHMSA does not recommend this alternative.

(3) No Action

If no action is taken, then special permit and approval applicants will continue to be assessed in the same manner as they are today. This will result in no change to the current potential effects to the environment, but will also not provide the applicant with information needed to improve its application processing time within PHMSA. Further, it may negatively impact transportation in commerce by not making innovative and safe transportation alternatives more easily available to the hazmat industry. PHMSA does not recommend this alternative.

Comments From Agencies and Public

PHMSA solicits comments about potential environmental impacts associated with this NPRM from other agencies, stakeholders, and citizens.

J. Privacy Act

Anyone is able to search the electronic form of all comments

received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70, pages 19477–78), which may be viewed at ''*http://www.gpo.gov/fdsys/pkg/FR-2000-04-11/pdf/00-8505.pdf*''.

K. Executive Order 13609 and International Trade Analysis

Under Executive Order 13609, agencies must consider whether the impacts associated with significant variations between domestic and international regulatory approaches are unnecessary, or may impair the ability of American business to export and compete internationally. In meeting shared challenges involving health, safety, labor, security, environmental, and other issues, international regulatory cooperation can identify approaches that are at least as protective as those that are or would be adopted in the absence of such cooperation. International regulatory cooperation can also reduce, eliminate, or prevent unnecessary differences in regulatory requirements.

Similarly, the Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. For purposes of these requirements, federal agencies may participate in the establishment of international standards, so long as the standards have a legitimate domestic objective, such as providing for safety, and do not operate to exclude imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards.

PHMSA participates in the establishment of international standards in order to protect the safety of the American public, and we have assessed the effects of the proposed rule to ensure that it does not cause unnecessary obstacles to foreign trade. Accordingly, this NPRM is consistent with E.O. 13609 and PHMSA's obligations.

List of Subjects

49 CFR Part 105

Administrative practice and procedure, Hazardous materials transportation, Penalties, Reporting and recordkeeping requirements.

49 CFR Part 107

Administrative practice and procedure, Hazardous materials transportation, Penalties, Reporting and recordkeeping requirements.

49 CFR Part 171

Exports, Hazardous materials transportation, Hazardous waste, Imports, Incorporation by reference, Reporting and recordkeeping requirements.

In consideration of the foregoing, we are proposing to amend 49 CFR chapter I as follows:

PART 105—HAZARDOUS MATERIALS PROGRAM DEFINITIONS AND GENERAL PROCEDURES

■ 1. The authority citation for part 105 is revised to read as follows:

Authority: 49 U.S.C. 5101–5128; 49 CFR 1.81 and 1.97.

■ 2. In § 105.5, the definitions for ''approval'' and ''special permit'' are revised in alphabetical order to read as follows:

§ 105.5 Definitions.

* * * * *

Approval means a written authorization, including a competent authority approval, issued by the Associate Administrator, the Associate Administrator's designee, or as otherwise prescribed in the HMR, to perform a function for which prior authorization by the Associate Administrator is required under subchapter C of this chapter (49 CFR parts 171 through 180).

* * * * *

Special permit means a document issued by the Associate Administrator, the Associate Administrator's designee, or as otherwise prescribed in the HMR, under the authority of 49 U.S.C. 5117 permitting a person to perform a function that is not otherwise permitted under subchapter A or C of this chapter, or other regulations issued under 49 U.S.C. 5101 et seq. (*e.g.,* Federal Motor Carrier Safety routing requirements).

* * * * *

PART 107—HAZARDOUS MATERIALS PROGRAM PROCEDURES

■ 3. The authority citation for part 107 continues to read as follows:

Authority: 49 U.S.C. 5101–5128, 44701; Pub. L. 101–410 section 4 (28 U.S.C. 2461 note); Pub. L. 104–121 sections 212–213; Pub. L. 104–134 section 31001; Pub. L. 112–141 section 33006, 33010; 49 CFR 1.81 and 1.97.

■ 4. In § 107.1, add the definitions for ''applicant fitness,'' ''fit or fitness,'' ''fitness coordinator,'' ''insufficient corrective action,'' and revise the definitions for ''approval,'' ''special permit'' to read as follows:

§ 107.1 Definitions.

* * * * *

Applicant fitness means a determination by PHMSA, the Associate Administrator's designee, or as otherwise prescribed in the HMR, that a special permit or approval applicant is fit to conduct operations requested in the application or an authorized special permit or approval.

* * * * *

Approval means a written authorization, including a competent authority approval, issued by the Associate Administrator, the Associate Administrator's designee, or as otherwise prescribed in the HMR, to perform a function for which prior authorization by the Associate Administrator is required under subchapter C of this chapter (49 CFR parts 171 through 180).

* * * * *

Fit or *Fitness* means demonstrated and documented knowledge and capabilities resulting in the assurance of a level of safety and performance necessary to ensure compliance with the applicable provisions and requirements of subchapter C of this chapter or a special permit or approval issued under subchapter C of this chapter.

* * * * *

Fitness coordinator means the PHMSA Field Operations officer or authorized Operating Administration (OA) representative that conducts reviews regarding an organization's hazardous materials operations, including such areas as accident history, compliance data, and other safety and transportation records to determine whether a special permit or approval applicant is determined to be fit as prescribed in §§ 107.113(f)(5) and 107.709(d)(5).

* * * * *

Insufficient corrective action means that either a PHMSA Field Operations officer or authorized Operating Administration (OA) representative has determined that evidence of an applicant's corrective action in response to prior to enforcement cases is insufficient and the basic safety management controls proposed for the type of hazardous material, packaging,

procedures, and/or mode of transportation remain inadequate.

* * * * *

Special permit means a document issued by the Associate Administrator, the Associate Administrator's designee, or as otherwise prescribed in the HMR, under the authority of 49 U.S.C. 5117 permitting a person to perform a function that is not otherwise permitted under subchapters A or C of this chapter, or other regulations issued under 49 U.S.C. 5101 *et seq.* (*e.g.,* Federal Motor Carrier Safety routing requirements).

* * * * *

■ 5. In § 107.113, paragraph (a) is revised to read as follows:

§ 107.113 Application processing and evaluation.

(a) The Associate Administrator reviews an application for a special permit, modification of a special permit, party to a special permit, or renewal of a special permit in conformance with the standard operating procedures specified in appendix A of this part (''Standard Operating Procedures for Special Permits and Approvals'') to determine if it is complete and conforms with the requirements of this subpart. This determination will be made within 30 days of receipt of the application for a special permit, modification of a special permit, or party to a special permit, and within 15 days of receipt of an application for renewal of a special permit. If an application is determined to be incomplete, PHMSA may reject the application. PHMSA will inform the applicant of the deficiency in writing.

* * * * *

■ 6. In § 107.117, paragraph (e) is revised to read as follows:

§ 107.117 Emergency processing.

* * * * *

(e) Upon receipt of all information necessary to process the application, the receiving Department official transmits to the Associate Administrator, by the most rapidly available means of communication, an evaluation as to whether an emergency exists under § 107.117(a) and, if appropriate, recommendations as to the conditions to be included in the special permit. The Associate Administrator will review an application for emergency processing of a special permit in conformance with the standard operating procedures specified in appendix A of this part (''Standard Operating Procedures for Special Permits and Approvals'') to determine if it is complete and conforms with the requirements of this subpart. If the Associate Administrator determines that an emergency exists under § 107.117(a) and that, with reference to the criteria of § 107.113(f), granting of the application is in the public interest, the Associate Administrator will issue the application subject to such terms as necessary and immediately notify the applicant. If the Associate Administrator determines that an emergency does not exist or that granting of the application is not in the public interest, the applicant will be notified immediately.

* * * * *

■ 7. In § 107.709, paragraph (b) is revised to read as follows:

§ 107.709 Processing of an application for approval, including an application for renewal or modification.

* * * * *

(b) The Associate Administrator reviews an application for an approval, modification of an approval, or renewal of an approval in conformance with the standard operating procedures specified in appendix A of this part (''Standard Operating Procedures for Special Permits and Approvals''). At any time during the processing of an application, the Associate Administrator may request additional information from the applicant. If the applicant does not respond to a written request for additional information within 30 days of the date the request was received, PHMSA may deem the application incomplete and deny it. The Associate Administrator may grant a 30-day extension if the applicant makes such a request in writing.

* * * * *

■ 8. Add new Appendix A to 49 CFR Part 107 to read as follows:

Appendix A To Part 107—Standard Operating Procedures for Special Permits and Approvals

This appendix sets forth the standard operating procedures (SOPs) for processing an application for a special permit or an approval in conformance with 49 CFR Parts 107 and 171–180. It is a guidance document to be used by PHMSA for the internal management of its special permit and approval programs.

A special permit is a document issued by the Associate Administrator, the Associate Administrator's designee, or as otherwise prescribed in the HMR, under the authority of 49 U.S.C. 5117 permitting a person to perform a function that is not otherwise permitted under subchapter A or C of this chapter, or other regulations issued under 49 U.S.C. 5101 et seq. (*e.g.,* Federal Motor Carrier Safety routing requirements). An approval is a written authorization, including a competent authority approval, issued by the Associate Administrator, the Associate Administrator's designee, or as otherwise prescribed in the HMR, to perform a function for which prior authorization by the Associate Administrator is required under subchapter C of this chapter (49 CFR parts 171 through 180). PHMSA receives applications for: (1) Designation as an approval or certification agency, (2) renewal or modification of a special permit or an approval, (3) granting of party status to a special permit, and (4) emergency processing for a special permit. Depending on the type of application, the SOP review process includes several phases, such as Completeness, Publication, Evaluation, and Disposition, and proceed in the following order.

SPECIAL PERMIT AND APPROVAL EVALUATION REVIEW PROCESS

Special permit	Non-classification approval	Classification approval	Registration approval
1. Completeness	1. Completeness	1. Completeness	1. Completeness.
2. Publication	2. Evaluation	2. Evaluation	2. Evaluation.
	a. Technical	a. Technical	a. Fitness only.
	b. Fitness.		
3. Evaluation	3. Disposition	3. Disposition	3. Disposition.
a. Technical	a. Approval	a. Approval	a. Approval.
b. Fitness	b. Denial	b. Denial	b. Denial.
4. Disposition	.		
a. Approval.			
b. Denial.			
5. Reconsideration	4. Reconsideration	4. Reconsideration	4. Reconsideration.

A non-classification approval certifies that: An approval holder is qualified to requalify, repair, rebuild, and/or manufacture cylinders stipulated in the HMR; an agency is qualified to perform inspections and other functions outlined in an approval and the HMR; an approval holder is providing an equivalent level of safety or safety that is consistent with the public interest in the transportation of hazardous materials outlined in the approval; and a radioactive package design or material classification fully complies with applicable domestic or international regulations. A classification approval certifies that explosives, fireworks, chemical oxygen generators, self-reactive materials, and organic peroxides have been classed for manufacturing and/or transportation based on requirements stipulated in the HMR. Registration approvals include the issuance of a unique identification number used solely as an identifier or in conjunction with approval holder's name and address, or the issuance of a registration number that is evidence the approval holder is qualified to perform an HMR authorized function, such as visually requalifying cylinders. This appendix does not include registrations issued under 49 CFR Part 107, Subpart G.

1. *Completeness.* PHMSA reviews all special permit and approval applications to determine if they contain all the information required under § 107.105 (for a special permit), § 107.117 (for emergency processing) or § 107.402 or § 107.705 (for an approval). If PHMSA determines an application is incomplete or insufficient, PHMSA may reject the application. If PHMSA rejects the application, it will notify the applicant of the deficiencies in writing. An applicant may resubmit a rejected application as a new application, provided the newly submitted application contains the information PHMSA needs to make a determination.

Emergency special permit applications must comply with all the requirements prescribed in § 107.105 for a special permit application, and contain sufficient information for PHMSA to determine that the applicant's request for emergency processing is justified under the conditions prescribed in § 107.117.

2. *Publication.* When PHMSA determines an application for a new special permit or a request to modify an existing special permit is complete and sufficient, PHMSA publishes a summary of the application in the **Federal Register** in conformance with § 107.113(b). The public has 30 days to comment on a new special permit and 15 days to comment on a request for modification of an existing special permit.

3. *Evaluation.* The evaluation phase consists of two assessments: Technical evaluation and fitness evaluation. These evaluations may be done concurrently and are described in greater detail below. When applicable, PHMSA consults and coordinates its evaluation of applications with the following Operating Administration (OA) that share enforcement authority under Federal hazardous material transportation law: Federal Aviation Administration, Federal Motor Carrier Safety Administration, Federal Railroad Administration, and United States Coast Guard. PHMSA also consults other agencies with hazardous material subject-matter expertise, such as the Nuclear Regulatory Commission and the Department of Energy.

(a) *Technical evaluation.* A technical evaluation considers whether the proposed special permit or approval will achieve a level of safety at least equal to that required under the HMR or, if a required safety level does not exist, considers whether the proposed special permit is consistent with the public interest in that will adequately protect against the risks to life and property inherent in the transportation of hazardous material. For a classification approval, the technical evaluation is a determination that the application meets the requirements of the regulations for issuance of the approval. If formal coordination with another OA is included as part of the evaluation phase, that OA is responsible for managing this process within the applicable OA. The OA reviews the application materials and PHMSA's technical evaluation, and may provide their own evaluation, comments and recommendations. The OA may also recommend operational controls or limitations to be incorporated into the special permit or approval to improve its safety. If an OA does not concur with PHMSA's recommendation based on the evaluation, PHMSA works with the OA to resolve their concerns.

(b) *Fitness evaluation.* Each applicant for a special permit or non-classification approval is subject to a fitness evaluation to assess if the applicant is fit to conduct the activity authorized by the special permit or approval application. PHMSA will coordinate fitness reviews with the appropriate OA if a proposed activity is specific to a particular mode of transportation, if the proposed activity will set new precedent or have a significant economic impact, or if an OA requests participation. PHMSA does not conduct initial fitness reviews as part of processing classification approvals, which include fireworks, explosives, organic peroxides, and self-reactive materials. Additionally, cylinder approvals and certification agency approvals do not follow the same minimum fitness review model.

(i) *Automated Review.* An applicant for a special permit or approval which requires a fitness evaluation is subject to an automated fitness review. If the applicant passes the initial automated review, the applicant is determined to be fit. To begin this review, PHMSA or the applicant enters the applicant's information into the Hazardous Materials Information System (HMIS) or the Hazmat Intelligence Portal (HIP), web-based applications that provide an integrated information source to identify hazardous material safety trends through the analysis of incident and accident information, and provide access to comprehensive information on hazardous materials incidents, special permits and approvals, enforcement actions, and other elements that support PHMSA's regulatory program. PHMSA then screens the applicant to determine if, within the four years prior to submitting its application, the applicant was involved in any incident attributable to the applicant or package where one of the following occurred:

(1) A death or injury;

(2) Two or more incidents involving a § 172.504(e) (placarding) Table 1 hazardous material;

(3) Three or more incidents involving a bulk packaging;

(4) The applicant has a prior enforcement case referral where the Deputy Associate Administrator for Field Operations, or the Deputy Associate Administrator's designee determined insufficient corrective action was taken, or there are Independent Inspection Agency (IIA) noted items on a cylinder requalifier inspection report, except for those applicants who were reinspected and found to have no violations;

(5) The applicant is a foreign cylinder manufacturer or requalifier, or a select holder that PHMSA or a representative of the Department has never inspected; or

(6) If an applicant is acting as an interstate carrier of hazardous materials under the terms of the special permit, they will be screened in an automated manner based upon criteria established by FMCSA, such as that contained in its Safety and Fitness Electronic Records (SAFER) system, which consists of interstate carrier data, several states' intrastate data, interstate vehicle registration data, and may include

operational data such as inspections and crashes.

(ii) *Safety profile review.* A fitness coordinator, as defined in § 107.1, conducts a safety profile review of all applicants meeting one of the criteria listed earlier in this appendix under ''automated review.'' In a safety profile review, PHMSA or the OA performs an in-depth evaluation of the applicant based upon items the automated review triggered concerning the applicant's four-year performance and compliance history prior to the submission of the application. Information considered during this review may include the applicant's history of prior violations, insufficient corrective actions, or evidence that the applicant is at risk of being unable to comply with the terms of an application for an existing special permit, approval, or the HMR. PHMSA also performs the review if two or more modes of transportation are requested in the application. The applicable OA performs the review if one mode of transportation is requested in the application. After conducting a review, if the fitness coordinator determines that the applicant may be unfit to conduct the activities requested in the application, the coordinator will forward the request and supporting documentation to PHMSA's Field Operations Division, or a representative of the Department, to perform an on-site inspection. After the safety profile review is completed, if the applicant is not selected for an on-site inspection, the applicant is determined to be fit.

(iii) *On-Site Inspection.* (A) PHMSA considers the factors in paragraph 3(b) as evidence that an applicant is at risk of being unable to comply with the terms of an application, including those listed below. PHMSA's Field Operations Division or representative of the Department will conduct an on-site inspection at the recommendation of the fitness coordinator if one of the following criteria applies:

(*1*) Any incident listed under automated review in paragraph 3(b)(i) of this appendix is attributable to the applicant or package, other than driver error;

(*2*) Insufficient Corrective Actions, as defined in § 107.1, in any enforcement case for a period of four years prior to submitting the application, except when reinspected with no violations noted;

(*3*) Items noted by an IIA on a cylinder requalifier inspection report, except when reinspected with no violations noted; or

(*4*) The applicant is a foreign cylinder manufacturer or requalifier that has never been inspected under current criteria.

(B) If, during an inspection, the PHMSA investigator or a representative of the Department finds evidence in the four years prior to submitting its application that an applicant has not implemented sufficient corrective actions for prior violations, or is at risk of being unable to comply with the terms of an application for or an existing special permit, approval, or the HMR, then PHMSA will determine that the applicant is unfit to conduct the activities requested in an application or authorized special permit or approval.

4. *Disposition.* (a) *Special Permit.* If an application for a special permit is issued, PHMSA provides the applicant, in writing, with a special permit and an authorization letter if party status is authorized.

(b) *Approval.* If an application for approval is issued, PHMSA provides the applicant, in writing, with an approval, which may come in various forms, including:

(1) An ''EX'' approval number for classifying an explosive (including fireworks; see §§ 173.56, 173.124, 173.128, and 173.168(a));

(2) A ''RIN'' (requalification identification number) to uniquely identify a cylinder requalification, repair, or rebuilding facility (see § 180.203);

(3) A ''VIN'' (visual identification number) to uniquely identify a facility that performs an internal or external visual inspection, or both, of a cylinder in conformance with 49 CFR part 180, subpart C, or applicable CGA Pamphlet or HMR provision;

(4) An ''M'' number for identifying packaging manufacturers (see § 178.3); or

(5) A ''CA'' (competent authority) for general approvals (see §§ 107.705, 173.185, and 173.230).

(c) *Denial.* An application for a special permit or approval may be denied in whole or in part. For example, if an application contains sufficient information to successfully complete its technical review but PHMSA determines the applicant is unfit, the application will be denied. If an application for a special permit or an approval is denied, PHMSA provides the applicant, in writing, with a brief statement of the reasons for denial and the opportunity to request reconsideration (see §§ 107.113(g), 107.402, and 107.709(f)).

(d) *Reconsideration.* (1) *Special Permit.* If an application for a special permit is denied, the applicant may request reconsideration as provided in § 107.123 and, if the reconsideration is denied, may appeal as provided in § 107.125. Applicants submitting special permit reconsiderations and appeals must do so in the same manner as new applications, provided the new submission is sufficiently complete to make a determination.

(2) *Approval.* If an application for an approval is denied, the applicant may request reconsideration as provided in § 107.715 and, if the reconsideration is denied, may appeal as provided in § 107.717. Applicants submitting approval reconsiderations and appeals must do so in the same manner as new applications, provided the new submission is sufficiently complete to make a determination.

PART 171—GENERAL INFORMATION, REGULATIONS, AND DEFINITIONS

■ 9. The authority citation for part 171 is revised to read as follows:

Authority: 49 U.S.C. 5101–5128, 44701; Pub. L. 101–410, section 4 (28 U.S.C. 2461 note); Pub. L. 104–121, sections 212–213; Pub. L. 104–134, section 31001; 49 CFR 1.81 and 1.97.

■ 10. In § 171.8, the definitions for ''approval,'' ''special permit'' are revised in alphabetical order to read as follows:

§ 171.8 Definitions and abbreviations.

* * * * *

Approval means a written authorization, including a competent authority approval, issued by the Associate Administrator, the Associate Administrator's designee, or as otherwise prescribed in the HMR, to perform a function for which prior authorization by the Associate Administrator is required under subchapter C of this chapter (49 CFR parts 171 through 180).

* * * * *

Special permit means a document issued by the Associate Administrator, the Associate Administrator's designee, or as otherwise prescribed in the HMR, under the authority of 49 U.S.C. 5117 permitting a person to perform a function that is not otherwise permitted under subchapter A or C of this chapter, or other regulations issued under 49 U.S.C. 5101 et seq. (*e.g.,* Federal Motor Carrier Safety routing requirements).

* * * * *

Issued in Washington, DC, under the authority delegated in 49 CFR 1.97.

Magdy El-Sibaie,

Associate Administrator for Hazardous Materials Safety, Pipeline and Hazardous Materials Safety Administration.

[FR Doc. 2014–18925 Filed 8–11–14; 8:45 am]

BILLING CODE 4910–60–P

NATIONAL TRANSPORTATION SAFETY BOARD

49 CFR Part 831

[Docket No. NTSB–GC–2012–0002]

RIN 3147–AA01

Investigation Procedures

AGENCY: National Transportation Safety Board (NTSB).

ACTION: Notice of proposed rulemaking.

SUMMARY: The NTSB is proposing to amend its regulations that address the NTSB's investigation procedures. Specifically, the NTSB proposes to organize regulations into distinct mode-specific subparts, where appropriate. While some of these proposed amendments are merely technical in nature, this notice proposes several substantive changes. In addition, in this rulemaking, the NTSB proposes including its party agreement form as an appendix and solicits comment on revisions to the party agreement.

DATES: Comments must be received by October 14, 2014. Comments received after the deadline will be considered to the extent possible.

ADDRESSES: A copy of this NPRM, published in the **Federal Register** (FR), is available for inspection and copying in the NTSB's public reading room, located at 490 L'Enfant Plaza, SW., Washington, DC 20594–2003. Alternatively, a copy is available on the government-wide Web site on regulations at *http://www.regulations.gov* (Docket ID Number NTSB–GC–2012–0002).

You may send comments identified by Docket ID Number NTSB–GC–2012–0002 using any of the following methods:

Federal eRulemaking Portal: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.

Mail: Send comments to NTSB Office of General Counsel, 490 L'Enfant Plaza East, SW., Washington, DC 20594–2003.

Facsimile: Fax comments to 202–314–6090.

Hand Delivery: Bring comments to 490 L'Enfant Plaza East, SW., 6th Floor, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. For more information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

Privacy: We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: David Tochen, General Counsel, (202) 314–6080.

SUPPLEMENTARY INFORMATION:

I. Background

On June 25, 2012, the NTSB published a notice indicating its intent to undertake a review of all NTSB regulations to ensure they are updated. 77 FR 37865. The NTSB initiated this review in accordance with Executive Order 13579, ''Regulation and Independent Regulatory Agencies,'' issued July 11, 2011. The purpose of Executive Order 13579 is to ensure all agencies adhere to the key principles found in Executive Order 13563, ''Improving Regulation and Regulatory Review,'' issued January 18, 2011, which include promoting public participation in rulemaking, improving integration and innovation, promoting flexibility and freedom of choice, and ensuring scientific integrity during the rulemaking process in order to create a regulatory system that protects public health, welfare, safety, and the environment while promoting economic growth, innovation, competitiveness, and job creation. The NTSB explained in its June 25, 2012, notice that it is committed to ensuring its regulations remain updated and comply with these principles.

As stated in the notice, the NTSB determined a very limited number of the NTSB's rules might be ''major rules,'' because they do not have a ''significant economic impact upon a substantial number of small entities.'' In addition, the NTSB is not primarily a regulatory agency; as a result, its regulations typically address procedures to further the agency's statutory responsibilities to investigate the facts, circumstances, and cause of transportation accidents and incidents, or implement government-wide statutes, such as the Freedom of Information Act and the Privacy Act. The NTSB identified 49 CFR part 831 as the sole regulatory part of the NTSB's regulations that could, when viewed in the broadest sense, have a significant economic impact on small entities. Therefore, the NTSB carefully reviewed all sections within 49 CFR part 831, in the interest of ensuring they accomplish the objectives stated in Executive Order 13563 and Executive Order 13579. The NTSB published an additional notice in the **Federal Register** on January 8, 2013, describing the NTSB's plan for updating all regulations. 78 FR 1193. The NTSB publishes this NPRM in accordance with the NTSB's plan.

II. Comments

The NTSB received five comments in response to its June 25, 2012 notice describing its planned review of 49 CFR part 831. Organizations in the transportation industry whose members have previously participated in NTSB investigations as ''parties'' pursuant to part 831 submitted comments: The Air Line Pilots Association, International; Airlines for America (A4A); the Transportation Trades Department, AFL–CIO; GE Aviation; and six railroad labor organizations, which submitted a joint comment.[1] The comments generally support the NTSB's party process, and made no specific substantive suggestions. The only comment that contained specific suggestions for substantive changes was the comment A4A submitted. We will address A4A's specific suggestions in turn in subsections II. and III.

A4A suggested several changes to various sections within part 831. In particular, A4A suggested the NTSB change § 831.6 to strengthen the protections from disclosure that the NTSB provides to submitters of voluntary safety-related information, such as information gathered through the Federal Aviation Administration (FAA)–NTSB Aviation Safety Information and Analysis Sharing System program.[2] A4A also stated witnesses whom the NTSB interview during investigations often must choose between having an attorney or a union official represent them. Therefore, A4A suggested the NTSB amend § 831.7 to allow a witness to have up to two representatives. In addition, regarding section 831.12 and access to information, the comment contained a lengthy description of how the NTSB might consider gaining access to new cockpit voice recorder (CVR) or Flight Data Recorder (FDR) recordings by remotely downloading the data from the devices, rather than removing the physical devices from each aircraft to read the data on them. A4A also suggested the NTSB establish ''a firm deadline'' for returning the physical devices to the air carrier. Regarding section 831.13 and dissemination of information concerning investigations, A4A suggested the NTSB clarify the

[1] American Train Dispatchers Association; Brotherhood of Locomotive Engineers and Trainmen; Brotherhood of Maintenance of Way Employees Division; Brotherhood of Railroad Signalmen; Brotherhood Railway Carmen Division; and United Transportation Union.

[2] For further information concerning the FAA–NTSB Aviation Safety Information and Analysis Sharing System program, see the preamble discussion under proposed § 831.6, Request to withhold information, below.

term ''information concerning an accident,'' and consider implementing exceptions to the prohibition on disseminating information from an investigation by allowing such dissemination when necessary ''to locate, review and evaluate information that may be related to the accident or requested by the NTSB,'' to ''prepare witnesses,'' or to ''share critical safety information'' within the party's organization. Concerning this issue of sharing information from an NTSB investigation, A4A also stated, ''[t]he concept that all such information is restricted to the Party Coordinator and group participants is impractical and can impede the investigative goals of the Board.'' Finally, A4A suggested the NTSB provide parties an advance copy of analytical documents, but not proposed probable cause findings, ''so that erroneous or incomplete factual conclusions can be pointed out and corrected in advance of the Sunshine Meeting.'' A4A included this suggestion under § 831.14, which sets forth requirements for parties' submission of proposed findings of accident investigations.

The NTSB responds to these suggestions within the discussion section, which explains the NTSB's proposed changes to 49 CFR part 831.

III. Changes and Additions

The NTSB proposes to reorganize part 831 because this part currently contains some sections that apply only to aviation accident and incident investigations and other sections that apply to investigations of transportation events that occur in the surface, rail, marine, and pipeline modes or involve the movement of hazardous materials. By including terms such as ''crash,'' ''transportation event,'' ''collision,'' ''casualty,'' ''mishap,'' and the like in lieu of the term ''accident'' in some places in the preamble's description of this part, and in some proposed sections of regulatory text, the NTSB provides additional descriptive terms of transportation events that it investigates in order to improve transportation safety. The NTSB proposes including other terms in the mode-specific subparts, as appropriate. As discussed below in the summary regarding proposed changes to § 831.1, the NTSB's inclusion of these terms is not exhaustive and does not serve as an expansion or a limitation on the NTSB's authority to investigate accidents and incidents.

Proposed subpart A would retain most of the regulations that currently exist in part 831 and would apply to all investigations, regardless of transportation mode. The following subparts would apply to a specific transportation mode, as follows: Subpart B—aviation investigations; Subpart C—highway investigations; Subpart D—railroad, pipeline, and hazardous materials investigations; and Subpart E—marine investigations.

Subpart A: General

Section 831.1 Applicability of Part

The NTSB proposes amending § 831.1 to include an updated statute citation and to delete the second sentence, which states, ''[r]ules applicable to accident hearings and reports are set forth in Part 845.'' The NTSB believes this sentence is unnecessary. In addition, the NTSB proposes changing the first sentence, which currently references the ''Independent Safety Board Act of 1974'' and the ''Federal Aviation Act of 1958'' to read ''49 U.S.C. 1101–1155.'' The two Acts referenced in the current version of § 831.1 have been amended several times and codified in various locations in title 49 of the United States Code. In addition, these two Acts, as well as many other transportation-related statutes were repealed and recodified without any substantive changes as part of the recodification of title 49 of the United States Code in 1994. Public Law 103–272, section 7(b). The NTSB has broad authority within 49 U.S.C. 1101–1155 to conduct investigations; therefore, the NTSB believes the citation to 49 U.S.C. 1101–1155 appropriately identifies the source of the NTSB's authority for part 831.

In § 831.1, the NTSB proposes including a listing of transportation events, the investigation of which the NTSB conducts under the provisions of 49 CFR part 831. The NTSB's proposal in this regard reflects the NTSB's effort to incorporate terms commonly used in each modal industry, such as derailment or casualty. The NTSB remains cognizant of its authority as defined in part by the word ''accident'' in 49 U.S.C. 1101, which states that the term 'accident' includes damage to or destruction of vehicles regardless of whether the initiating event is accidental or otherwise. However, various stakeholders describe transportation events with different terminology. Our use of the term ''event'' in subpart A, and of other terms in subparts B–E, reflects the NTSB's use of a general descriptor.

Section 831.2 Responsibility of NTSB

As described above, the NTSB proposes reorganizing part 831, to include a subpart that pertains to all modes of transportation subject to NTSB investigative jurisdiction (Subpart A) and mode-specific subparts (Subparts B, C, D, and E). The NTSB proposes moving the aviation-specific portions of part 831 from § 831.2 to subpart B. Therefore, the NTSB proposes non-substantive formatting changes to § 831.2 that are consistent with the proposed reorganization of part 831. For example, proposed §§ 831.30, 831.31, 831.40, 831.41, 831.50, and 831.51 are all derived from the current version of § 831.2.

Section 831.3 Authority of Directors

Section 831.3 currently states the NTSB office directors of each mode of transportation have the authority to order an investigation into any accident or incident. The NTSB proposes some minimal changes to this section, as well as the inclusion of the term ''event'' rather than ''accident or incident.'' The NTSB proposes changing the office listing to read, ''Directors, Office of Aviation Safety, Office of Highway Safety, Office of Railroad, Pipeline and Hazardous Materials Investigations, and Office of Marine Safety,'' to reflect the existing NTSB organizational structure.

Section 831.4 Nature of Investigation

The NTSB seeks to amend this section to explain in more detail its current practice of investigating transportation events. The NTSB's procedures concerning investigations have been modified over time, particularly in the commercial airline industry where events commonly require agency staff to make detailed inquiries to obtain information concerning passengers', crews', and other individuals' injuries and/or damage to property to determine whether the event is an accident or incident. The NTSB also engages in a process for determining the appropriate level of investigation of transportation events in other transportation modes. In general, the NTSB first collects preliminary information immediately following an event to determine whether: i. The event meets the criteria of a transportation event; ii. the NTSB will conduct a formal investigation, complete with visit(s) to the site of the event; iii. the NTSB will collect information remotely; or (iv) in some cases, close the inquiry without making a probable cause determination. As a result, the NTSB proposes new paragraph (a), titled ''General,'' and paragraph (b), titled ''Phases of investigation.'' The NTSB also proposes dividing paragraph (b) into two paragraphs: (1) Preliminary investigation, and (2) formal investigation.

With regard to paragraph (a), the NTSB proposes text containing some technical edits, as well as the phrase ''causes investigations to be conducted,'' because the NTSB requests the FAA gather information or evidence on its behalf following certain aviation events. Likewise, the NTSB's relationship with the U.S. Coast Guard in accordance with 49 U.S.C. 1131(a)(1)(E), 49 CFR part 850, and its memorandum of understanding with the Coast Guard regarding investigations, provide that the Coast Guard may conduct certain investigative activities for the NTSB, upon request.

In addition, the NTSB proposes including a phrase stating its purpose is not only to ascertain measures that would prevent similar events, but also ''mitigate the effects of'' similar events in the future. This proposed additional phrase is consistent with Congressional intent in authorizing the NTSB to conduct investigations, and will ensure this section is consistent with the NTSB's current practices.

The NTSB proposes retaining other text in § 831.4 as part of the new paragraph (b) within § 831.4. This paragraph describes the phases of an NTSB investigation. The NTSB tailors each investigation to accomplish effectively and efficiently the objective of improving transportation safety.

The NTSB proposes changes in paragraph (b), to include some subparagraphs, titled ''(1) preliminary investigation,'' and ''(2) formal investigation.'' These subparagraphs describe the standard phases through which the NTSB assesses the initial facts and then initiates a formal investigation.

In a preliminary investigation, the NTSB will gather available facts for the purposes of assessing the appropriate level of investigative action. With regard to events that may involve safety issues limited in scope, the NTSB may begin a preliminary investigation concerning the event, but choose to confine the investigation to certain aspects that may relate to safety trends or safety issues of concern to the NTSB. For such investigations, the NTSB may not issue a report with findings and a probable cause determination, but instead may close the investigation with another type of product such as a safety recommendation letter or a memorandum to the file. Section 831.4(b)(1) describes this type of investigation.

In general, a preliminary investigation may involve certain fact-gathering activities that are similar to those performed for a formal investigation, and as a result of findings, may be upgraded to a formal investigation or downgraded at any point in time.

In addition, the NTSB proposes clarifying the type of record(s) that may result from an investigation, by including the phrase ''or other NTSB product, such as a collection of factual records or safety recommendation(s)'' after the initial phrase of the sentence describing the results, which states, ''[t]he investigation results in NTSB conclusions issued in the form of a report or brief of the investigation.'' The NTSB may conduct some investigations for the purpose of determining trends or identifying problems or issues that may arise at a later date. In the alternative, the NTSB may issue a safety recommendation(s) or other type of document, based on information collected from a particular event, without making a probable cause determination.

As a related matter, the NTSB notes it often releases ''preliminary reports'' in investigations. These reports provide a concise summary of factual information, such as the date and time of the event, the location, and other basic information. The NTSB's proposed use of the term ''preliminary investigation'' in this NPRM does not indicate a change in the NTSB's practice of releasing preliminary reports, and the release of such reports does not preclude the NTSB from proceeding with a formal investigation, as described below.

In a formal investigation, the NTSB will proceed by gathering the facts to determine the probable cause of the transportation event. Once the NTSB determines a formal investigation is warranted, it will engage in fact-finding as described in the proposed language of § 831.4(b). Most of the language in paragraph (b) originates from the existing version of § 831.4. This paragraph states the NTSB may conduct an on-scene investigation, in which NTSB employee(s) visit the site, interview witnesses, conduct testing, extract data, collect documentation, and engage in any other activities that would assist the NTSB in gathering all discoverable facts relevant to the investigation. The NTSB proposes adding the phrase ''extract data'' to the sentence describing the NTSB's field investigation. Data recovery is often a critical component of investigations, and the NTSB frequently expends resources to download or extract data from recorders or devices that provide important information. The NTSB also proposes adding the phrases ''interview witnesses'' and ''gather documentation'' to this list, as both activities are often critical to conducting an investigation. Although the list in this regulatory text is not exhaustive, the NTSB believes these additions would be beneficial.

In addition, the NTSB proposes to retain language for paragraph (3) to note that its investigations are not for the purpose of determining liability. The proposed language is derived from language that currently exists in § 831.4, which states the Administrative Procedure Act does not apply to NTSB investigations, as they are solely fact-finding proceedings with no adverse parties. The NTSB also proposes removing the phrase, ''no formal issues'' because the meaning of this phrase is unclear; it is not a legal term of art, nor is it used in other regulations or the Administrative Procedure Act. The NTSB understands non-NTSB investigations for purposes of litigation, and litigation itself, often commence soon after the event occurs. The NTSB also remains aware of parties' and witnesses' interests, and is cognizant of attorneys' desire to take part in various aspects of the NTSB investigation. In this regard, the NTSB encourages attorneys to contact the NTSB Office of General Counsel when seeking information about an NTSB investigation. Coordinating with the NTSB Office of General Counsel will ensure agency investigators can remain focused on the agency's statutory obligation to investigate an event, rather than other interests arising from the transportation event.

Section 831.5 Priority of NTSB Investigations

The NTSB proposes amending § 831.5, titled ''Priority of NTSB investigations,'' by reorganizing the section into two paragraphs and by altering language. The NTSB proposes amendments to the existing text to achieve two objectives. First, the amendments provide a better organizational structure. Second, the amendments specifically address situations in which other regulatory and enforcement agencies seek to interview and gather evidence to take administrative or other action. The amendments balance the need for the NTSB to conduct its investigative activities in a manner that permits other agencies to fulfill their statutory mandates.

The NTSB has carefully considered the existing text, and proposes amendments to ensure other Federal agencies are aware of the NTSB's role as the Federal agency with priority over other investigations of transportation events. Consequently, the NTSB proposes the language, under the title

''Priority of NTSB investigations'' in § 831.5.

As indicated in both the existing and proposed language for § 831.5, the NTSB is fully aware other agencies (both Federal, state, and local) have other statutory responsibilities, such as rulemaking and enforcement. The NTSB does not seek to inhibit enforcement actions; however, the NTSB must be able to direct its investigations. Consistent with the language in the NTSB's enabling statute [3] concerning other federal agencies, the NTSB must ensure these agencies are aware the NTSB's investigation has priority. For this reason, the NTSB proposes language in § 831.5 to indicate other Federal agencies must conduct their work in a manner that recognizes the priority of the NTSB investigation. The NTSB believes the best way to accomplish this is for the employees of other Federal agencies who are involved in an investigation to contact the NTSB investigator-in-charge (IIC) prior to questioning a witness, gathering records or documents, or otherwise obtaining any type of information relevant to the non-NTSB investigation.

The NTSB, as discussed in the preamble concerning § 831.13, below, proposes that parties to an NTSB investigation must inform the NTSB of any safety-related actions (either preventative or remedial) they will take as a result of any information that becomes available during an NTSB investigation. The NTSB must remain aware of the actions another agency or organization is taking as a result of the information gathered during the course of the investigation. The NTSB believes such openness will ensure it remains fully informed of corrective actions and how those actions could affect the NTSB's activities and findings. The NTSB does not wish to impede enforcement or corrective action, but seeks to remain aware of the effects of other organizations' participation, and to ensure their involvement does not impair the NTSB investigation.

The NTSB also proposes language in § 831.5(a)(3) and (4), to ensure the NTSB is fully cognizant of all information pertinent to an investigation. Priority over other investigations means the NTSB must obtain evidence (including, but not limited to, records that predate the event, such as equipment maintenance records or operator training records, and statements from witnesses) in a timely manner. This first right of NTSB access to information is the best manner in which to ensure a complete, independent investigation, and applies to all organizations involved in the investigation. In amending this section, the NTSB seeks to ensure other agencies are aware the NTSB may request they delay collecting evidence or information until the NTSB approves of such collection. Similarly, NTSB investigations require party participants to assign relevant experts to NTSB investigations.

The NTSB specifically seeks input from other agencies concerning our prioritization of investigative activities. The NTSB seeks to ensure other agencies can complete time-sensitive tasks as needed, consistent with the NTSB's ability to obtain needed information on a priority basis and the NTSB's possession of records does not impair the functions of the other agencies.

Section 831.6 Request to Withhold Information

The NTSB proposes to make minor changes to § 831.6, titled ''Request to withhold information.'' First, the NTSB proposes adding the following two sentences after the ''Trade Secrets Act'' title in paragraph (a) of § 831.6: ''This section applies to domestic matters. Information the NTSB receives concerning international aviation events is addressed in § 821.23 of this part.'' The NTSB would not release information from an international investigation that the Trade Secrets Act protects.

The NTSB proposes re-codifying paragraph (a)(3) of § 831.6 as paragraph (b). The language of this paragraph would remain mostly unchanged. Within this paragraph the NTSB proposes slightly changing the description of ''voluntarily-provided safety information'' so the description will essentially duplicate the language of 49 U.S.C. 1114(b)(3).

The NTSB proposes adding the sentence ''[t]he NTSB will de-identify all such safety information to the greatest extent possible'' in paragraph (b)(2). The NTSB will de-identify any voluntarily-provided safety information to the greatest extent possible if it makes this information public.

The NTSB proposes codifying current paragraph 831.6(b), entitled ''Other,'' as § 831.6(c). The NTSB does not propose any substantive changes to paragraph (c).

As summarized above, A4A suggested in its comment responding to the NTSB's retrospective review notice that the NTSB strengthen the protections of § 831.6 ''to facilitate future information exchange initiatives,'' such as ''the expected FAA–NTSB Aviation Safety Information and Analysis Sharing [ASIAS] System program.'' [4] The NTSB is uncertain that it could withhold voluntarily provided information in response to a request under the FOIA, unless the NTSB had a statutory exemption permitting it to do so. For example, in protecting data obtained through Flight Operational Quality Assurance (FOQA) programs, the FAA relies on a statutory protection that protects from public disclosure reports data, and other information developed under the Aviation Safety Action Program, the FOQA Program, the Line Operations Safety Audit Program, information produced for purposes of developing and implementing a safety management system, and information prepared under the Aviation Safety Information Analysis and Sharing Program (or any successor program).[5]

The NTSB believes including language in § 831.6 indicating the NTSB will not disclose voluntarily provided safety information *relevant to a particular investigation* would be contrary to the NTSB's enabling statute, which only prohibits the NTSB from disclosing ''voluntarily provided safety-related information if that information is *not* related to the exercise of the Board's . . . investigation authority.'' 49 U.S.C. 1114(b)(3)(emphasis added). Therefore, the NTSB currently does not propose altering § 831.6 to provide protections for voluntarily submitted information related to a specific investigation. The NTSB understands this topic is of keen interest to the transportation industry and other government agencies. As a result, the NTSB specifically invites comments on the issue of how the NTSB should handle the voluntary provision of transportation safety information.

[3] 49 U.S.C. 1131(a)(2)(A) (stating, ''an investigation by the Board under paragraph (1)(A)–(D) or (F) of this subsection has priority over any investigation by another department, agency, or instrumentality of the United States Government. The Board shall provide for appropriate participation by other departments, agencies, or instrumentalities in the investigation. However, those departments, agencies, or instrumentalities may not participate in the decision of the Board about the probable cause of the accident''); *see also* 49 U.S.C. 1135(a) (requiring the Secretary of the Department of Transportation to respond to NTSB safety recommendations within 90 days of the issuance of such recommendations).

[4] For information concerning ASIAS, please see *http://www.asias.faa.gov.* ASIAS uses aggregate, protected data from industry and government voluntary reporting programs, without identifying the source of the data, to determine safety issues proactively, identify safety enhancements, and measure the effectiveness of solutions.

The NTSB–ASIAS Memorandum of Understanding signed in November 2012 outlines the procedures, guidelines, and roles and responsibilities for the ASIAS Executive Board to address specific written NTSB requests for ASIAS information.

[5] 49 U.S.C. 44735, as added by section 310(a) of the FAA Modernization and Reform Act of 2012, Pub. L. 112–95, 126 Stat. 11, 64 (Feb. 14, 2012).

Section 831.7 Witness Interviews

In the interest of clarity and consistency, the NTSB applies § 831.7 to situations in which a witness appears voluntarily for an interview, or in which the NTSB compels a witness to appear by issuing a subpoena. It is not unusual for witnesses to be represented in these situations and the NTSB is cognizant of litigation arising out of transportation events. In the event an attorney or other representative has questions concerning the NTSB's investigation or its pursuit of witness testimony, the attorney/representative should contact the NTSB Office of General Counsel.

The NTSB proposes changing the title of § 831.7 to ''[w]itness interviews,'' to describe this section in a more accurate manner.

The NTSB proposes these amendments for several reasons. First, some witnesses whom the NTSB seeks to interview have expressed their desire to be accompanied by more than one person. A4A recommended the NTSB change § 831.7 to allow more than one representative accompany each witness. In particular, A4A stated:

> The designation of one witness representative, attorney or otherwise, does not recognize that witnesses are frequently both union members and employees of a party, with distinctly different duties and interests. This creates unnecessary conflict for a witness, since he or she has to choose between a union representative or an attorney. Increasing the permissible number of representatives to two would better protect a witness in the NTSB process.

The NTSB acknowledges NTSB investigators have indeed conducted interviews in which a witness seeks to have both a union representative and an attorney present during the interview. The NTSB, however, declines to propose changes to § 831.7 to allow for more than one representative per witness, for several reasons. The NTSB believes no more than one representative is reasonably necessary, to advise and provide support to the witness.

Further, if the NTSB allowed two representatives per witness, the possibility could arise the representatives would disagree with how to advise the witness during the interview. This would distract from the purpose of the interview.

In addition, the NTSB notes, the proposal for language describing the representative's role at the interview is ''not to supplement the witness's testimony in any way or represent the interests of other affiliations of the witness during the interview.'' The NTSB believes this language is necessary, because litigation often has commenced before the NTSB interviews witnesses; therefore, the NTSB specifically notes it will not allow litigation interests to interfere with the fact-finding purpose of witness interviews the NTSB conducts.

The NTSB also proposes adding a new paragraph (b) to § 831.7, to describe investigators' roles in overseeing interviews. This paragraph would clearly describe the interview as occurring under the supervision of the investigator, and would confirm the investigator has the authority to exclude a representative from the interview if the representative engages in disorderly conduct or is contumacious. The NTSB believes investigators are rarely confronted with such circumstances, but it is appropriate to propose this provision in § 831.7, to ensure representatives are aware NTSB investigators direct the course of interviews.

In addition, the NTSB proposes adding paragraph (c) to § 831.7, to clarify the NTSB will release transcripts or summaries of interviews and witnesses' and their representatives' names in records that appear in the NTSB public docket for an investigation, absent unusual or compelling circumstances. This determination concerning the existence of unusual or compelling circumstances is solely within the discretion of the NTSB. The NTSB believes the language it proposes in paragraph (c), therefore, confirms the NTSB has the discretion to withhold witnesses' names if circumstances merit such protection.

Section 831.8 Investigator-in-Charge

The NTSB proposes minimal changes to the text of § 831.8, which describes the duties of NTSB investigators-in-charge (IICs). However, the NTSB proposes organizing § 831.8 into paragraphs, and removing the parentheses from the sentence stating the role of a Board Member at the site of an investigation is as the official spokesperson for the NTSB. The NTSB believes these changes will allow for quick reference to specific provisions of the section, and will assist in the public's understanding of IICs' duties.

The NTSB also proposes including a reference to § 800.27 of the NTSB's rules, which provides IICs the authority to sign and issue subpoenas, administer oaths and affirmations, and take depositions (or cause them to be taken) in furtherance of an investigation. The NTSB believes referencing § 800.27 ensures the public and participants in NTSB investigations are aware of IICs' authority. In addition, the NTSB proposes removing the word ''considerable'' from the final sentence in § 831.8, which currently provides the IIC ''continues to have considerable organizational and management responsibilities throughout later phases of the investigation, up to and including consideration and adoption of a report or brief of probable cause(s).'' The NTSB does not believe the adjective ''considerable'' is necessary in this paragraph, and the inclusion of that term may imply the IIC does not have considerable responsibilities from the time the NTSB commences the investigation.

Section 831.9 Authority of NTSB Representatives

Section 831.9, currently titled ''Authority of Board representatives,'' discusses the NTSB's authority to enter property or wreckage and inspect, photograph, or copy any records or wreckage. Section 831.9 also discusses the NTSB's authority to issue subpoenas and conduct testing. The NTSB proposes changes to § 831.9, in the interest of making the section easier to understand. In general, the proposed revisions strive to convey clearly the following: (1) NTSB representatives have the authority to enter property and inspect, download, photograph, or retain items as necessary to the investigation; (2) the NTSB is authorized to obtain evidence, such as medical records or testimony, by issuing a subpoena; and (3) the NTSB has the authority to conduct and supervise testing of evidence, which includes tearing down tangible components and extracting data from equipment, and taking any further action necessary to obtain and preserve evidence.

The NTSB's authority to obtain information during the course of an investigation is broad. Title 49 U.S.C. 1134 authorizes any NTSB ''officer or employee'' to obtain information in furtherance of the investigation. In addition, 49 U.S.C. 1114(e) authorizes the NTSB to obtain drug test information, such as split samples. In this regard, the NTSB will work with manufacturers of devices to extract data to the extent obtaining such data is beneficial to the NTSB's investigation. For example, for many investigations, the NTSB now must extract data from wireless devices. The changes the NTSB proposes to § 831.9, therefore, accounts for advances in technology.

In this section, the NTSB proposes using the term *authorized representative of the NTSB* in lieu of ''employee'' because, on some occasions, the NTSB requests the assistance of the FAA, local law enforcement, or other party representatives to inspect or photograph

the site of a transportation event, or collect evidence. Similarly, upon the approval of the IIC, the NTSB may utilize the assistance of other Federal agencies, such as the Coast Guard, the Federal Railroad Administration, the Pipeline and Hazardous Materials Safety Administration, or the Federal Motor Carrier Safety Administration, among other agencies. The NTSB maintains, in the initial phases of an investigation, employees of other Federal agencies who have arrived at the site of an event and begin to collect evidence on behalf of the NTSB are ''authorized representatives'' of the NTSB. Such conduct is consistent with the NTSB's party process, as more fully described below, in § 831.11.

Regarding the other portions of text in paragraphs (a)(1), (2), and (3), the proposed text is similar to the language in the existing version of § 831.9.

The NTSB proposes including the description of its subpoena authority in paragraph (b). The proposed text for paragraph (b) is identical to the current version of § 831.9, although paragraphs (1), (2), and (3) are new. These new provisions describe (1) the NTSB's authority to obtain medical records and specimens, and (2) the NTSB's status under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104–91, as a ''public health authority'' [6] and (3) the NTSB's authority to obtain all other records necessary for an investigation, such as records from cell phones or other wireless devices, as well as credit card records. The NTSB often must issue subpoenas to obtain medical records from hospitals and other health care providers, and it relies on its status as a recognized ''public health authority'' to obtain such records. Including this terminology in § 831.9 will ensure hospitals and other providers who have medical records critical to an NTSB investigation are aware of the NTSB's status under the HIPAA. With regard to paragraph (3), the NTSB is committed to obtaining all information necessary for its investigations, including records from wireless devices, credit cards, and the like. The NTSB obtains and analyzes such records only when necessary, and conducts such analysis in the least intrusive manner. The NTSB acknowledges the potential confidentiality issues associated with such records and, in general, works with the providers of such records before contemplating any public release of any portion of such a record.

Finally, the NTSB proposes including paragraph (c) in § 831.9 to describe the NTSB's authority to conduct tests and examine evidence, which includes the extraction of data from recorders or equipment. Most of the language in the proposed version of § 831.9(c) is similar to the current version of the final two sentences in § 831.9(a), which is based on the NTSB's statute, at 49 U.S.C. 1134(d). The only term the NTSB added to the proposed version of paragraph (c)(1) is ''extraction of data.'' With the increasing prevalence of recording devices in daily life, the NTSB often encounters recorders associated with accidents which require downloading to reveal useful data during an investigation. The NTSB proposes the addition of this term because, with recent advances in technology and personal use thereof, the NTSB's investigations often require the downloading or other retrieval of data from recorders or other equipment.

The NTSB recognizes a party may need access to a recorder or equipment. The NTSB will return such items to their owners, once the NTSB investigation no longer requires the NTSB's possession of the devices. However, as described above in reference to proposed § 831.5(a)(3) and (4), once an investigation commences, the NTSB maintains priority and will direct how and when the extraction of data should occur. Section 831.9(c), as proposed, articulates this concept.

Section 831.10 Autopsies and Postmortem Testing

Section 831.10, titled ''Autopsies,'' states NTSB investigators are authorized to obtain copies of autopsy reports or order an autopsy, while observing local law protecting religious beliefs. The NTSB proposes amending this section to address postmortem testing results, which the NTSB frequently needs for the purposes of assessing whether a deceased operator consumed drugs or alcohol prior to a transportation event. Specifically, the NTSB proposes changing the title of 831.10 to ''Autopsies and postmortem testing,'' replacing the word ''officials'' with the word ''authorities'' in the first sentence, and referencing postmortem tests alongside autopsies in the text of § 831.10. When sufficient, the NTSB opts to request postmortem testing in lieu of a full autopsy. The NTSB understands autopsies are time-consuming and costly; therefore, the NTSB only requests an autopsy when the information from an autopsy is necessary to the investigation.

Section 831.11 Parties to the Investigation

Section 831.11, titled ''Parties to the investigation,'' details the operation of the NTSB's process of designating parties when the agency undertakes an investigation. The NTSB proposes keeping the majority of the current text in § 831.11, although reorganizing it to add provisions bringing the description up-to-date and addressing issues that have arisen in certain investigations.

The NTSB invites comments concerning the use of the term ''party'' and/or ''parties'' in this section and other sections, as appropriate. For the language proposed in this NPRM, the NTSB continues to use the term ''party.'' The NTSB has long used this term to describe participants in NTSB investigations who offer necessary information and/or expertise. The NTSB is interested in obtaining feedback concerning whether the term ''party'' is appropriate, or whether another term, such as ''technical advisor'' is more suitable.

The NTSB proposes to title paragraph (a) ''[p]articipants,'' and include in it the existing text of § 831.11.

Concerning paragraph (a)(1), the NTSB notes no organization has a right to party status. The NTSB provides for participation of the FAA, pursuant to 49 U.S.C. 1132(c), when it is ''necessary to carry out the duties and powers'' of the FAA. As a matter of practice, the NTSB also often designates other Federal agencies to serve as parties. Additionally, in particularly complex investigations involving multiple parties, the NTSB organizes party representatives into groups arrayed by subject matter expertise, each with its own purpose of investigating a specific aspect of the event.[7] When the NTSB designates a particular organization as a party, the organization may ask that several employees of the organization be permitted to participate in each group. The NTSB will designate only qualified individuals who have expertise the NTSB determines is necessary to the investigation to participate in groups. The IIC ultimately has approval authority for each party participant and all group designees, and will assess which individuals should assist with the investigation as parties.

In addition, the NTSB proposes including the sentence, ''[t]he party representatives proposed by party organizations to participate in the

[6] 64 FR 59956 (Nov. 3, 1999); *see also* 45 CFR 164.501 and 164.512(b)(1)(i).

[7] The NTSB's Major Aviation Investigations Manual, available at *http://www.ntsb.gov/doclib/manuals/MajorInvestigationsManual.pdf, describes* the NTSB's practice of organizing investigations into groups.

investigation should, to the extent practicable, be personnel who had no direct involvement in the event under investigation.'' In some investigations, party participants either had some involvement in an event themselves, or had close ties to frontline employees involved in the event. The NTSB is concerned this could compromise the investigation, particularly in situations in which the NTSB is relying exclusively on that specific party for information. The proposed language clarifies party participants should be as independent as possible from the event. To the extent possible, this independence language would apply to FAA employees and representatives. The NTSB recognizes each investigation is different, and attempting to designate only party participants who have complete independence in some investigations may be an impossible goal. The NTSB proposes including the term ''to the extent practicable'' to provide adequate flexibility, while informing parties the NTSB expects its participants to act in an objective manner in assisting with the investigation.

Concerning paragraphs (a)(3) and (4), this language is from the current version of § 831.11(a)(2). The NTSB believes organizing § 831.11(a)(2) into two distinct paragraphs, as (a)(3) and (4), allows the public to follow paragraph (a) more easily.

With regard to parties in general, the NTSB often requests party participants who may be engaged in enforcement activities to erect a figurative ''wall'' between their agency's enforcement and investigative duties. Wherever possible, the NTSB seeks to designate individuals as party representatives only if they are not also engaged in enforcement activities; however, the NTSB acknowledges in some cases, the same individual must serve in both roles. As a result, at this juncture, the NTSB declines to propose a regulatory prohibition stating individuals who are engaged in enforcement duties may not participate in NTSB investigations.

The NTSB proposes paragraph (b) of § 831.11 be titled ''Disclosures,'' and include text that conveys two concepts: (1) The NTSB maintains discretion to disclose party representatives names, and (2) the NTSB may share information among parties for purposes of the investigation, but will preserve confidentiality to the greatest extent possible, and adhere to the provisions of 49 U.S.C. 1114 and § 831.6(b)(1) of this part.

This new proposed language results from experiences in some investigations. Although the NTSB will refrain from disclosing certain information that is exempt from disclosure under the Freedom of Information Act (FOIA), parties should expect the names of employees and other individuals associated with their organization will appear in the NTSB's public docket. The NTSB believes the public has an interest in knowing who participated in an NTSB investigation, and parties do not have a significant privacy interest in their employees' or members' names. As a result, the NTSB party participants' names are not exempt from disclosure.

The NTSB proposes a short statement in paragraph (b)(2) apprising potential parties of the practice of sharing information. An investigation requires the sharing of information among parties. The NTSB attempts to undertake such sharing in a judicious manner, especially when the NTSB must ask a party to share confidential or commercially valuable information with other party participants. In addition, NTSB investigators frequently remind party participants at group meetings that the predominant purpose for their participation is to assist the NTSB in its investigation, rather than to learn investigative information. The NTSB will consider a party's requests for imposing limits on sharing certain information or other procedural safeguards. In addition, the NTSB, as stated above, generally does not place information into the public docket that is exempt from disclosure under the FOIA.

The NTSB proposes keeping most of the text of § 831.11(b) as § 831.11(c), with the title ''Party agreement.'' The only significant change the NTSB proposes in this paragraph is the addition of the statement that employees of other Federal agencies will not be required to sign the Statement of Party Representatives. The NTSB's practice is to refrain from asking representatives of other Federal agencies to sign the Statement. The NTSB does not believe such signatures are necessary, as other Federal agencies understand the NTSB's party process, NTSB investigative procedures, and their responsibilities as party participants in investigations. As a result, the NTSB believes it is appropriate to indicate in paragraph (c) of § 831.11 that other Federal agencies need not sign the Statement of Party Representatives.

Lastly, in paragraph (d) of § 831.11, the NTSB proposes text concerning party inquiries and/or reviews. In this new proposed paragraph, the NTSB intends to include text acknowledging parties may conduct reviews or audits into certain aspects of a transportation event, and requiring party participants to inform the IIC in a timely manner of such contemporaneous reviews or audits.

The NTSB's proposal to add this requirement results from recent issues the NTSB encountered in multiple investigations. The NTSB is aware parties may conduct their own reviews of oversight deficiencies or their processes and procedures following a transportation event. The NTSB does not attempt to limit or discourage such activities; however, the NTSB notes party participants must remain responsive to NTSB requests for information or assistance. In addition, in the event a party participant becomes aware of information relevant to the investigation, the IIC should be made aware of such information. For this reason, the NTSB proposes adding paragraph (d), to require participants to inform the IIC if they are conducting a separate audit, inquiry, or other review while the NTSB's investigation is ongoing. In addition, to the extent a party conducts a review or engages in a post-event activity that overlaps with the NTSB's work or anticipated work, the party must advise the IIC and seek his or her approval to conduct these activities. The party must also provide the NTSB with a copy of the results of the separate audit, inquiry, or other review. A party who engages in such activities without the prior approval of the IIC will lose party status. Likewise, any party's failure to disclose the results of a separate audit, inquiry, or other review to the IIC will result in loss of party status.

Section 831.12 Access to and release of wreckage, records, mail and cargo

The NTSB proposes only minimal edits to § 831.12. The NTSB proposes removing the final sentence of paragraph (b) of § 831.12, which refers to a form the NTSB completes upon the return of wreckage to its owner. Currently, this sentence states, ''[w]hen such material is released, Form 6120.15, 'Release of Wreckage,' will be completed, acknowledging receipt.'' The NTSB does not believe a reference to a form is necessary in this section.

The NTSB notes A4A commented on § 831.12, by suggesting the NTSB change § 831.12 to allow remote read-outs of digital flight data recorders and cockpit voice recorders, to preclude the need for transporting the recorders to NTSB Headquarters in Washington, DC A4A also recommended the NTSB ''establish a firm deadline for returning [recorders] to the [air] carrier.'' The NTSB appreciates A4A's comments. The

NTSB is aware of the advances in technology allowing the downloading of data to occur remotely as an aircraft pulls into the gate at its destination or otherwise. However, the NTSB believes this concern, while relevant to its investigations, is not appropriate for inclusion in 831.12 but rather will be considered as the agency reviews its policies and procedures regarding recorder data.

As to A4A's comment concerning deadlines for the return of recorders to air carriers, the NTSB returns recorders to air carriers once it completes the necessary work involving the recorder, and it abides by strict internal protocols to secure the recorder. The NTSB also endeavors to complete data downloading for recorders as quickly as possible. The NTSB declines to propose any changes to § 831.12 concerning the return of recorders because the requirements of each investigation will vary. The NTSB has noted A4A's comment, however, and may update its handbooks concerning recorders if the NTSB determines the establishment of a deadline would be possible.[8]

Section 831.13 Flow and Dissemination of Investigative Information

As with several other sections in part 831, the NTSB proposes organizing § 831.13 into more paragraphs, and providing titles to each paragraph, to ensure the public can understand § 831.13 more easily. In paragraph (a), the NTSB proposes removing the reference to a ''field investigation,'' because that term is not defined in the NTSB's regulations, and the NTSB believes the phrase ''at the site of the event'' adequately conveys the intent.

Also in paragraph (a), the NTSB believes it is prudent to state clearly that § 831.13 applies from the time an investigation commences until the NTSB concludes its investigation. Parties who are uncertain as to whether the NTSB has concluded a particular investigation may inquire of the IIC. This temporal description results from parties' requests in some investigations to release information for purposes of civil litigation. In its responses to such requests, the NTSB notes it interprets this prohibition on disclosing information as only relevant to information obtained during the course of the investigation. In addition, A4A, in its comment, suggested: ''[t]he NTSB should examine whether a definition of 'information concerning an accident' that may not be released by a party would avoid misunderstandings about the scope of that term.'' The NTSB agrees with this comment in principle, but notes it is difficult to provide an exhaustive list of the type of information that might be pertinent to every investigation. However, the NTSB believes the proposed description in paragraph (a) offers a better definition of the intent of the phrase, ''information concerning the investigation.''

The NTSB proposes keeping the text in the existing version of § 831.13(b), but codifying the paragraph as § 831.13(c) and adding the title, ''[p]rohibition on release of information.'' The NTSB has referenced this provision in several instances since the promulgation of this regulation, and believes it is critical to NTSB investigations. Preliminary releases of information when an investigation is ongoing could result in the release of incorrect or incomplete information, which would impede the progress of an investigation and erode public confidence in the credibility of the investigation.

The A4A comment also suggested the NTSB allow parties to release information in certain circumstances. In particular, A4A suggested the NTSB provide some flexibility concerning the prohibition on release of information. A4A states as follows:

> [T]he NTSB should consider specifically allowing ''information concerning an accident'' to be shared by a party to the extent reasonably necessary to:
> ▪ Locate, review and evaluate information that may be related to the accident or requested by the NTSB (providing the NTSB with information ''relevant to an accident'' can only be most effectively accomplished if the party can freely search for and evaluate such information within its organization);
> ▪ prepare witnesses; or
> ▪ share critical safety information within its organization.

In subsequent discussions between NTSB staff and the A4A Safety Committee representatives,[9] some members of the committee expanded on these comments, indicating it would also be helpful to include language better defining the scope of information that may be shared with frontline employees, such as pilots, during an NTSB investigation.

After careful consideration of these comments as well as other factors, the NTSB proposes text for paragraph (c) that provides for the release of investigative information provided certain conditions are met. The proposed language will allow parties to release information within party organizations as needed to implement prevention, remedial action, or as otherwise noted by the NTSB (e.g., in a safety bulletin to employees), in accordance with certain criteria. As a general matter, in the absence of the IIC's restrictions, the proposed communication may only be provided to those in the organization who have decision-making authority or a need to know the information. However, the NTSB recognizes the decision-makers may believe a need for a wider dissemination within the party organization or to customers exists to implement safety measures. For such dissemination, the proposed document or communication containing the information must be provided to the IIC in a timely manner prior to the planned dissemination. The time should allow the IIC to set forth case-specific conditions or correct inaccuracies. A party should expect the IIC will generally need more time to review if the communication is intended to be distributed throughout a party organization; in all cases, the NTSB will make a concerted effort to review the information and respond to the request to disseminate it as efficiently as possible. The NTSB promotes the timely dissemination of factual information concerning the investigation within party organizations for the limited purposes of assessing the need for corrective actions and developing measures to implement such actions. Such releases function to prevent recurrence of transportation events, and may assist the NTSB in formulating necessary requests for additional information.

Likewise, party participants must inform the NTSB IIC regarding the party organization's findings and planned actions resulting from any dissemination of investigative information within their organization.

In addition, in furtherance of the ultimate goal of making timely safety improvements, the NTSB would permit parties to share information gathered by the NTSB in the course of its investigation outside of their organizations, provided the parties

[8] NTSB Cockpit Voice Recorder Handbook (November 2001), available at *http://www.ntsb.gov/doclib/manuals/CVR_Handbook.pdf;* NTSB Flight Data Recorder Handbook (December 2002), available at *http://www.ntsb.gov/doclib/manuals/FDR_Handbook.pdf.*

[9] The NTSB sought additional information from A4A concerning their August 24, 2012 comment. Representatives from the A4A Safety Committee met with the NTSB Deputy Director of Aviation Safety on December 4, 2012, and discussed the items outlined in their comment. The docket for this rulemaking includes a memorandum containing a detailed description of all items discussed at the December 4 meeting. This memorandum is available as Document Number NTSB–GC–2012–0002–0007 in the docket for this rulemaking on the Regulations.gov Web site at *http://www.regulations.gov/#!documentDetail;D=NTSB-GC-2012-0002-0007.*

fulfill certain criteria. First, the party must share the information with the IIC in a timely manner to receive approval of the IIC before the release is to occur.

In such cases, the IIC would evaluate how the dissemination of the information would improve safety, and would seek to take precautions to ensure the release of information would not impede the investigation. This evaluation process prior to the dissemination of investigative information allows the NTSB to appropriately balance the investigative needs and the potential safety improvements. This process also allows the NTSB and the party to work together to achieve the objective of improving safety in a timely manner. For example, the NTSB understands manufacturers may seek to take immediate action to improve the safety of their vehicles, equipment, or other materials, and the NTSB certainly shares this goal. Such action may include alerting customers of a safety concern with the product. Therefore, the NTSB believes providing additional clarity in § 831.13 will benefit investigative parties in all transportation modes.

The NTSB further notes, however, no investigative information shall be disseminated by party participants to any individual within their party's organization or otherwise for purposes of litigation preparation or media interests without the IIC's advance approval. In this regard, the IIC's litmus test for whether to approve dissemination of any investigative information during the course of an ongoing investigation will be the purpose of the sharing of information. As indicated above, IICs will generally approve sharing of information within a party organization for purposes of making safety improvements.

With regard to the use of information concerning the investigation for the purposes of preparing witnesses, the NTSB is not in favor of this proposal, as advance access to such information by witnesses may affect their truthful testimony to the NTSB or otherwise compromise the integrity of the investigation. However, the NTSB invites commenters to propose examples and scenarios in which such use of information concerning the investigation could benefit the investigation.

Furthermore, as discussed below, the NTSB recognizes the role of other Federal agencies in conducting investigations for purposes of enforcement of regulations. Such investigations often require obtaining information in an expeditious manner. The NTSB does not prohibit parties from sharing necessary information with another Federal agency in response to the agency's demand. However, the NTSB IIC should be informed of the provision of records and information, and should not be excluded from communications concerning the existence of records or information relevant to the investigation. To the greatest extent possible, the NTSB will work with other agencies to share information obtained in the course of the NTSB investigation to minimize duplicative requests to NTSB parties for information.

Concerning paragraph (b)(5), the NTSB notes it has chosen to reference specifically the statutory descriptions of cockpit voice recorder and surface vehicle recorder recordings, codified at 49 U.S.C. 1114(c) and (d). The NTSB recognizes § 1114(c) describes ''cockpit voice recorder'' respectively, as follows: ''[t]he Board may not disclose publicly any part of a cockpit voice or video recorder recording or transcript of oral communications by and between flight crew members and ground stations related to an accident or incident investigated by the Board [until the time of the investigative hearing or the time a majority of the other factual reports on the accident or incident are placed in the public docket] [10] ''; similarly, § 1114(d) prohibits the NTSB from disclosing publicly ''any part of a surface vehicle voice or video recorder recording or transcript of oral communications by or among drivers, train employees, or other operating employees responsible for the movement and direction of the vehicle or vessel, or between such operating employees and company communication centers, related to an accident investigated by the Board [until the time of the investigative hearing or the time a majority of the other factual reports on the accident or incident are placed in the public docket].'' The NTSB consistently applies these provisions and exercises care in making any release determinations concerning voice or vehicle recordings.

In addition, the NTSB notes it is attentive to the needs of victims and victims' family members. The NTSB's Transportation Disaster Assistance Division provides information to families in accordance with 49 U.S.C. 1136 and 1138. The NTSB also extends the practice of providing information to family members concerning transportation events not specifically covered under 49 U.S.C. 1136 and 1138. During each investigation, the NTSB informs family members and survivors they may contact the Division at any time to inquire about the status of an investigation or other matters regarding the investigation. In responding to such inquiries, the NTSB remains mindful of the provisions and requirements in part 801 of this chapter, concerning the public release of information, as well as § 831.11 of this part, which states the role of party participants is to provide necessary technical expertise, and gather and review factual information. These regulations serve to protect ongoing investigations while allowing family members and survivors direct contact with NTSB employees who will respond to their inquiries and provide them with information in the timeliest manner possible.

Section 831.14 Proposed Findings

In § 831.14, titled ''[p]roposed findings,'' the NTSB does not propose any substantive changes, but only proposes changing the word ''Board'' to ''NTSB'' in paragraph (a).

As summarized above, A4A submitted a comment requesting the NTSB add to § 831.14 a statement that the NTSB will provide a copy of the NTSB draft final report, including analytical conclusions but not necessarily probable cause and recommendations, to parties for review prior to a Board meeting, when the Board schedules a meeting on an investigation. A4A's comment cites the recommended standards and practices of ICAO, as countries who conduct aviation accident and incident investigations in accordance with these recommended standards and practices release draft reports to accredited representatives (who often seek the input of their technical advisers) in foreign aircraft investigations.

While the NTSB does not propose amending § 831.14 pursuant to A4A's comment concerning the sharing of draft reports, the NTSB is considering adopting a practice of sharing draft reports with parties in some modes. The NTSB plans to address this issue outside the purview of this NPRM. If the NTSB determines to engage in such sharing, it will ensure party representatives receive timely notification of the NTSB's plans.

Reorganization of Part 831

As described above, the NTSB has determined organizing part 831 into mode-specific subparts would be helpful to NTSB investigators, party participants, and the public. Therefore, it is proposing new subparts B, C, D and E, respectively. The NTSB proposes

[10] Sections 1114(c) and (d), however, allow for release of the recording transcript. Section 1114 is available to the public at *http://www.gpo.gov/fdsys/pkg/USCODE-2009-title49/pdf/USCODE-2009-title49-subtitleII-chap11-subchapII-sec1114.pdf.*

moving the portions referencing mode-specific responsibilities, such as the existing version of § 831.2(a), which is titled ''*Aviation*'' and contains three lengthy paragraphs, to various sections within the proposed new subpart B. Similarly, the NTSB proposes dividing and relocating portions of the existing version of § 831.2(b), titled ''*Surface,*'' which currently states the NTSB is responsible for the investigation of railroad and pipeline accidents in which a fatality or in which substantial property damage has occurred, or which involve a passenger train. The regulation includes a reference to 49 CFR part 840. In addition, the regulation states the NTSB is responsible for major marine casualties and marine accidents involving a public and non-public vessel, or involving Coast Guard functions (under 49 CFR part 850). Regarding highway accidents, the regulation states the NTSB is responsible for accidents involving railroad grade-crossing events, the investigation of which is selected in cooperation with the States.

49 CFR 831.2(b) (footnote omitted). The NTSB proposes moving each mode-specific listing in paragraph (b) to its mode-specific subpart.

Subpart B: Aviation Investigations

The NTSB proposes the addition of a new subpart titled ''Aviation Investigations,'' composed of four sections mostly derived from existing text within part 831.

Section 831.20 Responsibility of NTSB in Aviation Investigations

The NTSB proposes adding § 831.20, titled ''[r]esponsibility of NTSB in aviation investigations,'' to include the same text in the current version of § 831.2(a).

Section 831.21 Authority of NTSB Representatives in Aviation Investigations

In addition, the NTSB proposes adding § 831.21 titled, ''[a]uthority of NTSB representatives in aviation investigations.'' The NTSB proposes including the aviation-specific text in current § 831.9(b) as the text for proposed § 831.21, to state NTSB employees possess the authority to examine and test any civil or public aircraft, as well as aircraft engines, propellers, appliances, equipment or any other property aboard the aircraft involved in an accident or incident.

As noted in the discussion concerning § 831.9, above, this proposed language is from the NTSB's enabling statute, which specifically provides the NTSB with authority to examine and test evidence related to an aviation accident.[11] The NTSB believes including this in Subpart B, as an aviation-specific authorization, is the best manner in which to organize part 831. The NTSB has not suggested substantive changes to this language, but only replaces ''[t]he Board,'' with ''[a]ny employee of the NTSB,'' to maintain consistent terminology throughout the NTSB's regulations.

Section 831.22 Other Government Agencies and NTSB Aviation Investigations

The NTSB also proposes adding § 831.22, titled ''Other Government agencies and NTSB aviation investigations.'' The NTSB proposes moving part of the text of § 831.11(a)(4) to § 831.22(a). In addition, the NTSB proposes re-codifying the current version of § 831.2(a)(2) as paragraph (b) in § 831.22, with no substantive changes.

The NTSB continues to utilize the FAA's assistance in certain investigations, particularly general aviation investigations, in which the FAA arrives at the site of the accident or incident and collects information. The FAA then provides the information to the NTSB, which reviews and analyzes it, and either follows through with the investigation to complete a probable cause finding, or determines the information indicates the event may be closed by placing a memorandum on file. The NTSB plans to continue this procedure; therefore, the NTSB does not suggest substantive edits to this paragraph.

The NTSB proposes codifying the footnote within § 831.2(a)(2) as paragraph (c) in § 831.22, to state FAA representatives have the same authority as NTSB investigators when conducting activities on behalf of the NTSB.

In providing on-scene assistance to the NTSB for certain investigations, the NTSB will consider the FAA an ''authorized representative.'' Section 831.9, as proposed herein, states that any authorized representative of the NTSB may enter property or wreckage; inspect, photograph, or copy records or information; and question any person who has knowledge of the accident or incident. The NTSB will request the FAA complete such work on the NTSB's behalf. Therefore, the NTSB believes including this language concerning the authority of FAA employees during investigations as paragraph (c) is appropriate.

The NTSB proposes adding paragraph (d) to § 831.22, to state the NTSB may exercise its discretion to make available a public docket with information from investigations in which the FAA has conducted the fact-finding, as described in paragraphs (b) and (c) of § 831.22.

The NTSB proposes this paragraph because it may opt to conclude an incident investigation only after reviewing information obtained from the FAA, and, as described above, may determine a probable cause finding is not necessary in some cases. Nevertheless, the NTSB may, in the interest of transparency, place the records from such investigations in a public docket.

The NTSB values the FAA's assistance with NTSB investigations. Representatives of the NTSB met with FAA personnel on January 6, 2014, to discuss the sharing of information during accident and incident investigations, as well as the overall oversight and conduct of investigations. This meeting helped the NTSB to better understand the FAA's concerns. The NTSB and FAA reached a consensus that the NTSB will be aware of all FAA requests for information made to other parties. The FAA should ensure the NTSB receives information the FAA has requested from a party, for any purpose. This expectation is consistent with Congress's direction for the NTSB to maintain priority over each investigation. 49 U.S.C. 1131(a)(2)(A).

Section 831.23 International Aviation Investigations

The NTSB proposes adding § 831.23, titled ''International Aviation Investigations,'' to include most of the language from § 831.2(a)(2), which describes the NTSB's role in international aviation investigations. In particular, the NTSB proposes text for § 831.23 directly derived from § 831.2(a)(2); however, the NTSB proposes breaking the text into three distinct paragraphs. The NTSB believes such organization will aid in the ability to read and easily reference the description of the NTSB's role in foreign investigations.

In proposing to keep the reference to Annex 13 to the Convention on International Civil Aviation (the Chicago Convention) in the text of the regulation, the NTSB notes it will observe the recommended standards and practices ICAO issues, to the extent practicable. Such recommendations include releasing draft reports concerning accidents and incidents to accredited representatives, and permitting the representatives' subsequent sharing of these reports with their technical advisers. As noted above within the discussion concerning § 831.14 of this part, this practice differs

[11] 49 U.S.C. 1134.

from domestic investigations. However, in the interest of ensuring consistency with other countries' investigative practices in international investigations, and in observation of ICAO's recommended standards and practices, NTSB investigators-in-charge will release draft reports to accredited representatives.

Also, the NTSB proposes adding a new provision concerning advisers (also ''technical advisers'') in foreign investigations. When an NTSB investigator is designated as an *accredited representative* (the ''U.S. accredited representative'') under Annex 13, the U.S. accredited representative may appoint *technical advisers* to provide information and assist with the investigation. Similar to ''parties'' in domestic investigations, these technical advisers work under the supervision of the U.S. accredited representative. The NTSB believes it is beneficial to include a paragraph in § 831.23 describing this relationship.

The NTSB has encountered situations concerning foreign investigations in which technical advisers have not communicated with the U.S. accredited representative or the foreign investigator-in-charge, as per Annex 13. The NTSB believes including language these in § 831.23(c) will clearly describe the relationships Annex 13 contemplates between technical advisers, NTSB-designated U.S. accredited representatives, and foreign IICs. As a result, the NTSB anticipates technical advisers will exercise care in fulfilling their duties in assisting with the investigation, and in communicating about the investigation.

In addition, concerning the release of information in international investigations, the NTSB remains mindful of 49 U.S.C. 1114(f), which provides the NTSB will not release information concerning an international investigation until either the investigating country releases its report on the investigation, or two years have passed since the occurrence of the accident or incident. Based on this statutory requirement, technical advisers, who work at the direction of the NTSB, should not release information about the investigation unless the foreign IIC approves such release, the investigating country has made the investigation report publicly available, or two years have passed since the event. Based on this proscription, the NTSB believes a reference to § 831.13 in this section is beneficial.

The NTSB proposes including paragraph (d) in § 831.23, to include the text of the final sentence in the current version of § 831.2(a)(3).

The only change the NTSB proposes in this text is to shorten the reference to *Aircraft Accident and Incident Investigation,* Annex 13 to the Convention on International Civil Aviation, to ''Annex 13.''

The NTSB also proposes adding a new paragraph (e), to § 831.23, to clarify the NTSB has the authority to subpoena records or other evidence in furtherance of a foreign investigation. In this regard, the NTSB interprets the provisions of § 831.9, discussed above, to apply to foreign investigations. Paragraph (e) would consist of the following text: ''The NTSB may issue a subpoena for records or other necessary evidence during the course of a foreign investigation, in accordance with the provisions of § 831.9 of this part.''

Subpart C: Highway Investigations

The NTSB proposes adding subpart C, titled ''Highway Investigations,'' to part 831. Within this new subpart, the NTSB proposes two sections, titled ''[r]esponsibility of NTSB in highway investigations,'' and ''[a]uthority of NTSB representatives in highway investigations.'' Neither of these sections consist of new text, but are derivations of the current language in §§ 831.2 and 831.9, respectively.

Section 831.30 Responsibility of NTSB in Highway Investigations

Regarding proposed § 831.30 describing the responsibility of the NTSB in highway investigations, the NTSB would retain portions of the text in the current version of § 831.2(b).

Section 831.31 Authority of NTSB Representatives in Highway Investigations

The NTSB proposes adding § 831.31 to describe the authority of NTSB representatives, some of which is set forth in the current version of § 831.9.

As proposed, § 831.9 includes several provisions concerning the NTSB's authority. However, the NTSB believes it would be helpful to include the statements of authority proposed in § 831.31, to ensure the highway-specific authorities are easy to locate.

This description of the NTSB's responsibility, from § 831.2, is derived from the NTSB's enabling statute, at 49 U.S.C. 1131(a)(1)(B).

Subpart D: Railroad, Pipeline, and Hazardous Materials Investigations

The NTSB proposes adding subpart D, titled ''Railroad, Pipeline, and Hazardous Materials Investigations,'' to part 831. Within this new subpart, the NTSB proposes two sections, which are derivations of the current language in §§ 831.2 and 831.9, respectively.

Section 831.40 Responsibility of NTSB in Railroad, Pipeline, and Hazardous Materials Investigations

Regarding the section describing the responsibility of the NTSB in highway investigations, the NTSB proposes retaining some text specific to railroad and pipeline events from § 831.2, under the heading, ''[r]esponsibility of NTSB in railroad, pipeline, and hazardous materials investigations. This description of the NTSB's responsibility, from § 831.2(b), is derived from the NTSB's enabling statute, at 49 U.S.C. 1131(a)(1)(C) and (D).

The NTSB also proposes adding paragraph (c) to § 831.40, to describe the NTSB's responsibility to investigate certain hazardous materials events. Such a description is derived from portions of the current version of § 831.2(c). The NTSB proposes the following text for § 831.40(c): ''(c) The NTSB is responsible for the investigation of accidents, collisions, crashes, derailments, explosions, incidents, and ruptures it selects that involve the transportation and/or release of hazardous materials.''

The NTSB believes it will be helpful to distinguish between railroad, pipeline, and hazardous materials investigations. Although such investigations often have similarities and may possibly involve more than one mode of transportation, the NTSB's responsibilities in these investigations are distinct.

Section 831.41 Authority of NTSB Representatives in Railroad, Pipeline, and Hazardous Materials Investigations

The NTSB proposes text for new § 831.41, to describe the NTSB's authority in railroad, pipeline, and hazardous materials investigations; this text is derived from the existing version of § 831.9.

Although slightly duplicative of the language in §§ 831.21 and 831.31, the NTSB believes including this section in each subpart will be helpful to the public, NTSB investigators, and other parties.

Subpart E: Marine Investigations

The NTSB proposes adding subpart E, entitled ''Marine Investigations,'' to part 831. Within this new subpart, the NTSB proposes two sections, entitled ''[r]esponsibility of NTSB in marine investigations,'' and ''[a]uthority of NTSB representatives in marine investigations.'' Neither of these

sections consists of new text, but are derivations of current language in §§ 831.2 and 831.9, respectively.

Section 831.50 Responsibility of NTSB in Marine Investigations

The NTSB proposes text in § 831.50 stating the NTSB is responsible for investigating major marine accidents, allisions, casualties, collisions, crashes, and incidents involving a public and non-public vessel or involving functions of the United States Coast Guard. The proposed text of paragraph (a) within § 831.50 also includes a reference to part 850 of this chapter, which addresses marine investigations and the relationship the NTSB has with the Coast Guard.

The NTSB also proposes paragraphs (b) and (c) within § 831.50, which are derived from the existing version of § 831.2. The NTSB proposes organizing these provisions as three distinct paragraphs, set forth above, without footnotes. The existing version of § 831.2(b) included in a footnote the language about the NTSB's and Coast Guard's joint participation in certain marine investigations. The NTSB believes this principle is important, and, although described more fully in part 850, the NTSB believes it will be helpful to reference part 850 in paragraph (c) of proposed new § 831.50, and state the NTSB and the Coast Guard will jointly conduct some marine investigations.

Section 831.51 Authority of NTSB Representatives in Marine Investigations

Similar to §§ 831.21, 831.31, and 831.41, the NTSB also proposes text within § 831.51, concerning the authority of NTSB representatives in marine investigations.

The NTSB believes its proposed language, regarding marine investigations in which the NTSB is the lead investigative agency, will provide clarity to the Coast Guard and other investigative parties. This language currently exists in § 831.9; the NTSB only proposes moving some of the mode-specific text of § 831.9 to the mode-specific subparts.

In this NPRM, the NTSB does not propose changes or additions to part 850 of this chapter. However, in retrospectively reviewing all NTSB regulations, the NTSB has noted certain updates to part 850 might be appropriate. The NTSB will work with the Coast Guard to publish an NPRM in the future.

Appendix: Statement of Party Representatives to NTSB Investigation

Consistent with the existing and proposed text of § 831.11, regarding parties to NTSB investigations, the NTSB requires participants to sign the Statement of Party Representatives upon conferring party status. As described above, the NTSB does not ask representatives of Federal agencies to sign the Statement. In this NPRM, the NTSB does not propose any substantive changes to the Statement, but includes some minor, technical amendments for clarity. Concerning other potential changes, the agency is evaluating the need for substantive amendments to the Statement. Therefore, the NTSB solicits feedback on the Statement. For example, should the statement remain general, and incorporate by reference the regulations within part 831? Or would including a summary of the regulations of part 831 within the Statement be helpful? In addition, would expressly summarizing the provisions of § 831.13, which prohibits parties from disseminating investigative information without IIC approval, be helpful? In addition to these considerations, the NTSB welcomes comments on all aspects of the current version of the Statement.

IV. Regulatory Analysis

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of the potential costs and benefits under section 6(a)(3) of that Order. As such, the Office of Management and Budget has not reviewed this rule under Executive Order 12866. Likewise, this rule does not require an analysis under the Unfunded Mandates Reform Act, 2 U.S.C. 1501–1571, or the National Environmental Policy Act, 42 U.S.C. 4321–4347.

In addition, the NTSB has considered whether this rule would have a significant economic impact on a substantial number of small entities, under the Regulatory Flexibility Act (5 U.S.C. 601–612). The NTSB certifies under 5 U.S.C. 605(b) that this rule would not have a significant economic impact on a substantial number of small entities. Moreover, in accordance with 5 U.S.C. 605(b), the NTSB will submit this certification to the Chief Counsel for Advocacy at the Small Business Administration.

Moreover, the NTSB does not anticipate this rule will have a substantial, direct effect on state or local governments or will preempt state law; as such, this rule does not have implications for federalism under Executive Order 13132, Federalism. This rule also complies with all applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. In addition, the NTSB has evaluated this rule under: Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights; Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks; Executive Order 13175, Consultation and Coordination with Indian Tribal Governments; Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use; and the National Technology Transfer and Advancement Act, 15 U.S.C. 272 note. The NTSB has concluded that this rule does not contravene any of the requirements set forth in these Executive Orders or statutes, nor does this rule prompt further consideration with regard to such requirements.

The NTSB invites comments relating to any of the foregoing determinations and notes the most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data.

List of Subjects in 49 CFR part 831

Aircraft accidents, Aircraft incidents, Aviation safety, Hazardous materials transportation, Highway safety, Investigations, Marine safety, Pipeline safety, Railroad safety.

For the reasons discussed in the preamble, the NTSB proposes to revise 49 CFR part 831 to read as follows:

PART 831—INVESTIGATION PROCEDURES

Subpart A—General

Sec.

831.1 Applicability of this part.
831.2 Responsibility of NTSB.
831.3 Authority of Directors.
831.4 Nature of investigation.
831.5 Priority of NTSB investigations.
831.6 Request to withhold information.
831.7 Witness interviews.
831.8 Investigator-in-charge.
831.9 Authority of NTSB representatives.
831.10 Autopsies and postmortem testing.
831.11 Parties to the investigation.
831.12 Access to and release of wreckage, records, mail, and cargo.
831.13 Flow and dissemination of investigative information.
831.14 Proposed findings.

Subpart B—Aviation Investigations

831.20 Responsibility of NTSB in aviation investigations.
831.21 Authority of NTSB representatives in aviation investigations.
831.22 Other Government agencies and NTSB aviation investigations.

831.23 International aviation investigations.

Subpart C—Highway Investigations

831.30 Responsibility of NTSB in highway investigations.
831.31 Authority of NTSB representatives in highway investigations.

Subpart D—Railroad, Pipeline, and Hazardous Materials Investigations

831.40 Responsibility of NTSB in railroad, pipeline, and hazardous materials investigations.
831.41 Authority of NTSB representatives in railroad, pipeline, and hazardous materials investigations.

Subpart E—Marine Investigations

831.50 Responsibility of NTSB in marine investigations.
831.51 Authority of NTSB representatives in marine investigations.
Appendix to Part 831—Statement of Party Representatives to NTSB Investigation.

Authority: 49 U.S.C. 1113(f).

Subpart A—General

§ 831.1 Applicability of this part.

(a) Unless otherwise specifically ordered by the National Transportation Safety Board (NTSB), the provisions of this part shall govern all NTSB investigations conducted under the authority of 49 U.S.C. 1101–1155.

(b) The NTSB will conduct investigations of transportation events which include, but are not limited to: Accidents, allisions, casualties, collisions, crashes, derailments, explosions, incidents, mishaps, ruptures, and other similar events. The provisions of this part apply to all NTSB investigations of such events.

§ 831.2 Responsibility of the NTSB.

(a) The provisions of §§ 831.20, 831.30, 831.40, and 831.50 describe the NTSB's responsibility to conduct investigations in each mode of transportation.

(b) The NTSB is also responsible for the investigation of an event that occurs in connection with the transportation of people or property, which, in the judgment of the NTSB, is catastrophic, involves problems of a recurring character, or would otherwise carry out the intent of the Independent Safety Board Act of 1974. This authority includes, but is not limited to, marine and boating events not covered by part 850 of this chapter, and events selected by the NTSB involving transportation and/or release of hazardous materials.

§ 831.3 Authority of Directors.

The Directors, Office of Aviation Safety, Office of Highway Safety, Office of Railroad, Pipeline and Hazardous Materials Investigations, and Office of Marine Safety, subject to the provisions of § 831.2 and part 800 of this chapter, may order an investigation into any transportation event.

§ 831.4 Nature of investigation.

(a) *General.* The NTSB conducts investigations, or causes such investigations to be conducted, to determine the facts, conditions, and circumstances relating to an event. The NTSB then uses these results to determine probable cause and/or ascertain measures that would best tend to prevent (or mitigate the effects of) similar events in the future.

(b) *Phases of investigation*—(1) *Preliminary Investigation.* Immediately upon learning of an event, the NTSB undertakes a preliminary investigation in which it gathers available facts for the purposes of assessing the appropriate level of investigative action. If the NTSB determines it will not proceed with a formal investigation into the event, the appropriate office director may close the preliminary investigation and not proceed with a formal investigation.

(2) *Formal Investigation.* The NTSB proceeds with a formal investigation by gathering facts to determine the probable cause of a transportation event.

(3)(i) The manner in which the NTSB gathers facts for an investigation may include an on-scene investigation, where NTSB employee(s) visit the site of the event, interview witnesses, conduct testing, extract data, gather documentation, or engage in any other activities that would assist the NTSB in obtaining all discoverable facts relevant to the investigation. The investigation may result in a number of products designed to improve transportation safety including NTSB conclusions issued in the form of a report or brief of the investigation, or other NTSB product, such as a collection of factual records, safety recommendation(s), or other safety information.

(ii) Such investigations are fact-finding proceedings with no adverse parties. These proceedings are not subject to the Administrative Procedure Act (5 U.S.C. 504 et seq.), and are not conducted for the purpose of determining the rights, liabilities, or blame of any person or entity, as they are not adjudicatory proceedings.

§ 831.5 Priority of NTSB investigations.

(a) *Relationships with other agencies.* (1) Any investigation the NTSB conducts directly (except major marine investigations conducted under 49 U.S.C. 1131(a)(1)(E)) or pursuant to the appendix to part 800 of this chapter has priority over all other investigations conducted by other Federal agencies. However, this section does not apply to the role of the United States Attorney General when circumstances reasonably indicate that the event may have been caused by an intentional criminal act, as described in 49 U.S.C. 1131(a)(2)(B) and 1131(a)(2)(C).

(2) The NTSB shall provide for appropriate participation by other Federal agencies in any such investigation, except such agencies may not participate in the NTSB's probable cause determination.

(3) The NTSB investigation has first right to access wreckage, information, and resources it deems pertinent to its investigation. As described in § 831.9(c) of this part, the NTSB has exclusive authority to decide when, and the manner in which, testing, extraction of data, and examination of evidence will occur.

(4) The NTSB may take possession of records or information (including data) related to determining the probable cause, if the NTSB determines such possession is necessary to its investigation.

(5) The NTSB and Federal, state, and local agencies shall assure that appropriate information obtained or developed in the course of their investigations is exchanged in a timely manner.

(i) Nothing in this section prohibits the NTSB from sharing information with other agencies.

(ii) The NTSB is not a first responder agency, but recognizes the role of incident management systems and the role of unified command systems.

(b) *Enforcement investigations by other agencies.* (1) While an NTSB investigation is underway, other Federal agencies may conduct activities under applicable provisions of law related to their enforcement responsibilities. In conducting such activities, other agencies may obtain information directly from parties involved in, and witnesses to, the transportation event, provided they do so after coordinating with the NTSB investigator-in-charge (IIC) and without interfering with the NTSB's investigation. Such Federal activities will not influence the NTSB's investigations.

(2) The NTSB cooperates with state and/or local agencies that conduct activities for the purposes of enforcement of a state statute or regulation. Such state activities shall not influence the NTSB's investigations.

(3) Except as described in § 831.31 of this chapter, which applies to highway investigations, Federal agencies shall provide the results of their investigations to the NTSB when such investigations are for purposes of

remedial action or safety improvement. In general, this requirement will not apply to enforcement records or enforcement investigation results.

§ 831.6 Request to withhold information.

(a) *Trade Secrets Act.* This section applies to domestic matters. Information the NTSB receives concerning international aviation events is addressed in § 821.23 of this part.

(1) *General.* The Trade Secrets Act provides criminal penalties for unauthorized government disclosure of trade secrets and other specified confidential commercial information. The Freedom of Information Act authorizes withholding such information; however, the Independent Safety Board Act, at 49 U.S.C. 1114(b), states the NTSB may, under certain circumstances, disclose information related to trade secrets.

(2) *Procedures.* Information submitted to the NTSB that the submitter believes qualifies as a trade secret or confidential commercial information subject either to the Trade Secrets Act (codified at 18 U.S.C. 1905) or FOIA Exemption 4 (codified at 5 U.S.C. 552(b)(4)) shall be so identified by the submitter on each and every page that contains such information. The NTSB shall give the submitter of any information so identified, or information the NTSB has substantial reason to believe qualifies as a trade secret or confidential commercial information subject either to the Trade Secrets Act or FOIA Exemption 4, the opportunity to comment on any contemplated disclosure, pursuant to 49 U.S.C. 1114(b). In all instances in which the NTSB decides to disclose such information pursuant to 49 U.S.C. 1114(b) and/or 5 U.S.C. 552, the NTSB will provide at least 10 days' notice to the submitter. Notice may not be provided the submitter when disclosure is required by a law other than FOIA if the information is not identified by the submitter as qualifying for withholding, as is required by this paragraph, unless the NTSB has substantial reason to believe disclosure would result in competitive harm.

(b) *Voluntarily-provided safety information.* (1) In general, the NTSB will not disclose commercial, safety-related information provided voluntarily and not related to exercise of the NTSB's investigation authority, if the NTSB determines disclosure of the information would inhibit the voluntary provision of that type of information.

(2) Reference to voluntarily-provided safety information for the purposes of safety recommendations will be undertaken with consideration for its confidential nature. The NTSB will de-identify all such safety information to the greatest extent possible.

(c) *Other.* Any person may make written objection to the public disclosure of any other information contained in any report or document filed, or otherwise obtained by the NTSB, stating the grounds for such objection. The NTSB, on its own initiative or if such objection is made, may order such information withheld from public disclosure when, in its judgment, the information may be withheld under the provisions of an exemption to the Freedom of Information Act (5 U.S.C. 552, see part 801 of this chapter), and its release is found not to be in the public interest.

§ 831.7 Witness interviews.

(a) Any person interviewed by an NTSB employee or investigator who is working on behalf of the NTSB during the investigation (hereinafter, ''investigator''), regardless of the form of the interview (sworn, unsworn, transcribed, not transcribed, etc.), has the right to be accompanied by no more than one attorney or non-attorney representative of his or her choosing. The role of this representative is to provide support and counsel as requested by the witness and not to supplement the witness's testimony or represent the interests of other affiliations of the witness during the interview.

(b)(1) The investigator conducting the interview shall take all necessary action to ensure the witness's representative acts in accordance with the role described in paragraph (a) of this section during the interview, to prevent conduct that may be disruptive to the interview.

(2) If the witness's representative engages in disruptive conduct, the investigator conducting the interview may take action, as the circumstances warrant, including exclusion of the witness's representative from the interview.

(c) The NTSB will release transcripts or summaries of witness interviews in the NTSB public docket for the investigation, as defined at § 801.3(c) of this chapter. The NTSB will release names of witnesses and their representatives in investigative documents or other records in the NTSB public docket, unless the NTSB determines unusual or compelling circumstances exist to preclude disclosure.

§ 831.8 Investigator-in-charge.

(a) In addition to the authority stated in § 800.27 of this chapter, the investigator-in-charge (IIC) designated for an investigation has the responsibilities listed below.

(1) The IIC organizes, conducts, controls, and manages the field phase of the investigation, regardless of whether a Board Member is also on-scene.

(2) The IIC has the responsibility and authority to supervise and coordinate all resources and activities of all personnel, both NTSB and non-NTSB, involved in the on-site investigation.

(3) The IIC continues to have organizational and management responsibilities throughout later phases of the investigation, up to and including consideration and adoption of a report or brief of probable cause(s).

(b) The role of a Board Member at the scene of an investigation is as the official spokesperson for the NTSB.

§ 831.9 Authority of NTSB representatives.

(a) *General authority.* To carry out its statutory responsibilities, the NTSB is authorized to conduct hearings, administer oaths, and require, by subpoena or otherwise, necessary witnesses and evidence.

(1) Any authorized representative of the NTSB may enter any property where an event subject to the NTSB's jurisdiction has occurred, or wreckage from any such event is located, and do all things considered necessary for proper investigation.

(2) Any authorized representative of the NTSB may inspect, photograph, or copy any records or information (including files, medical records pursuant to paragraph (b)(2) of this section, and correspondence then or thereafter existing) for the purpose of conducting an investigation.

(3) Authorized representatives of the NTSB may question any person having knowledge relevant to a transportation event.

(b) *Subpoenas.* The NTSB may issue a subpoena, enforceable in Federal district court, to obtain necessary testimony or evidence.

(1) Pursuant to its authority to issue subpoenas, the NTSB shall have access to medical records and specimens.

(2) For purposes of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104–191, the NTSB is a ''public health authority'' as that term is used in the regulations promulgated by the Department of Health and Human Services (see 45 CFR 164.501 or any successor regulation). Consistent with 49 U.S.C. 1101–1155 and HIPAA, a ''covered entity'' may disclose protected health information to the NTSB pursuant to subpoena.

(3) The NTSB may issue subpoenas for all other records, data and information necessary for an investigation, including but not limited to, credit card records and records from portable electronic devices.

(c) *Examination of evidence.* (1) Only the NTSB will decide when, and in what manner, testing, extraction of data, and examination of evidence will occur.

(2) Authorized representatives acting on behalf of the NTSB have authority to decide the means in which any testing or extraction of data will be conducted, pursuant to the specific direction of the NTSB. The NTSB has exclusive authority to make all pertinent decisions related to the testing or extraction of data.

§ 831.10 Autopsies and postmortem testing.

The NTSB is authorized to obtain, with or without reimbursement, a copy of the report of autopsy performed by State or local authorities on any person who dies as a result of having been involved in a transportation event within the jurisdiction of the NTSB. The investigator-in-charge (IIC), on behalf of the NTSB, may order an autopsy or other postmortem tests of such persons as may be necessary for the investigation. The IIC will direct that an autopsy be performed only to the extent it will be consistent with the needs of the investigation and with provisions of local law protecting religious beliefs with respect to autopsies.

§ 831.11 Parties to the investigation.

(a) *Participants.* (1) The investigator-in-charge designates parties to participate in the investigation. Parties shall be limited to those persons, government agencies (Federal, state, or local), companies, and organizations whose employees, functions, activities, or products were involved in the event and who can provide suitable qualified technical personnel actively to assist in the investigation. The representatives proposed by party organizations to participate in the investigation should, to the extent practicable, be personnel who had no direct involvement in the event under investigation.

(2) No entity shall automatically have the right to participate in an NTSB investigation as a party. However, the NTSB will provide for the participation of the Federal Aviation Administration (FAA) in the investigation of an aircraft accident when participation is necessary to carry out the duties and powers of the FAA.

(3) Participants in the investigation (i.e., party representatives, party coordinators, and/or the larger party organization) shall be responsive to the direction of NTSB representatives and may have their party status revoked or suspended if they do not comply with their assigned duties and instructions, withhold information, or conduct themselves in a manner prejudicial to the investigation.

(4) No party to the investigation shall be represented in any aspect of the NTSB investigation by any person who also represents claimants or insurers. No party representative may occupy a legal position (see § 845.13 of this chapter). Failure to comply with these provisions may result in sanctions, including loss of status as a party.

(b) *Disclosures.* (1) Party representatives' names may be disclosed in documents the NTSB places in the public docket for the investigation, as defined in § 801.3(c) of this chapter.

(2) The NTSB may share parties' information considered proprietary or confidential with other parties during the course of an investigation, but will preserve the confidentiality of the information to the greatest extent possible. The NTSB will adhere to the provisions of 49 U.S.C. 1114, as described in § 831.6(b)(1) of this part, in determining whether to share any such information in order to preserve the confidentiality of the information to the greatest extent possible.

(c) *Party agreement.* All party representatives shall sign the ''Statement of Party Representatives to NTSB Investigation'' immediately upon accepting party representative status. Failure to sign that statement in a timely manner may result in sanctions, including loss of party status. Representatives of other Federal agencies are not required to sign the Statement, but must adhere to the responsibilities and limitations set forth in the agreement. This Statement is set forth in the Appendix of this part.

(d) *Party inquiries or reviews.* Any party conducting or authorizing an inquiry or review of its own processes and procedures as a result of a transportation event the NTSB is investigating shall inform the investigator-in-charge in a timely manner of the nature of its inquiry or review to coordinate such efforts with the NTSB's investigation. Further, a party performing such an inquiry or review shall provide the IIC with details of findings from this work. Investigations performed by other Federal agencies during an NTSB investigation are addressed in § 831.5 of this part.

§ 831.12 Access to and release of wreckage, records, mail, and cargo.

(a) Only the NTSB's investigation personnel, and persons authorized by the investigator-in-charge to participate in any particular investigation, examination or testing shall be permitted access to wreckage, records, mail, or cargo in the NTSB's custody.

(b) Wreckage, records, mail, and cargo in the NTSB's custody shall be released by an authorized representative of the NTSB when it is determined that the NTSB has no further need for such items.

§ 831.13 Flow and dissemination of investigative information.

(a) *Information concerning the investigation.* (1) This section applies to factual information collected or compiled by the NTSB as part of its investigation, such as photographs, visual representations of factual data, physical evidence at the scene of the event, interview statements, wreckage documentation, flight data and cockpit voice recorder information, surveillance video, etc., and information pertaining to the status or activities conducted as part of the investigation, from the time the NTSB commences its investigation until the time the NTSB concludes its investigation.

(2) Release of information at the scene of the event shall be limited to factual developments, and shall be made through the Board Member present at the scene, the representative of the NTSB's Office of Public Affairs, or the investigator-in-charge.

(3) The NTSB's release of the information described in paragraph (a)(1) of this section does not authorize parties to comment publicly on the information during the course of the investigation. Any disseminations of factual information a party seeks to make must occur in accordance with paragraph (c) of this section.

(b) *Provision of information.* All information obtained by any person or organization during the investigation, as described in paragraph (a) of this section, must be provided to the NTSB.

(c) *Release of information.* Parties are prohibited from releasing information obtained during an investigation at any time prior to the NTSB's public release of the information unless the release is consistent with all of the following criteria:

(1) All information shall be provided to the IIC (directly or through an NTSB employee) before being provided to any person or organization. Consistent with paragraph (c)(2) of this section, parties must notify the IIC in a timely manner

of any intent to disseminate information within their organizations.

(2) Unless otherwise restricted by the IIC, parties to the investigation may release information to officers and other key personnel who exercise decision-making authority within their respective organizations as necessary for the purposes of prevention or remedial action.

(3)(i) The IIC may choose to approve, in advance, any release of information within a party organization for purposes other than prevention or remedial action.

(ii) The IIC may approve any release of information concerning the investigation to an organization or person who is not a party to the investigation, with the approval of the Chairman, who may delegate this authority to the director of the office overseeing the investigation.

(iii) Documents that provide information concerning the investigation, such as written directives or informational updates for release to party employees or customers, shall be approved by the IIC prior to release.

(4) Parties shall timely inform the IIC of any planned safety improvements that will occur as a result of sharing information from the investigation within their organization.

(5) The release of information pertaining to recordings or transcripts from cockpit voice recorder (CVR) or surface vehicle recorders, as described in 49 U.S.C. 1114(c)(1) and (d)(1), respectively, shall be handled in accordance with 49 U.S.C. 1114(c) and (d). Any release of such information prior to the NTSB's release of it shall be approved in advance by the IIC, who must coordinate with the Chairman and director of the office in which the IIC works.

§ 831.14 Proposed findings.

(a) *General.* Any person or organization whose employees, functions, activities, or products were involved in an event under investigation may submit to the NTSB written proposed findings to be drawn from the evidence produced during the course of the investigation, a proposed probable cause, and/or proposed safety recommendation(s) designed to prevent future events.

(b) *Timing of submissions.* To be considered, these submissions must be received before the matter is announced in the **Federal Register** for consideration at a Board meeting. All written submissions shall be presented to staff in advance of the formal scheduling of the meeting. This procedure ensures orderly and thorough consideration of all views.

(c) *Exception.* This limitation does not apply to safety enforcement cases handled pursuant to part 821 of this chapter. Separate ex parte rules, at part 821, subpart J, apply to those proceedings.

Subpart B—Aviation Investigations

§ 831.20 Responsibility of NTSB in aviation investigations.

The NTSB is responsible for the organization, conduct, and control of all aviation accident investigations, and those incidents subject to NTSB investigation (see §§ 830.2 and 830.5 of this chapter) within the United States, its territories and possessions, where the accident or incident involves any civil aircraft or certain public aircraft (as specified in § 830.5 of this chapter), including a collision involving civil or public aircraft (as specified in § 830.5) and an aircraft operated by the Armed Forces or an intelligence agency. It is also responsible for supporting the investigations of certain accidents and incidents that occur outside the United States, and which involve civil aircraft and/or certain public aircraft, when the accident or incident is not in the territory of another country (*i.e.,* in international waters).

§ 831.21 Authority of NTSB representatives in aviation investigations.

Any employee of the NTSB, upon presenting appropriate credentials, is authorized to examine and test to the extent necessary any civil or public aircraft (as specified in § 830.5 of this chapter), aircraft engine, propeller, appliance, or property aboard such aircraft involved in an accident or incident.

§ 831.22 Other Government agencies and NTSB aviation investigations.

(a) Title 49 U.S.C. 1132(c) provides for the participation of the Federal Aviation Administration (FAA) in NTSB aviation investigations, and section 1131(a)(2) provides for the appropriate participation by other departments, agencies, or instrumentalities of the United States Government.

(1) The FAA and those other Federal entities named as parties to the investigation are accorded the same rights and privileges, and are subject to the same limitations, as other parties. This includes a responsibility to timely share information concerning the NTSB investigation that has been developed by the FAA and other Federal entities in the exercise of their investigation authority.

(2) In exercising their authority, the FAA and other Federal entities may obtain information directly from parties involved in, and witnesses to, the accident or incident, provided they do so after coordinating with the NTSB IIC and without interfering with the NTSB's investigation.

(b) Certain investigative activities may be conducted by the FAA, pursuant to a ''Request to the Secretary of the Department of Transportation to Investigate Certain Aircraft Accidents,'' effective February 10, 1977 (the text of the request is contained in the appendix to part 800 of this chapter), but the NTSB determines the probable cause of such accidents or incidents. Under no circumstances are aviation investigations where the FAA has conducted fact-finding on the NTSB's behalf to be considered to be joint investigations in the sense of sharing responsibility. These investigations remain NTSB investigations.

(c) The authority of a representative of the FAA conducting investigative activities on behalf of the NTSB is the same as that of an NTSB investigator under this part.

(d) The NTSB maintains its discretion to open a public docket, as defined in § 801.3 of this chapter, with information from investigations in which the FAA has conducted the fact-finding, as described in paragraph (b) of this section.

§ 831.23 International aviation investigations.

(a) The NTSB is the agency charged with fulfilling the obligations of the United States under Annex 13 to the Convention on International Civil Aviation, *Aircraft Accident and Incident Investigation* (hereinafter, ''Annex 13''), and does so consistent with State Department requirements and in coordination with that department. Annex 13 contains standards and recommended practices for the notification, investigation, and reporting of certain accidents and incidents involving international civil aviation.

(b) Pursuant to Annex 13:

(1) The state of occurrence of the accident or incident is responsible for the investigation, when the state is a signatory to Annex 13; and

(2) The NTSB participates in the investigation when the accident or incident involves a civil aircraft of a U.S. operator, registry, or manufacture, or when the U.S. is the state that designed the civil aircraft or parts thereon.

(c) *Technical advisers.* When the NTSB has designated an investigator to participate in an international

investigation as an ''accredited representative'' under Annex 13, the accredited representative may elect to receive assistance from ''advisers,'' as defined in Annex 13, ¶¶ 5.24 and 5.24.1.

(1) Such technical advisers shall work at the direction and under the supervision of the NTSB accredited representative.

(2) The NTSB considers the provisions of § 831.13 of this part to apply to U.S. advisers working under the supervision of the U.S. accredited representative in international aviation investigations.

(d) If the accident or incident occurs in a foreign state not bound by the provisions of Annex 13, or if the accident or incident involves a state aircraft (Annex 13 applies only to civil aircraft), the conduct of the investigation shall be in consonance with any agreement entered into between the United States and the foreign state.

Subpart C—Highway Investigations

§ 831.30 Responsibility of NTSB in highway investigations.

The NTSB is responsible for the investigation of highway accidents, collisions, crashes and explosions, including railroad grade-crossing events, the investigation of which is conducted in cooperation with the States.

§ 831.31 Authority of NTSB representatives in highway investigations.

(a) Any employee of the NTSB, upon presenting appropriate credentials, is authorized to test or examine any item, including, but not limited to, any vehicle, any part of a vehicle, or the equipment and contents therein, when such examination or testing is determined to be required for purposes of such investigation.

(b) Any examination or testing shall be conducted in such a manner so as not to interfere with or obstruct to the extent practicable the transportation services provided by the owner or operator of such vehicle, and shall be conducted in such a manner so as to preserve, to the maximum extent feasible, any evidence relating to the transportation event, consistent with the needs of the investigation and with the cooperation of such owner or operator.

(c) Any Federal, state, or local agency that conducts an investigation of the same highway event the NTSB is investigating shall provide the results of their investigations to the NTSB.

Subpart D—Railroad, Pipeline, and Hazardous Materials Investigations

§ 831.40 Responsibility of NTSB in railroad, pipeline, and hazardous materials investigations.

(a) The NTSB is responsible for the investigation of railroad accidents, collisions, crashes, derailments, explosions, incidents, and releases in which there is a fatality, substantial property damage, or which involve a passenger train, as described in part 840 of this chapter.

(b) The NTSB is responsible for the investigation of pipeline accidents, explosions, incidents, and ruptures in which there is a fatality, significant injury to the environment, or substantial property damage.

§ 831.41 Authority of NTSB representatives in railroad, pipeline, and hazardous materials investigations.

(a) Any employee of the NTSB, upon presenting appropriate credentials, is authorized to test or examine any rolling stock, track, or pipeline component, or any part of any such item (or contents therein) when such examination or testing is determined to be required for purposes of such investigation.

(b) Any examination or testing shall be conducted in such a manner so as not to obstruct to the extent practicable the transportation services provided by the owner or operator of such rolling stock, track, signal, rail shop, property, or pipeline component, and shall be conducted in such a manner so as to preserve, to the maximum extent feasible, any evidence relating to the event, consistent with the needs of the investigation and with the cooperation of such owner or operator.

Subpart E—Marine Investigations

§ 831.50 Responsibility of NTSB in marine investigations.

(a) The NTSB is responsible for the investigation of major marine casualties and marine events (including, but not limited to, allisions, abandonments, and accidents) involving a public and non-public vessel or involving Coast Guard functions, in accordance with part 850 of this chapter.

(b) The NTSB's responsibility in conducting or participating in marine investigations is consistent with investigative procedures mutually agreed to by the NTSB Chairman and the Commandant of the Coast Guard.

(c) Part 850 of this chapter governs the conduct of certain investigations in which the NTSB and the Coast Guard participate jointly.

§ 831.51 Authority of NTSB representatives in marine investigations.

(a) Any employee of the NTSB, upon presenting appropriate credentials, is authorized to test or examine any vessel or any part of any such vessel (or equipment and contents therein), including, but not limited to, port facilities, navigational aids, and related records, when such examination or testing is determined to be required for purposes of such investigation.

(b) Any examination or testing shall be conducted in such a manner so as not to obstruct to the extent practicable the transportation services provided by the owner or operator of such vessel, and shall be conducted in such a manner so as to preserve, to the maximum extent feasible, any evidence relating to the event, consistent with the needs of the investigation and with the cooperation of such owner or operator.

Appendix to Part 831—Statement of Party Representatives to NTSB Investigation.

CERTIFICATION OF PARTY REPRESENTATIVE [1]

I acknowledge I am participating in the above-referenced accident or incident investigation, on behalf of my employer who has been named a party to the National Transportation Safety Board (NTSB) safety investigation, for the purpose of providing technical assistance to the NTSB's evidence documentation and fact-finding activities. I understand as a party participant, I and my organization shall be responsive to the direction of NTSB personnel and may lose party status for conduct that is prejudicial to the investigation or inconsistent with NTSB policies or instructions. No information pertaining to the accident, or in any manner relevant to the investigation, may be withheld from the NTSB by any party or party participant.

I further acknowledge I have familiarized myself with the attached copies of the NTSB Investigation Procedures (49 C.F.R. Part 831) and ''Information and Guidance for Parties to NTSB Accident and Incident Investigations,'' and will comply with all procedures in Part 831. If I am the party coordinator for my party, I agree to take all reasonable steps to ensure the employees and participants of my organization comply with these requirements. This includes, but is not limited to, the provisions of 49 C.F.R. §§ 831.11 and 831.13, which, respectively, specify certain criteria for

[1] In aviation investigations this form may also be referred to as ''Statement of Party Representatives to NTSB Investigation.''

participation in NTSB investigations and limitations on the dissemination of investigation information.

No party coordinator or representative may occupy a legal position or be a person who also represents claimants or insurers. I certify my participation is not on behalf of either claimants or insurers, and, although factual information obtained as a result of participating in the NTSB investigation may ultimately be used in litigation (at the appropriate time, and in a manner that is not inconsistent with the provisions of 49 C.F.R. § 831.13 and 49 U.S.C. § 1154), my participation is to assist the NTSB safety investigation and not for the purposes of preparing for litigation. I also certify, after the NTSB Investigator-in-Charge (IIC) releases the parties and party participants from the restrictions on dissemination of investigative information specified in 49 C.F.R. § 831.13, neither I nor my party's organization will in any way assert in civil litigation arising out of the accident any claim of privilege for information or records received as a result of my participation in the NTSB investigation.

Signature Date

Name & Title

Party Organization/Employer[1]

Christopher A. Hart,

Acting Chairman.

[FR Doc. 2014–18921 Filed 8–11–14; 8:45 am]

BILLING CODE 7533–01–P

[1] In aviation investigations this form may also be referred to as ''Statement of Party Representatives to NTSB Investigation.''

Notices

Federal Register

Vol. 79, No. 155

Tuesday, August 12, 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.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

August 6, 2014.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by September 11, 2014 will be considered. Written comments should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), New Executive Office Building, 725 17th Street NW., Washington, DC 20502. Commenters are encouraged to submit their comments to OMB via email to: *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Animal and Plant Health Inspection Service

Title: NAHMS Emergency Epidemiologic Investigation.

OMB Control Number: 0579–0376.

Summary of Collection: Collection and dissemination of animal health data and information is mandated by 7 U.S.C. 391, the Animal Industry Act of 1884, which established the precursor of the Animal and Plant Health Inspection Service (APHIS), Veterinary Services, the Bureau of Animal Industry. Legal requirements for examining and reporting on animal disease control methods were further mandated by 7 U.S.C. 8308, 8314 of the Animal Health Protection Act, ''Detection, Control, and Eradication of Disease and Pests,'' May 13, 2002. Emergency epidemiologic investigations will allow Veterinary Services Officials to rapidly implement prevention and control measures, keep the public informed to reduce fear or panic, and keep international markets open by informing trading partners.

Need and Use of the Information: The primary objective of the National Animal Health Monitoring System's (NAHMS) emergency epidemiologic investigation is to provide for the prevention and control of animal disease conditions and protect the U.S. livestock population from the introduction and spread of domestic, emerging, zoonotic, and foreign animal disease. APHIS will collect information using a questionnaire or telephone interview or direct interview. APHIS will use the data collected to (1) Identify the scope of the problem (2) Define and describe the affected population and the susceptible population (3) Predict or detect trends in disease occurrence and movement (4) Understand the risk factors for disease (5) Estimate the cost of disease control and develop intervention options (6) Provide parameters for mathematical models of animal disease to evaluate potential control scenarios (7) Make recommendation for disease control (8) Provide lessons learned and guidance on the best methods to avoid future outbreaks (9) Identify areas for further research e.g. mechanisms of disease transfer, vaccine technology, and diagnostic testing needs.

Description of Respondents: Business or other for-profit.

Number of Respondents: 8,000.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 6.077.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2014–18957 Filed 8–11–14; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Forest Service

Sequoia National Forest, California; Tobias Forest Ecosystem Restoration Project

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The Forest Service proposes ecological restoration in the Tobias Forest Ecosystem Restoration Project (Tobias Project) by encouraging a healthy and diverse forest ecosystem that is resilient to the effects of wildfire, drought, disease, and other disturbances. The Tobias Project is located in the Greenhorn Mountains on the Western Divide Ranger District, between Alta Sierra and Johnsondale in Tulare County, California. This project includes commercially thinning stands of mature trees (smaller than 30 inches diameter at breast height) to increase heterogeneity and resilience on 960 acres. An additional 3,300 acres are proposed for hand thinning of immature trees. To restore the historic species composition, areas selected for thinning would favor Jeffrey and sugar pines, oak, and other shade intolerant species.

DATES: Comments concerning the scope of the analysis must be received by September 11, 2014. The draft environmental impact statement is expected November 2014 and the final environmental impact statement is expected June 2015.

ADDRESSES: Send written comments to Rick Stevens, District Ranger, Western Divide Ranger District, 32588 Hwy 190, Springville, CA 93265. Comments may also be sent via email to *comments-*

pacificsouthwest-sequoia@fs.fed.us, or via facsimile to (559) 539–2067.

FOR FURTHER INFORMATION CONTACT: O'Dell Tucker, Planner, Western Divide Ranger District, 32588 Hwy 190, Springville, CA 93265.

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Rely Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m. Eastern Time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Background

A scoping letter was sent on May 8, 2013 for the proposed Tobias Forest Ecosystem Restoration Project. The Forest Service after reviewing public comments, interdisciplinary input on the proposed action, and further field surveys for soils, permanent streams, and meadows, decided to issue a Notice of Intent to prepare an Environmental Impact Statement (EIS). The decision to prepare an EIS addresses the comments received during the initial scoping period, as well as the additional resource needs and concerns discovered while conducting field surveys.

Purpose and Need for Action

The purpose of the project is to restore and maintain the forests throughout the project area to promote a healthy, diverse forest ecosystem that is resilient to the effects of wildfire, drought, disease, and other disturbances. There is a need to increase diversity in age, density, and stand structure; modify tree species composition to favor oaks and pines (Jeffrey and sugar) over incense-cedar and white fir; modify fuel conditions to reduce the risk of uncharacteristically large, stand-replacing fires; improve wildlife habitat structure for resting, roosting, denning, and nesting purposes for forest-dependent wildlife species; support local economies with sustainable and cost-effective use of any byproducts of project implementation; improve watershed conditions by decommissioning some roads when the project concludes, in addition to routine maintenance of existing roads.

Proposed Action

The proposed action includes commercial (ground skidding and skyline yarding) thinning stands of mature trees smaller than 30 inches diameter at breast height (dbh) to increase heterogeneity and resilience on 960 acres. An additional 3,300 acres are proposed for hand thinning of immature trees less than 10 inches dbh. Approximately 10 percent of the hand-thinned acreage (~350 acres) would be masticated. Areas selected for thinning and mastication would favor Jeffrey and sugar pines, oak, and other shade intolerant species, to restore the historic species composition. Prescibed fire would be introduced on the landscape after thinning and mastication are completed to reduce surface fuels and promote natural regeneration of species indigenous to the project area. Large snags and large woody debris would be protected. Riparian areas and meadows would be protected and improved. Approximately eight (8) miles of road decommissioning is proposed to improve the watershed condition, stream habitat, and water quality. The proposal also includes 450 acres of fuelbreak treatment along ridgelines.

Possible Alternatives

In addition to the proposed action, the EIS will evaluate the required No Action Alternative and an alternative that uses non-commercial treatments on the same acres as the proposed action. Other alternatives may be identified through the interdisciplinary process and public participation.

Responsible Official

The responsible official is Kevin B. Elliott, Forest Supervisor, Sequoia National Forest, 1839 South Newcomb Street, Porterville, CA 93257.

Nature of Decision To Be Made

The responsible official will decide whether to adopt and implement the proposed action, an alternative to the proposed action, or take no action with respect to the Tobias Forest Ecosystem Restoration project.

Scoping Process

This Notice of Intent intiates the scoping process which guides the development of the EIS. It is important that reviewers provide their comments at such times and in such a manner that they are useful to the agency's preparation of the enviornmental impact statement. Therefore, comments should be provided prior to the close of the comment period and should clearly articulate the reviewer's concerns and contentions.

Specific written comments are defined as comments ''. . . within the scope of the proposed action, have a direct relationship to the proposed action, and must include supporting reasons for the responsible official to consider.'' (36 CFR 218.2). Submission of timely, specific written comments is a prerequisite for eligibility to file an objection under the 36 CFR part 218 regulations.

Comment Requested

This project will follow the new objection procedures as directed by 36 CFR 218. The objection process provides an opportunity for members of the public who have participated in opportunities for public participation provided throughout the planning process to have any unresolved concerns receive an independent review by the Forest Service prior to a final decision being made by the responsible official. Only those who provided specific written comments during opportunities for public comment are eligible to file an objection.

Comments received in response to this solicitation, including the names and addresses of those who comment, will be part of the public record on this proposed action. Comments submitted anonymously will be accepted and considered, however anonymous comments will not provide the Agency with the ability to provide the respondent with subsequent environmental documents.

Authority: 40 CFR 1501.7 and 1508.22; Forest Service Handbook 1909.15, Section 21.

Dated: August 6, 2014.

Kevin B. Elliott,

Forest Supervisor.

[FR Doc. 2014–19005 Filed 8–11–14; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Office of Advocacy and Outreach

[FOA No.: OAO–00007]

Socially Disadvantaged Farmers and Ranchers Policy Research Center

Catalog of Federal Domestic Assistance (CFDA) No.: 10.464.

AGENCY: Office of Advocacy and Outreach (OAO), United States Department of Agriculture (USDA).

ACTION: Funding Opportunity Announcement (FOA).

SUMMARY: This notice announces the availability of funds and solicits applications from eligible institutions to compete for financial assistance in the form of a grant to establish a Socially Disadvantaged Farmers and Ranchers Policy Research Center (The Center) at an 1890 Institution (as defined in 7 U.S.C. 7601).

Authority: The Agricultural Act of 2014, Title XII, Subtitle B, provides funding for a ''Socially Disadvantaged Farmers and Ranchers Policy Research Center.'' Section 12203 directs the Secretary to award a grant to a college or university eligible to receive

funds under the Act of August 30, 1890 [Second Morrill Act] (7 U.S.C. 321 et seq.), including Tuskegee University, to establish a policy research center to be known as the ''Socially Disadvantaged Farmers and Ranchers Policy Research Center'' for the purpose of developing policy recommendations for the protection and promotion of the interests of socially disadvantaged farmers and ranchers.

The Center will collect and analyze data, develop policy recommendations, and evaluate policy concerning socially disadvantaged farmer and rancher issues.

We will award $400,000 in fiscal year (FY) 2014, ending September 30. Additional funds may be awarded in subsequent years.

DATES: Proposals must be received by September 11, 2014, at 5:00 p.m. EST, at *www.grants.gov.* Proposals received after this deadline will *not* be considered for funding.

ADDRESSES:

How to File a Complaint of Discrimination: To file a complaint of discrimination, complete the USDA Program Discrimination Complaint Form, which may be accessed online at *http://www.ocio.usda.gov/sites/default/files/docs/2012/Complain_combined_6_8_12.pdf,* or write a letter signed by you or your authorized representative.

Send your completed complaint form or letter to USDA by mail, fax, or email:

Mail: U.S. Department of Agriculture, Director, Office of Adjudication, 1400 Independence Avenue SW., Washington, DC 20250–9410.

Fax: (202) 690–7442.

Email: program.intake@usda.gov.

FOR FURTHER INFORMATION CONTACT:

Agency Contact: U.S. Department of Agriculture, Office of Advocacy and Outreach, Attn: Kenya Nicholas, Program Director, Whitten Building Room 520–A, 1400 Independence Avenue SW., Washington, DC 20250, Phone: (202) 720–6350, Fax: (202) 720–7136, Email: *OASDVFR2014@osec.usda.gov.*

Persons with Disabilities: Persons who require alternative means for communication (Braille, large print, audiotape, etc.), should contact USDA's TARGET Center at (202) 720–2600 (voice and TDD).

Funding/Awards: The total funding available for this competitive opportunity is $400,000. The OAO will award one new grant from this announcement.

Contents of This Announcement

I. Funding Opportunity Description
II. Award Information
III. Eligibility Information
IV. Proposal and Submission Information
V. Competitive Review and Evaluation Criteria
VI. Award Administration Information

I. Funding Opportunity Description

USDA's Office of Advocacy and Outreach (OAO) invites proposals for a competitive grant award to establish a new USDA Socially Disadvantaged Farmers and Ranchers Policy Research Center (The Center). The Center will specialize in policy research impacting socially disadvantaged farmers and ranchers. Land loss, land retention, and access to local, state, and federal programs will be major areas of research and policy development. The Center's director and staff will have experience and/or education required to understand the socially disadvantaged farmers and ranchers communities. The Center will propose how they will work with other institutions, as appropriate, inside and outside the land grant community.

Proposed recommendations resulting from the following list of activities, including but not limited to, shall be submitted to the Director of OAO:

- Analyze current agriculture policy and its implications on socially disadvantaged farmers and ranchers.
- Collect data on where USDA meetings are being held, and how socially disadvantaged farmers and ranchers participate.
- Make recommendations on improving participation rates of socially disadvantaged farmers and ranchers.
- Provide recommendations on how to improve diversity of county office staff and committees.
- Provide recommendations on actions to improve USDA program agencies' outreach and technical assistance to socially disadvantaged farmers and ranchers.
- Collect data on the history of the education of socially disadvantaged farmers and ranchers and evaluate the result of past educational efforts in the South and the abilities to meet the educational needs of socially disadvantaged farmers and ranchers today.
- Collect data on how socially disadvantaged farmers and ranchers receive agricultural information.
- Determine how many socially disadvantaged farmers and ranchers have received training on the use of information technology (IT) equipment and provide recommendations on ways to increase the utilization of IT for their farming organizations.
- Provide recommendations on improving the application approval process for socially disadvantaged farmers and ranchers applying for USDA assistance. Determine how past discrimination impacts access to present programs and provide recommendations to improve participation among socially disadvantaged farmers and ranchers.
- Collect data on the reasons for the decline of socially disadvantaged farms, ranches, and land ownership. Provide recommendations on how to track and maintain current data on the number and location of socially disadvantaged farmers and ranchers.
- Analyze data collected from all sources, and develop policy recommendations that will enable socially disadvantaged farmers and ranchers to stay in farming and preserve their lands.

II. Award Information

A. Statutory Authority

The statutory authority for this action is section 2501(i) of the Food, Agriculture, Conservation, and Trade Act of 1990 (7 U.S.C. 2279(i)), as added by section 12203 of the Agricultural Act of 2014, Public Law 113–79, which directs the Secretary of Agriculture to ''award a grant to a college or university eligible to receive funds under the Act of August 30, 1890 (7 U.S.C. 321 et seq.), including Tuskegee University, to establish a policy research center to be known as the 'Socially Disadvantaged Farmers and Ranchers Policy Research Center' for the purpose of developing policy recommendations for the protection and promotion of the interests of socially disadvantaged farmers and ranchers.''

B. Expected Amount of Funding

OAO expects to make one award in FY 2014 of $400,000 to fund the Center. Institutions shall submit only one proposal.

C. Project Period

The project period for awards resulting from this solicitation will not begin prior to the effective award date and will be for *one* year.

D. Award Type

Funding for the selected proposal will be in the form of a grant which must be fully executed no later than September 30, 2014. The anticipated Federal involvement will be limited to the following activities:

- Approval of awardees' final budget and statement of work accompanying the grant agreement;
- Monitoring of awardees' performance through quarterly and final reports;
- Evaluation of and feedback on awardees' use of federal funds through periodic performance and financial

reports and on-site visits to ensure that objectives and award conditions are being met; and

• Facilitation of communication between the Center and USDA program agencies such as the Farm Service Agency, Natural Resources Conservation Service, Risk Management Agency, Rural Development, Forest Service, and Agricultural Research Service.

III. Eligibility Information

A. Eligible Applicants

Any 1890 Institution (as defined in 7 U.S.C. 7601) may apply.

B. Cost-Sharing or Matching

Matching is not required for this program.

C. Threshold Eligibility Criteria

Applications from eligible entities that meet all criteria will be evaluated as follows:

1. Proposals must comply with the submission instructions and requirements set forth in Section IV of this announcement. Pages in excess of the page limitation will not be considered.

2. Proposals must be received through *www.grants.gov* as specified in Section IV of this announcement on or before the proposal submission deadline. Applicants will receive an electronic confirmation receipt of their proposal from *www.grants.gov.*

3. Proposals received after the submission deadline will not be considered.

IV. Proposal and Submission Information

A. Obtain Proposal Package

Applicants may download individual grant proposal forms from *www.grants.gov.* For assistance with *www.grants.gov,* please consult the Applicant User Guide at (*http://grants.gov/assets/ApplicantUserGuide.pdf*).

B. Form of Proposal Submission

Applicants are required to submit proposals through *www.grants.gov.* Applicants will be required to register through *www.grants.gov* in order to begin the proposal submission process.

Proposals must be submitted by September 11, 2014, via *www.grants.gov* by 5:00 p.m. EST. Proposals received after this deadline will *not* be considered.

C. Content of Proposal Package Submission

These guidelines are provided to assist you in preparing a proposal. Please read them carefully before preparing your submission.

All submissions must contain completed and electronically signed original application forms, as well as the attachments described below:

• Forms. The listed forms can be found in the proposal package at *www.grants.gov.*

○ Standard Form 424, Application for Federal Assistance;

○ Standard Form 424A, Budget Information—Non-Construction Programs;

○ Standard Form 424B, Non-Construction Programs

• Attachments. These elements are required for all grant proposals and are included in the proposal package at *www.grants.gov* as fillable PDF templates. Applicants must download and complete these attachments and save the completed PDF files to the application submission portal at *www.grants.gov.* NOTE: Please number each page of each attachment and indicate the total number of pages per attachment (i.e., 1 of 10, 2 of 10, etc.).

○ Attachment 1: Program Summary Page. The proposal must contain a Program Summary Page, which must follow immediately after the budget form, and should not be numbered. The program summary is limited to 250 words. The program summary should be a self-contained, specific description of the activities to be undertaken. The summary should focus on the overall program goals and supporting objectives and plans to accomplish the goals. The importance of a concise, informative program summary cannot be overemphasized.

○ Attachment 2: Statement of Work. The statement of work format should be *25 double-spaced pages or less,* one-inch margins, and 12-point font. The overall application may not exceed 45 pages, including attachments. The proposal should be assembled so that the statement of work immediately follows the Program Summary. To clarify page limitation requirements, page numbering for the statement of work should start with 1 and should be placed on the bottom of the page. All proposals are to be formatted for standard 8½″ x 11″ paper. The statement of work must address the following components:

(1) Active Research

A plan discussing the kind of socially disadvantaged farmer and rancher activities needed to inform important issues in the development of agriculture policy impacts to socially disadvantaged farmers and ranchers. The plan should demonstrate the applicant's deep knowledge of policy issues, past research projects and their impacts, and how current and future studies can further the knowledge base. The plan should describe how the Center will implement and develop capacity to conduct research on issues relevant to agricultural policy. The plan should outline a strategy for collaborating with OAO and USDA program agencies for the purpose of identifying topics and making recommendations on agricultural policy relating to socially disadvantaged farmers and ranchers.

(2) Staffing and Organizational Plan

The application must include a staffing and organizational proposal for the Center, including an analysis of the types of background needed among staff members. The application should discuss the Center's capacity to collaborate and issue sub-awards to researchers outside of the Center. Full resumes (2 page maximum) of proposed staff members should be included as a separate appendix to the application.

○ Attachment 3: Budget Narrative. The budget narrative should identify and describe the costs associated with the proposed Center, including sub-awards or contracts and indirect costs. Other funding sources may also be identified in this attachment. Each cost indicated must be fully allowable under the Federal Cost Principles in order to be funded. The budget narrative should not exceed 2 pages.

Funds may be requested under any of the budget categories listed below, provided that the item or service requested is identified as necessary for successful conduct of the proposed program, allowable under applicable Federal cost principles, and not prohibited under any applicable Federal statute or regulation.

Budget items include:

- Personnel
- Fringe benefits
- Travel
- Equipment
- Supplies
- Contractual items
- Other direct costs
- Indirect charges

Salaries of faculty members and other personnel who will be working on the program may be requested in proportion to the effort they will devote to the program.

Indirect costs are limited by Federal statute to the federally recognized audited rate for the institution. For reimbursement of indirect costs, the applicant must include with the application a copy of its indirect cost rate schedule that reports the

applicant's federally negotiated audited rate.

Electronic copies of the standard budget form and general instructions are available at *www.grants.gov* as part of the application package.

○ Attachment 4: Appendices. Letters of Commitment, Letters of Support, and approvals or other actions are encouraged but not required documentation for this funding opportunity. However, applicants can consolidate all supplemental materials into one additional attachment. Do *not* include sections from other attachments as an Appendix.

D. Sub-Awards and Partnerships

The OAO awards funds to one eligible applicant as the awardee. Please indicate a lead applicant as the responsible party if other eligible applicants are named as partners or co-applicants or members of a coalition or consortium. The awardee is accountable to the OAO for the proper expenditure of all funds.

Funding may be used to provide sub-awards, which includes using sub-awards to fund partnerships; however, the awardee must utilize at least 50 percent of the total funds awarded, and no more than three subcontracts will be permitted. All sub-awardees must comply with applicable requirements for sub-awards. Applicants must compete for services, contracts, and products, including consultant contracts, and conduct cost and price analyses to the extent required by applicable procurement regulations.

E. Submission Dates and Times

The closing date and time for receipt of proposal submissions is September 11, 2014, by 5:00 p.m., EST via *www.grants.gov.* Proposals received after the submission deadline will be considered late without further consideration.

F. Confidential Information

In accordance with 7 CFR 2500.017, the names of entities submitting proposals, as well as proposal content and evaluations, will be kept confidential to the extent permissible by law. If an applicant chooses to include confidential or proprietary information in the proposal, it will be treated in accordance with Exemption 4 of the Freedom of Information Act (FOIA). Exemption 4 of the FOIA protects trade secrets, and commercial and financial information obtained from a person that is privileged or confidential.

G. Pre-Submission Proposal Assistance

- The OAO cannot assist individual applicants by reviewing draft proposals or providing advice on how to respond to evaluation criteria. However, the OAO will respond to questions from individual applicants regarding eligibility criteria, administrative issues related to the submission of the proposal, and requests for clarification regarding the announcement.
- The OAO will post questions and answers (Q&A's) relating to this funding opportunity during its open period at *www.grants.gov* on the following Web page: *http://www.outreach.usda.gov/grants/.* The OAO will update the Q&A's on a weekly basis and conduct webinars on an as-needed basis. Questions should be submitted to: *OASDVFR2014@osec.usda.gov.*

V. Competitive Review and Evaluation Criteria

A. Competitive Review

Only eligible entities whose proposals meet the threshold criteria in Section III of this announcement will be reviewed according to the evaluation criteria set forth below. Applicants should explicitly and fully address these criteria as part of their proposal package. Each proposal will be reviewed under the regulations established under 7 CFR Chapter XXV Part 2500 Subpart C.

Applications for the Center that meet the initial screening requirements will be evaluated and rated by a technical review panel. The panel will use the evaluation criteria listed below to score each application. The evaluation criteria are designed to assess the quality of the proposed program and to determine the probability of its success. The evaluation criteria are closely related and are considered as a whole in judging the overall quality of an application. Points are awarded only to applications that are responsive to the evaluation criteria within the context of this program announcement. These review results will be the primary element used by the OAO in making funding decisions. Reviewers will determine the strengths and weaknesses of each application in terms of the evaluation criteria listed below and assign numerical scores out of a possible 100 points. A summary of all applicant scores and strengths/weaknesses and recommendations will be prepared. A preliminary funding recommendation will be provided to the designated approving official who will make the final funding decision.

B. Evaluation Criteria

The point value following each criterion heading indicates the maximum numerical relative weight that each section will be given in the review process. Applicants should take care to ensure that all criteria are fully addressed in the applications.

Criteria	Points
(1) Active Research	50
The applicant demonstrates a proven record of research, outreach, and community involvement within socially disadvantaged communities. The applicant will discuss the activities proposed to address important issues in the development of agricultural policy impacting socially disadvantaged farmers and ranchers. The applicant demonstrates knowledge of policy issues and past research projects on socially disadvantaged farmers and ranchers. The applicant describes in detail how the Center will implement its statement of work to develop capacity to conduct research and provide recommendations on agricultural policy relevant to socially disadvantaged farmers and ranchers. The applicant outlines a strategy for collaborating with OAO and USDA program agencies on agricultural policy relating to socially disadvantaged farmers and ranchers.	
(2) Staffing and Organizational Arrangements	25
The applicant's proposed Center Director and staff demonstrate appropriate levels of experience, administrative skills, public administration experience, and relevant technical expertise. The applicant demonstrates an adequate level of Center Director and staff time commitments to the Center. The applicant demonstrates an ability to work in collaboration with other practitioners as well as existing or planned relationships with researchers at other institutions. The applicant demonstrates the nature and extent of the organization's support for research. The applicant demonstrates the commitment of the university (and proposed institutional unit that will contain the Center) to support the Center's major activities.	
(3) Budget and Resource Allocation	25

Criteria	Points
The applicant provides a budget that yields an efficient and effective allocation of funds to achieve the objectives of this announcement, as well as core administrative functions necessary to carry out the Center's mission. The application includes a narrative description and justification for proposed budget line items and demonstrates that the project's costs are adequate, reasonable, and necessary for the activities or personnel to be supported. The budget and narrative demonstrate a clear relationship to the approach. The applicant demonstrates the manner in which funds will be allocated to best serve the Center's goal, including but not limited to, the level of indirect costs: (1) Charged by the Center and (2) allowed to the institutions of researchers receiving sub-awards.	

C. Selection of Reviewers

Reviewers will be selected based upon training and experience in relevant fields including, outreach, technical assistance, cooperative extension services, education, statistical, and ethnographic data collection and analysis, and agricultural programs. Reviewers will be drawn from a diverse group of experts to create balanced review panels. More information on the selection of reviewers can be found in 7 CFR 2500.023.

VI. Award Administration Information

A. Award Notices

Proposal Notifications and Feedback

1. The successful applicant will be notified by the OAO via telephone, email, or postal mail. The notification will advise the applicant that its proposed project has been evaluated and recommended for award. The notification will be sent to the original signer of the SF–424, Application for Federal Assistance. The award notice will be forwarded to the grantee for execution and returned to the OAO grants officer, who is the authorizing official. Once grant documents are executed by all parties, authorization to begin work will be given.

2. The OAO will send notification to unsuccessful applicants via email or postal mail. The notification will be sent to the original signer of the SF–424, Application for Federal Assistance.

3. Applicant feedback will be provided using the procedures established by 7 CFR 2500.026.

B. Administrative and National Policy Requirements

All awards resulting from this FOA will be administered in accordance with the OAO assistance regulations codified at 7 CFR Part 2500. A listing and description of general federal regulations and cost principles applicable to the award of assistance agreements under this FOA can be found in 7 CFR 2500.003.

Applicable Federal statutes, regulations, and guidelines include the following: (a) Guidelines to be followed when submitting grant proposals and cooperative agreements and rules governing the evaluation of proposals; (b) the USDA Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations, 7 CFR Part 3019; (c) the USDA Uniform Federal Assistance Regulations, 7 CFR Part 3015; and (d) the USDA Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, 7 CFR Part 3016.

C. Data Universal Numbering System, System for Award Management, and Central Contractor Registry Registration

In accordance with the Federal Funding Accountability and Transparency Act (FFATA) and the USDA implementation, all applicants must obtain and provide an identifying number from Dun and Bradstreet's (D&B) Data Universal Numbering System (DUNS). Applicants can receive a DUNS number, at no cost, by calling the toll-free DUNS Number request line at 1–866–705–5711, or visiting the D&B Web site at *www.dnb.com.*

In addition, FFATA requires applicants to register with the Central Contractor Registry (CCR) and the System for Award Management (SAM). This registration must be maintained and updated annually. Applicants can register or update their profile, at no cost, by visiting the SAM Web site at *www.sam.gov* which will satisfy both the CCR and SAM registration requirements.

D. Reporting Requirement

In accordance with 7 CFR 2500.045 and 2500.046, the following reporting requirements will apply to awards provided under this FOA. The OAO reserves the right to revise the schedule and format of reporting requirements as necessary in the award agreement.

1. Quarterly progress reports and financial reports will be required.

• *Quarterly Progress Reports.* The awardee must submit the OMB-approved Performance Progress Report form (SF–PPR, Approval Number: 0970–0334). For each report, the awardee must complete fields 1 through 12 of the SF–PPR. To complete field 10, the awardee is required to provide a detailed narrative of project performance and activities as an attachment, as described in the award agreement. Quarterly progress reports must be submitted to the designated OAO official within 30 calendar days after the end of each calendar quarter.

• *Quarterly Financial Reports.* The awardee must submit the Standard Form 425, Federal Financial Report. For each report, the awardee *must complete both* the Federal Cash Transaction Report and the Financial Status Report sections of the SF–425. Quarterly financial reports must be submitted to the designated OAO official within 30 calendar days after the end of each calendar quarter.

2. Final progress and financial reports will be required upon project completion. The final progress report should include a summary of the project or activity throughout the funding period, achievements of the project or activity, and a discussion of problems experienced in conducting the project or activity. The final financial report should consist of a complete SF–425 indicating the total costs of the project. Final progress and financial reports must be submitted to the designated OAO official within 90 calendar days after the completion of the award period.

Signed this 6th day of August 2014.

Carolyn C. Parker,

Director, Office of Advocacy and Outreach.

[FR Doc. 2014–18981 Filed 8–11–14; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Rhode Island Advisory Committee

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that a planning meeting of the Rhode Island Advisory Committee to the Commission will convene at The Dorcas International Institute of Rhode

Island (EDT) on Tuesday, August 26, 2014, at 645 Elmwood Avenue, Providence, Rhode Island 02907. The purpose of the planning meeting is to review civil rights project proposals and select a civil rights topic to examine.

Members of the public are entitled to submit written comments. The comments must be received in the regional office by Friday, September 26, 2014. Comments may be mailed to the Eastern Regional Office, U.S. Commission on Civil Rights, 1331 Pennsylvania Avenue, Suite 1150, Washington, DC 20425, faxed to (202) 376–7548, or emailed to Evelyn Bohor at *ero@usccr.gov.* Persons who desire additional information may contact the Eastern Regional Office at 202–376–7533.

Persons needing accessibility services should contact the Eastern Regional Office at least 10 working days before the scheduled date of the meeting.

Records generated from this meeting may be inspected and reproduced at the Eastern Regional Office, as they become available, both before and after the meeting. Persons interested in the work of this advisory committee are advised to go to the Commission's Web site, *www.usccr.gov,* or to contact the Eastern Regional Office at the above phone number, email or street address.

The meetings will be conducted pursuant to the provisions of the rules and regulations of the Commission and FACA.

Dated August 7, 2014.

David Mussatt,

Chief, Regional Programs Coordination Unit.

[FR Doc. 2014–19000 Filed 8–11–14; 8:45 am]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–54–2014]

Proposed Foreign-Trade Zone—Limon, Colorado Under Alternative Site Framework

An application has been submitted to the Foreign-Trade Zones (FTZ) Board by the Town of Limon, Colorado to establish a foreign-trade zone at sites in Limon, Colorado, adjacent to the Denver U.S. Customs and Border Protection (CBP) port of entry, under the alternative site framework (ASF) adopted by the FTZ Board (15 CFR Sec. 400.2(c)). The ASF is an option for grantees for the establishment or reorganization of zones and can permit significantly greater flexibility in the designation of new ''subzones'' or ''usage-driven'' FTZ sites for operators/users located within a grantee's ''service area'' in the context of the FTZ Board's standard 2,000-acre activation limit for a zone project. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally docketed on August 7, 2014. The applicant is authorized to make the proposal under Colorado statute 7–49.5–102.

The proposed zone would be the 3rd zone for the Denver CBP port of entry. The existing zones are as follows: FTZ 112, Colorado Springs, CO (Grantee: Colorado Springs Foreign-Trade Zone, Inc., Board Order 281, 49 FR 44936, 11/13/84); and, FTZ 123, Denver, CO (Grantee: City and County of Denver, Board Order 311, 50FR 34729, 08/27/1985).

The applicant's proposed service area under the ASF would be Adams, Arapahoe and Morgan Counties, Colorado and portions of Elbert, Lincoln and Washington Counties, Colorado, as described in the application. If approved, the applicant would be able to serve sites throughout the service area based on companies' needs for FTZ designation. The application indicates that the proposed service area is within and adjacent to the Denver U.S. Customs and Border Protection port of entry.

The proposed zone would include two ''magnet'' sites: Proposed *Site 1* (141.16 acres)—Big Sandy industrial area, 1055 Immel Street, Limon; Proposed *Site 2* (280.3 acres)—East Airport industrial area, 21650 State Highway 40, Limon. The ASF allows for the possible exemption of one magnet site from the ''sunset'' time limits that generally apply to sites under the ASF, and the applicant proposes that Site 1 be so exempted.

The application indicates a need for zone services in the Limon, Colorado area. Specific production approvals are not being sought at this time. Such requests would be made to the FTZ Board on a case-by-case basis.

In accordance with the FTZ Board's regulations, Christopher Kemp of the FTZ Staff is designated examiner to evaluate and analyze the facts and information presented in the application and case record and to report findings and recommendations to the FTZ Board.

Public comment is invited from interested parties. Submissions shall be addressed to the FTZ Board's Executive Secretary at the address below. The closing period for their receipt is October 14, 2014. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to October 27, 2014.

A copy of the application will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 21013, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230–0002, and in the ''Reading Room'' section of the FTZ Board's Web site, which is accessible via *www.trade.gov/ftz.*

For further information, contact Christopher Kemp at *Christopher.Kemp@trade.gov* or (202) 482–0862.

Dated: August 7, 2014.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2014–19049 Filed 8–11–14; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–55–2014]

Foreign-Trade Zone (FTZ) 221—Mesa, Arizona; Notification of Proposed Production Activity; Apple Inc./GTAT Corp. (Components for Consumer Electronics); Mesa, Arizona

The City of Mesa, grantee of FTZ 221, submitted a notification of proposed production activity to the FTZ Board on behalf of Apple Inc./GTAT Corp. (Project Cascade), located in Mesa, Arizona, within Subzone 221A. The notification conforming to the requirements of the regulations of the FTZ Board (15 CFR 400.22) was received on July 31, 2014.

Project Cascade already has authority to produce certain components for consumer electronics within Subzone 221A. The current request would add finished products and foreign status materials/components to the scope of authority. Pursuant to 15 CFR 400.14(b), additional FTZ authority would be limited to the specific foreign-status materials/components and specific finished products described in the submitted notification (as described below) and subsequently authorized by the FTZ Board.

Production under FTZ procedures could exempt Project Cascade from customs duty payments on the foreign status materials/components used in export production. On its domestic sales, Project Cascade would be able to choose the duty rates during customs entry procedures that apply to sapphire crackle and waste/scrap (duty rate

ranges from duty-free to 3%) for the foreign status materials/components noted below and in the existing scope of authority. Customs duties also could possibly be deferred or reduced on foreign status production equipment.

The materials/components sourced from abroad include: alumina, sapphire and sapphire crackle (duty rate ranges from duty-free to 6.4%).

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is September 22, 2014

A copy of the notification will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 21013, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230–0002, and in the ''Reading Room'' section of the Board's Web site, which is accessible via *www.trade.gov/ftz.*

FOR FURTHER INFORMATION CONTACT: Elizabeth Whiteman at *Elizabeth.Whiteman@trade.gov* or (202) 482–0473.

Dated: August 7, 2014.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2014–19053 Filed 8–11–14; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–881]

Malleable Cast Iron Pipe Fittings From the People's Republic of China: Continuation of Antidumping Duty Order

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: As a result of the determinations by the Department of Commerce (the ''Department'') and the International Trade Commission (the ''ITC'') that revocation of the antidumping duty (''AD'') order on malleable cast iron pipe fittings from the People's Republic of China (''PRC'') would be likely to lead to continuation or recurrence of dumping and of material injury to an industry in the United States, the Department is publishing this notice of continuation of the AD order.

DATES: *Effective Date:* August 12, 2014.

FOR FURTHER INFORMATION CONTACT: Brendan Quinn or Erin Begnal, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–5848 or (202) 482–1442, respectively.

SUPPLEMENTARY INFORMATION: On March 3, 2014, the Department published the notice of initiation of the second sunset review of the AD *Order*[1] on malleable cast iron pipe fittings from the PRC, pursuant to section 751(c) of the Tariff Act of 1930, as amended (''the Act'').[2]

As a result of its review, the Department determined that revocation of the malleable cast iron pipe fittings *Order* would be likely to lead to a continuation or recurrence of dumping, and, therefore, notified the ITC of the magnitude of the margins likely to prevail should the order be revoked.[3]

On August 5, 2014, the ITC published its determination, pursuant to section 751(c) of the Act, that revocation of the existing AD order on malleable cast iron pipe fittings from the PRC would be likely to lead to a continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[4]

Scope of the Order

The products covered by the *Order* are certain malleable iron pipe fittings, cast, other than grooved fittings, from the PRC. The merchandise is currently classifiable under item numbers 7307.19.90.30, 7307.19.90.60, 7307.19.90.80, and 7326.90.85.88 of the Harmonized Tariff Schedule of the United States (''HTSUS''). Excluded from the scope of this order are metal compression couplings, which are imported under HTSUS number 7307.19.90.80. A metal compression coupling consists of a coupling body, two gaskets, and two compression nuts. These products range in diameter from ½ inch to 2 inches and are carried only in galvanized finish. Although HTSUS subheadings are provided for convenience and customs purposes, the Department's written description of the scope of this proceeding is dispositive.

[1] *See Antidumping Duty Order: Certain Malleable Iron Pipe Fittings From the People's Republic of China,* 68 FR 69376 (December 12, 2003) (''*Order*'').

[2] *See Initiation of Five-Year (''Sunset'') Review,* 79 FR 11762 (March 3, 2014).

[3] *See Malleable Cast Iron Pipe Fittings from the People's Republic of China: Final Results of Expedited Second Sunset Review of Antidumping Duty Order,* 79 FR 42291 (July 21, 2014).

[4] *See Malleable Cast Iron Pipe Fittings From China,* 79 FR 45460 (August 05, 2014); *see also* USITC Publication 4484, August 2014) entitled *Malleable Iron Pipe Fittings from China (Inv. No. 731–TA–1021 (Second Review*)).

Continuation of the Order

As a result of these determinations by the Department and the ITC that revocation of the AD order on malleable cast iron pipe fittings would be likely to lead to a continuation or recurrence of dumping, and material injury to an industry in the United States, pursuant to sections 751(c) and 751(d)(2) of the Act, the Department hereby orders the continuation of the AD order on malleable cast iron pipe fittings from the PRC. U.S. Customs and Border Protection will continue to collect cash deposits for estimated antidumping duties at the rates in effect at the time of entry for all imports of subject merchandise. The effective date of the continuation of the order will be the date of publication in the **Federal Register** of this notice of continuation. Pursuant to section 751(c)(2) of the Act, the Department intends to initiate the next five-year review of the order not later than 30 days prior to the fifth anniversary of the effective date of this continuation.

This five-year (sunset) review and this notice are in accordance with section 751(c) of the Act and published pursuant to section 777(i)(1) of the Act and 19 CFR 351.218(f)(4).

Dated: August 5, 2014.

Paul Piquado,

Assistant Secretary, for Enforcement and Compliance.

[FR Doc. 2014–19051 Filed 8–11–14; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–931]

Continuation of Countervailing Duty Order: Circular Welded Austenitic Stainless Pressure Pipe From the People's Republic of China

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: As a result of the determinations by the Department of Commerce (the ''Department'') the International Trade Commission (the ''ITC'') that revocation of the countervailing duty (''CVD'') order on circular welded stainless pressure pipe from the People's Republic of China (''PRC'') would likely lead to continuation or recurrence of a countervailable subsidy and material injury to an industry in the United States, the Department is publishing this notice of the continuation of this CVD order.

DATES: *Effective Date:* August 12, 2014.

FOR FURTHER INFORMATION CONTACT: Eric Greynolds (CVD order), AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street & Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–6071.

SUPPLEMENTARY INFORMATION:

Background

On February 3, 2014, the Department published the notice of initiation of the first sunset review of the CVD order on circular welded pressure pipe from the PRC, pursuant to section 751(c) of the Tariff Act of 1930, as amended (the ''Act'').[1] As a result of its review, the Department determined that revocation of the CVD order on circular welded pressure pipe from the PRC would likely lead to continuation or recurrence of subsidization and notified the ITC of the subsidy rates likely to prevail should the order be revoked.[2] On July 14, 2014, the ITC published its determination, pursuant to section 751(c) of the Act, that revocation of the CVD order on circular welded pressure pipe from the PRC would likely lead to a continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[3]

Scope of the Order

The merchandise covered by this CVD order is circular welded austenitic stainless pressure pipe not greater than 14 inches in outside diameter. This merchandise includes, but is not limited to, the American Society for Testing and Materials (''ASTM'') A–312 or ASTM A–778 specifications, or comparable domestic or foreign specifications. ASTM A–358 products are only included when they are produced to meet ASTM A–312 or ASTM A–778 specifications, or comparable domestic or foreign specifications.

Excluded from the scope are: (1) Welded stainless mechanical tubing, meeting ASTM A–554 or comparable domestic or foreign specifications; (2) boiler, heat exchanger, superheater, refining furnace, feedwater heater, and condenser tubing, meeting ASTM A–249, ASTM A–688 or comparable domestic or foreign specifications; and (3) specialized tubing, meeting ASTM A–269, ASTM A–270 or comparable domestic or foreign specifications.

The subject imports are normally classified in subheadings 7306.40.5005, 7306.40.5040, 7306.40.5062, 7306.40.5064, and 7306.40.5085 of the Harmonized Tariff Schedule of the United States (''HTSUS''). They may also enter under HTSUS subheadings 7306.40.1010, 7306.40.1015, 7306.40.5042, 7306.40.5044, 7306.40.5080, and 7306.40.5090. The HTSUS subheadings are provided for convenience and customs purposes only; the written description of the scope is dispositive.

Continuation of the Order

As a result of the determinations by the Department and the ITC that revocation of this CVD order would likely lead to continuation or recurrence of a countervailable subsidy and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act, the Department hereby orders the continuation of the CVD order on circular welded austenitic stainless pressure pipe. U.S. Customs and Border Protection will continue to collect cash deposits at the rates in effect at the time of entry for all imports of subject merchandise. The effective date of the continuation of this order is the date of publication in the **Federal Register** of this Notice of Continuation.

Pursuant to sections 751(c)(2) of the Act, the Department intends to initiate the next five-year review of these finding/orders not later than 30 days prior to the fifth anniversary of the effective date of this continuation.

This five-year (sunset) review and notice are in accordance with section 751(c) of the Act and published pursuant to section 777(i)(1) of the Act and 19 CFR 351.218(f)(4).

Dated: July 31, 2014.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2014–18706 Filed 8–11–14; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Initiation of Five-Year (''Sunset'') Review,* 79 FR 6163 (February 3, 2014).

[2] *See Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China: Final Results of the Expedited Sunset Review of the Countervailing Duty Order,* 79 FR 32911 (June 9, 2014).

[3] *See Welded Stainless Pressure Pipe From China,* 79 FR 40779 (July 14, 2014).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–475–818]

Certain Pasta From Italy: Initiation of Changed Circumstances Review

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (''Department'') received information sufficient to warrant initiation of a changed circumstances review of the antidumping duty order on certain pasta (''pasta'') from Italy. Specifically, based upon a request filed by La Molisana S.p.A. (''La Molisana''), a producer/exporter to the United States of subject merchandise, the Department is initiating a changed circumstances review to determine whether La Molisana is the successor-in-interest of La Molisana Industrie Alimentari, S.p.A. (''La Molisana Industrie''), a respondent in several prior reviews and proceedings of the pasta *Order.*[1]

DATES: *Effective Date:* August 12, 2014.

FOR FURTHER INFORMATION CONTACT: Raquel Silva or Erin Begnal, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–6475 and (202) 482–1442, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 24, 1996, the Department published an antidumping duty order on pasta from Italy.[2] On June 23, 2014,[3] La Molisana informed the Department that, in 2011, the company was bought by the Ferro Family Group, which changed the company's name from La Molisana Industrie[4] to La Molisana. La Molisana stated that La Molisana Industrie entered bankruptcy proceedings in 2004, but continued to operate and produce pasta uninterrupted until the ownership change and since.[5] La Molisana submitted various documents supporting its request, including trademark registration filings with the U.S. government for La Molisana and La Molisana Industrie, organization charts for both entities, and catalogue excerpts for both.[6]

The company now known as La Molisana requests that: (1) The Department conduct a changed

[1] *See Notice of Antidumping Duty Order and Amended Final Determination of Sales at Less Than Fair Value: Certain Pasta From Italy,* 61 FR 38547 (July 24, 1996) (''*Order*'').

[2] *See Order.*

[3] *See* letter from La Molisana, ''Certain Pasta From Italy: Request for Changed Circumstance Review,'' dated June 23, 2014 (''CCR Request''), at 4.

[4] The CCR Request, at 2–3, indicates that La Molisana Industrie participated as a respondent in the original antidumping duty investigation, and the administrative review covering the period 1998–1999. Its cash deposit rate was again revised during a Section 129 proceeding in 2012 to 0%.

[5] *See* CCR Request, at 4.

[6] *Id.,* at Exhibits CC–1(a), CC–1(b), CC–4(d), and CC–4(e).

circumstances review pursuant to section 751(b)(1) of the Tariff Act of 1930, as amended, (the ''Act'') and 19 CFR 351.216 to determine that it is the successor-in-interest to La Molisana Industrie for purposes of the antidumping order; and (2) the Department conduct an expedited review pursuant to 19 CFR 351.221(c)(3).[7] We received no comments from any other interested party.

Scope of the Order

Imports covered by the order are shipments of certain non-egg dry pasta in packages of five pounds four ounces or less, whether or not enriched or fortified or containing milk or other optional ingredients such as chopped vegetables, vegetable purees, milk, gluten, diastasis, vitamins, coloring and flavorings, and up to two percent egg white.

Excluded from the scope of the order are refrigerated, frozen, or canned pastas, as well as all forms of egg pasta, with the exception of non-egg dry pasta containing up to two percent egg white. Also excluded are imports of organic pasta from Italy that are certified by a European Union (''EU'') authorized body and accompanied by a National Organic Program import certificate for organic products.[8] Pursuant to the Department's May 12, 2011, changed circumstances review, effective January 1, 2009, gluten-free pasta is also excluded from the scope of the countervailing duty order.[9]

The merchandise subject to the order is currently classifiable under items 1901.90.90.95 and 1902.19.20 of the Harmonized Tariff Schedule of the United States (''HTSUS''). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise subject to the order is dispositive.

Initiation of Changed Circumstances Review

Pursuant to section 751(b)(1) of the Act, the Department will conduct a changed circumstances review upon receipt of information concerning, or a request from, an interested party for a review of an antidumping duty order which shows changed circumstances sufficient to warrant a review of the order. In the event that the Department determines that expedited action is warranted, 19 CFR 351.221(c)(3)(ii) permits the Department to combine the notices of initiation and preliminary results.

In accordance with 19 CFR 351.216(d), the Department determined that the information submitted by La Molisana constitutes sufficient evidence to conduct a changed circumstances review. In an antidumping duty changed circumstances review involving a successor-in-interest determination, the Department typically examines several factors including, but not limited to, changes in: (1) Management; (2) production facilities; (3) supplier relationships; and (4) customer base.[10] While no single factor or combination of factors will necessarily be dispositive, the Department generally will consider the new company to be the successor to the predecessor if the resulting operations are essentially the same as those of the predecessor company.[11] Thus, if the record demonstrates that, with respect to the production and sale of the subject merchandise, the new company operates as the same business entity as the predecessor company, the Department may assign the new company the cash deposit rate of its predecessor.[12]

Based on the information provided in its submission, La Molisana provided sufficient evidence to warrant a review to determine if it is the successor-in-interest to La Molisana Industrie. Therefore, pursuant to section 751(b)(1) of the Act and 19 CFR 351.216(d), we are initiating a changed circumstances review. However, information provided in the submissions, while sufficient for purposes of initiating this review, requires further clarification and/or supplementation before the successor-in-interest determination is reached. Accordingly, the Department intends to issue a questionnaire requesting additional information for the review, as provided for by 19 CFR 351.221(b)(2). For that reason, the Department finds that the expedited action is not warranted and, therefore, is not conducting this review on an expedited basis by publishing preliminary results in conjunction with this notice of initiation. The Department will publish in the **Federal Register** a notice of the preliminary results of the antidumping duty changed circumstances review, in accordance with 19 CFR 351.221(b)(4), and 19 CFR 351.221(c)(3)(i). That notice will set forth the factual and legal conclusions upon which our preliminary results are based and a description of any action proposed.

Pursuant to 19 CFR 351.221(b)(4)(ii), interested parties will have an opportunity to comment on the preliminary results of review. In accordance with 19 CFR 351.216(e), the Department will issue the final results of its antidumping duty changed circumstances review not later than 270 days after the date on which the review is initiated, or not later than 45 days if all parties to the proceeding agree to the outcome of the review.

This notice is published in accordance with sections 751(b)(l) and 777(i)(l) of the Act and 19 CFR 351.216(b) and 351.221(b)(1).

Dated: August 5, 2014.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2014–19058 Filed 8–11–14; 8:45 am]

BILLING CODE 3510–DS–P

[7] *Id.,* at 1, 13–14.

[8] On October 10, 2012, the Department revised the ''Scope of the Order'' to recognize the EU-authorized Italian agents for purposes of the antidumping and countervailing duty orders on pasta from Italy. *See* Memorandum from Yasmin Nair to Susan Kuhbach, titled ''Recognition of EU Organic Certifying Agents for Certifying Organic Pasta from Italy,'' dated October 10, 2012, which is on file in the Department's Central Records Unit.

[9] *See Certain Pasta From Italy: Final Results of Countervailing Duty Changed Circumstances Review and Revocation, In Part,* 76 FR 27634 (May 12, 2011).

[10] *See, e.g., Certain Activated Carbon From the People's Republic of China: Notice of Initiation of Changed Circumstances Review,* 74 FR 19934, 19935 (April 30, 2009).

[11] *See, e.g., Notice of Initiation of Antidumping Duty Changed Circumstances Review: Certain Forged Stainless Steel Flanges from India,* 71 FR 327 (January 4, 2006).

[12] *See, e.g., Fresh and Chilled Atlantic Salmon From Norway; Final Results of Changed Circumstances Antidumping Duty Administrative Review,* 64 FR 9979, 9980 (March 1, 1999).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–964]

Seamless Refined Copper Pipe and Tube From the People's Republic of China: Amended Final Results of Antidumping Duty Administrative Review; 2011–2012

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (''the Department'') is amending the final results of the 2011–2012 administrative review of the antidumping duty order on seamless refined copper pipe and tube (''copper pipe'') from the People's Republic of China (''PRC'') to correct a ministerial error.[1] The period of review (''POR'') is

[1] *See Seamless Refined Copper Pipe and Tube From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011–2012,* 79 FR 23324 (April 28, 2014) (''*Final Results*''), and accompanying Issues and Decision Memorandum (''I&D Memo'').

November 1, 2011 through October 31, 2012.

DATES: *Effective Date:* August 12, 2014.

FOR FURTHER INFORMATION CONTACT: Thomas Martin, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–3936.

SUPPLEMENTARY INFORMATION:

Background

On April 22, 2014, the Department disclosed to interested parties its calculations for the *Final Results.*[2] On April 28, 2014, we received ministerial error comments from Golden Dragon.[3] On May 1, 2014, we received ministerial error rebuttal comments from Petitioners.[4] No other interested party submitted comments.

Before the Department could take action on the alleged ministerial error, both Golden Dragon and Petitioners filed a summons and complaint with the U.S. Court of International Trade (''CIT'') challenging the *Final Results,* which vested the CIT with jurisdiction over the administrative proceeding.[5] On July 18, 2014, the CIT granted the Department leave to publish amended final results upon considering the ministerial error allegation.[6]

Scope of the Order

For a full description of the products covered by the antidumping duty order, *see* Memorandum to Paul Piquado, Assistant Secretary for Enforcement and Compliance, through Gary Taverman, Senior Advisor for Antidumping and Countervailing Duty Operations, from Abdelali Elouaradia, Director, Office IV, ''Antidumping Duty Administrative Review: Seamless Refined Copper Pipe and Tube from the People's Republic of China; 2011–2012: Ministerial Error Allegation Memorandum,'' dated concurrently with and hereby adopted by this notice (''Ministerial Error Memo'').

Ministerial Errors

Section 751(h) of the Tariff Act of 1930, as amended (''the Act''), and 19 CFR 351.224(f) define a ''ministerial error'' as an error ''in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any similar type of unintentional error which the Secretary considers ministerial.'' After analyzing the ministerial error comments and rebuttal comments, we have determined, in accordance with section 751(h) of the Act and 19 CFR 351.224(e), that we made the following ministerial error in our calculations for the *Final Results:* we inadvertently did not cap Golden Dragon's reported freight distances for factors of production valued using import statistics pursuant to the rule in *Sigma.*[7] For a detailed discussion of this error, as well as the Department's analysis, *see* Ministerial Error Memo.

In accordance with section 751(h) of the Act and 19 CFR 351.224(e), we are amending the *Final Results* for Golden Dragon. The revised weighted-average dumping margin for Golden Dragon is detailed below.

Amended Final Results of Administrative Review

The amended weighted-average dumping margins are as follows:

Exporter	Weighted-average dumping margin (percent)
Golden Dragon Precise Copper Tube Group, Inc., Hong Kong GD Trading Co., Ltd., and Golden Dragon Holding (Hong Kong) International, Ltd.	4.48

Disclosure

We will disclose the calculations performed for these amended final results to interested parties within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Assessment Rates

Pursuant to section 751(a)(2)(A) of the Act and 19 CFR 351.212(b), the Department will determine, and U.S. Customs and Border Protection (''CBP'') shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the amended final results of this review. The Department intends to issue assessment instructions to CBP 15 days after the publication date of the amended final results of this review.

For assessment purposes, we calculated importer-specific assessment rates for merchandise subject to this review. We will continue to direct CBP to assess importer-specific assessment rates based on the resulting per-unit (*i.e.,* per-kg) rates for each entry of the subject merchandise during the POR. Specifically, we calculated importer-specific duty assessment rates on a per-unit rate basis by dividing the total amount of dumping for each importer by the total sales quantity of subject merchandise sold to that importer during the POR. We also estimated each importer's *ad valorem* assessment rate by dividing the total amount of dumping for each importer by the total estimated entered value of those same sales. If an estimated importer-specific *ad valorem* assessment rate is *de minimis* (*i.e.,* less than 0.50 percent), the Department will instruct CBP to liquidate that importer entries of subject merchandise without regard to antidumping duties, in accordance with 19 CFR 351.106(c)(2).

Cash Deposit Requirements

The following cash deposit requirements are effective as of April 28, 2014, the date of publication of the *Final Results,* for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption, as provided for by section 751(a)(2)(C) of the Act: (1) For the exporters identified above, the cash deposit rate will be equal to their weighted-average dumping margin in these amended final results of review; (2) for previously investigated or reviewed PRC and non-PRC exporters not listed above that received a separate rate in a previously completed segment of this proceeding, the cash deposit rate will continue to be the existing exporter-specific rate published for the most recent period; (3) for all PRC exporters of subject merchandise that have not been found to be entitled a separate rate in the *Final Results,* the cash deposit rate will be that for the PRC-wide entity (*i.e.,* 60.85 percent); and (4) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporter that supplied that non-PRC exporter. These deposit

[2] The interested parties include: Cerro Flow Products, LLC, Wieland Copper Products, LLC, Mueller Copper Tube Products Inc., and Mueller Copper Tube Company, Inc. (collectively, ''Petitioners''), and Golden Dragon Precise Copper Tube Group, Inc., Hong Kong GD Trading Co., Ltd., and Golden Dragon Holding (Hong Kong) International, Ltd. (collectively, ''Golden Dragon'').

[3] *See* Letter from Golden Dragon to the Honorable Penny Pritzker, ''Re: Seamless Steel Copper Pipe and Tube from the People's Republic of China (11/1/11–10/31/12); Ministerial Error Allegation with respect to the Final Determination for Golden Dragon,'' dated April 28, 2014.

[4] *See* Letter from Petitioners to The Honorable Penny S. Pritzker, ''Re: Seamless Refined Copper Pipe and Tube from the People's Republic of China: Petitioners' Rebuttal Comments to Golden Dragon's Ministerial Error Allegation,'' dated May 1, 2014.

[5] *See Zenith Elecs. Corp.* v. *United States,* 884 F.2d 556, 561–62 (Fed. Cir. 1989).

[6] *See Golden Dragon Precise Copper Tube Group, Inc.* v. *United States,* Slip Op. 14–85, Consol. Court No. 14–00116 (Ct. Int'l Trade July 18, 2014).

[7] *See Sigma Corp.* v. *United States,* 117 F.3d 1401, 1407–08 (Fed. Cir. 1997) (''*Sigma*'').

requirements, when imposed, shall remain in effect until further notice.

Reimbursement of Duties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties has occurred and the subsequent assessment of doubled antidumping duties.

Administrative Protective Orders

This notice also serves as a reminder to parties subject to administrative protective order (''APO'') of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Notification to Interested Parties

These amended final results are published in accordance with sections 751(h) and 777(i)(1) of the Act.

Dated: August 6, 2014.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2014–19056 Filed 8–11–14; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Notice of Scope Rulings

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* August 12, 2014.

SUMMARY: The Department of Commerce (''Department'') hereby publishes a list of scope rulings and anticircumvention determinations made between April 1, 2014, and June 30, 2014, inclusive. We intend to publish future lists after the close of the next calendar quarter.

FOR FURTHER INFORMATION CONTACT: Brenda E. Waters, AD/CVD Operations, Customs Liaison Unit, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: 202–482–4735.

SUPPLEMENTARY INFORMATION:

Background

The Department's regulations provide that the Secretary will publish in the **Federal Register** a list of scope rulings on a quarterly basis.[1] Our most recent notification of scope rulings was published on May 29, 2014.[2] This current notice covers all scope rulings and anticircumvention determinations made by Enforcement and Compliance between April 1, 2014, and June 30, 2014, inclusive. Subsequent lists will follow after the close of each calendar quarter.

Scope Rulings Made Between April 1, 2014 and June 30, 2014

Brazil

A–351–841: Polyethylene Terephthalate Film Sheet and Strip From Brazil

Requestor: Evertis Packaging Solutions: Ecoblock C products in thicknesses of 14 or 16 millimeters produced by Evertis Packaging Solutions are not within the scope of the antidumping order because they are amorphous polyethylene terephthalate film which lack biaxial orientation; May 2, 2104

People's Republic of China

A–570–967 and C–570–968: Aluminum Extrusions From the People's Republic of China

Requestor: N.R. Windows Inc.; NR Windows' window wall kits, composed of non-weight bearing extruded aluminum window frames, sheet aluminum, fasteners, gaskets, glazing sealants, and glass panes, are outside the scope of the order because the window wall kits contain, at the time of importation, all of the necessary parts to fully assemble a final finished good, require no further finishing or fabrication, and are assembled ''as is'' into a finished product and, thus, meet the exclusion criteria for finished goods kits; June 19, 2014.

A–570–967 and C–570–968: Aluminum Extrusions From the People's Republic of China

Requestor: Glenmore Industries LLC; Glenmore's trade booth kits, composed of polyester knit fabric-covered aluminum wall panels, fabric covered aluminum headers, aluminum posts (columns), and crossbeams, contain, upon importation, all of the components required and necessary to assemble complete commercial display spaces for use at trade shows, conventions, fairs and similar exhibitions and displays and, thus, constitute finished goods kits that meet the exclusion criteria of the scope; June 23, 2014.

A–570–970 and C–570–971: Multilayered Wood Flooring From the People's Republic of China

Requestor: Shenzhenshi Huanwei Woods Co., Ltd. (Huanwei); multilayered wood flooring exported by Huanwei is not within the scope of the antidumping and countervailing duty orders because Huanwei's product is composed of only two-layers—a top layer of veneer and a base layer, whereas the scope language requires the merchandise to be composed of at least two layers, or plies, of wood veneer in combination with a core; May 13, 2014.

A–570–918: Steel Wire Garment Hangers From the People's Republic of China

Requestor: Trendsformers, LLC; hanging jewelry organizers (''Hang It Jewelry Organizers'') are outside the scope of the antidumping duty order because they are manufactured and used in manners distinct from subject merchandise. Specifically, these hangers, sold in jewelry departments, are intended for use in the home to hold earrings, bracelets and necklaces. These hangers are not sold to dry cleaners, laundries, uniform rental services, or similar industrial operations; June 19, 2014.

A–570–890: Wooden Bedroom From the People's Republic of China

Requestor: Ethan Allen Operations Inc.; Marlene, Nadine, Serpentine, and Vivica chests are all covered by the scope of the antidumping duty order because of similarities with subject chests described in the scope; May 27, 2014.

Interested parties are invited to comment on the completeness of this list of completed scope and anticircumvention inquiries. Any comments should be submitted to the Deputy Assistant Secretary for AD/CVD Operations, Enforcement and Compliance, International Trade Administration, 14th Street and Constitution Avenue NW., APO/Dockets Unit, Room 1870, Washington, DC 20230.

This notice is published in accordance with 19 CFR 351.225(o).

[1] *See* 19 CFR 351.225(o).

[2] *See Notice of Scope Rulings,* 79 FR 30821 (May 29, 2014).

Dated: August 6, 2014.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2014–19057 Filed 8–11–14; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XD401

Magnuson-Stevens Act Provisions; General Provisions for Domestic Fisheries; Application for Exempted Fishing Permits

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

ACTION: Notice; request for comments.

SUMMARY: The Assistant Regional Administrator for Sustainable Fisheries, Greater Atlantic Region, NMFS (Assistant Regional Administrator), has made a preliminary determination that two separate exempted fishing permit applications contain all of the required information and warrant further consideration. The exempted fishing permits would facilitate compensation fishing under the Monkfish Research Set-Aside Program by exempting vessels from monkfish days-at-sea possession limits. The compensation fishing is in support of two 2014/2015 Monkfish Research Set-Aside projects.

Regulations under the Magnuson-Stevens Fishery Conservation and Management Act require publication of this notification to provide interested parties the opportunity to comment on applications for proposed exempted fishing permits.

DATES: Comments must be received on or before August 27, 2014.

ADDRESSES: You may submit written comments by any of the following methods:

- *Email: nero.efp@noaa.gov.* Include in the subject line ''Comments on UNE and SMAST Monkfish RSA EFPs.''
- *Mail:* John K. Bullard, Regional Administrator, NMFS, Greater Atlantic Regional Fisheries Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope ''Comments on UNE and SMAST monkfish RSA EFPs.''

FOR FURTHER INFORMATION CONTACT: Brett Alger, Fishery Management Specialist, 978–675–2153.

SUPPLEMENTARY INFORMATION: The Northeast Fisheries Science Center has awarded grants to the University of New England (UNE) and the University of Massachusetts, Dartmouth, School for Marine Science and Technology (SMAST), under the 2014 and 2015 Monkfish Research Set-Aside (RSA) Program. UNE and SMAST have submitted exempted fishing permit (EFP) applications requesting an exemption from monkfish possession limits for vessels operatiing under a monkfish RSA day-at-sea (DAS) to facilitate monkfish RSA compensation fishing.

Monkfish EFPs that waive possession limits have been routinely approved since 2007 to increase operational efficiency and to optimize research funds generated from the Monkfish RSA Program. To ensure that the amount of monkfish harvested by vessels operating under the EFPs is similar to the amount of monkfish that was anticipated to be harvested under the 500 RSA DAS set-aside by the New England and Mid-Atlantic Fishery Management Councils, we have associated an amount of monkfish equal to twice the possession limit of Permit Category A and C vessels fishing in the Southern Fishery Management Area (SFMA) of the monkfish fishery with each RSA DAS. Under the 2014/2015 Monkfish RSA Program, each monkfish RSA DAS equates to 3,200 lb (1,452 kg) of whole monkfish. This is considered a reasonable approximation because it is reflective of how the standard monkfish commercial fishery operates. It is likely that RSA grant recipients would optimize their RSA DAS award by utilizing vessels that have this possession limit.

UNE submitted a complete application for an EFP on June 3, 2014. The primary goal of their study is to investigate the immediate and short-term discard mortality rates of winter skates that are captured in sink gillnets in the targeted monkfish fishery. The EFP would exempt vessels from monkfish DAS possession limits in either of the monkfish management areas, in order to conduct monkfish compensation fishing through May 2016. Fishing activity would otherwise be conducted under normal monkfish commercial fishing practices. The vessels would use standard commercial gear and land monkfish for sale. UNE has been awarded 607 RSA DAS: 359 RSA DAS in 2014 and 248 RSA DAS in 2015. If approved, participating vessels operating under the 2014 EFP could use up to 359 DAS, or catch up to 1,148,800 lb (521,087 kg) of whole monkfish, and under the 2015 EFP, vessels could use up to 248 RSA DAS, or catch up to 793,600 lb (359,971 kg) of whole monkfish.

SMAST submitted a complete application for an EFP on June 30, 2014. The primary goal of their study is to investigate large-scale movement patterns of monkfish using data storage tags and to validate monkfish aging. The EFP would exempt up to 42 vessels from the monkfish possession limits in either of the monkfish management areas, in order to conduct monkfish compensation fishing through May 2016. Fishing activity would otherwise be conducted under normal monkfish commercial fishing practices. The vessels would use standard commercial gear and land monkfish for sale. SMAST has been awarded 393 RSA DAS: 141 RSA DAS in 2014 and 252 RSA DAS in 2015. If approved, participating vessels operating under the 2014 EFP could use up to 141 DAS, or catch up to 451,200 lb (204,661 kg) of whole monkfish, and under the 2015 EFP, vessels could use up to 252 RSA DAS, or catch up to 806,400 lb (365,777 kg) of whole monkfish.

Fishing under either EFP would stop if either the DAS are all used, or the associated pounds are caught, whichever occurs first. While these exemption requests are for both 2014 and 2015, the 2015 EFPs would not be issued until the start of the 2015 fishing year.

If approved, either applicant may request minor modifications and extensions to the EFP throughout the year. EFP modifications and extensions may be granted without further notice if they are deemed essential to facilitate completion of the proposed research and have minimal impacts that do not change the scope or impact of the initially approved EFP request. Any fishing activity conducted outside the scope of the exempted fishing activity would be prohibited.

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

Dated: August 6, 2014.

Emily H. Menashes,

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

[FR Doc. 2014–18962 Filed 8–11–14; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XD412

Pacific Island Fisheries; Marine Conservation Plan for Guam

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

ACTION: Notice of agency decision.

SUMMARY: NMFS announces approval of a Marine Conservation Plan (MCP) for Guam.

DATES: This agency decision is effective from August 4, 2014, through August 3, 2017.

ADDRESSES: You may obtain a copy of the MCP, identified by NOAA–NMFS–2014–0094, from the Federal e-Rulemaking Portal, *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2014-0094,* or from the Western Pacific Fishery Management Council (Council), 1164 Bishop St., Suite 1400, Honolulu, HI 96813, 808–522–8220, *www.wpcouncil.org.*

FOR FURTHER INFORMATION CONTACT: Jarad Makaiau, Sustainable Fisheries, NMFS Pacific Islands Regional Office, 808–725–5176.

SUPPLEMENTARY INFORMATION: Section 204(e) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) authorizes the Secretary of State, with the concurrence of the Secretary of Commerce (Secretary) and in consultation with the Council, to negotiate and enter into a Pacific Insular Area fishery agreement (PIAFA). A PIAFA would allow foreign fishing within the U.S. Exclusive Economic Zone (EEZ) adjacent to American Samoa, Guam, or the Northern Mariana Islands with the concurrence of, and in consultation with, the Governor of the Pacific Insular Area to which the PIAFA applies. Before entering into a PIAFA, the appropriate Governor, with the concurrence of the Council, must develop a 3-year MCP providing details on uses for any funds collected by the Secretary under the PIAFA.

The Magnuson-Stevens Act requires payments received under a PIAFA to be deposited into the United States Treasury and then conveyed to the Treasury of the Pacific Insular Area for which funds were collected. In the case of violations by foreign fishing vessels in the EEZ around any Pacific Insular Area, amounts received by the Secretary attributable to fines and penalties imposed under the Magnuson-Stevens Act, including sums collected from the forfeiture and disposition or sale of property seized subject to its authority, shall be deposited into the Treasury of the Pacific Insular Area adjacent to the EEZ in which the violation occurred, after direct costs of the enforcement action are subtracted. The government may use funds deposited into the Treasury of the Pacific Insular Area for fisheries enforcement and for implementation of an MCP.

An MCP must be consistent with the Council's fishery ecosystem plans, must identify conservation and management objectives (including criteria for determining when such objectives have been met), and must prioritize planned marine conservation projects. Although no foreign fishing is being considered at this time, at its 160th meeting held June 24–27, 2014, in Honolulu, the Council reviewed and approved the MCP for Guam and recommended its submission to the Secretary for approval. On July 24, 2014, the Governor of Guam submitted the MCP to NMFS, the designee of the Secretary, for review and approval.

The Guam MCP contains six conservation and management objectives, listed below. Please refer to the MCP for planned projects and activities designed to meet each objective, the evaluative criteria, and priority rankings.

MCP Objectives:

1. Fisheries resource assessment, research and monitoring;

2. Effective surveillance and enforcement mechanisms;

3. Promote ecosystems approach to fisheries management, climate change adaptation and mitigation, and regional cooperation;

4. Public participation, education and outreach, and local capacity building;

5. Domestic fisheries development; and

6. Recognizing the importance of island cultures and traditional fishing practices and community based management.

This notice announces that NMFS has determined that the Guam MCP satisfies the requirements of the Magnuson-Stevens Act and approves the MCP for the 3-year period from August 4, 2014, through August 3, 2017. This MCP supersedes the one approved for the period June 28, 2011, through June 27, 2014 (76 FR 39858, July 7, 2011).

Dated: August 6, 2014.

Emily H. Menashes,

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

[FR Doc. 2014–18964 Filed 8–11–14; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 1333–062]

Pacific Gas and Electric Company; Notice of Application Accepted for Filing, Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Application for Temporary Variance of License Requirement.

b. *Project No.:* 1333–062.

c. *Date Filed:* June 26, 2014.

d. *Applicants:* Pacific Gas and Electric Company (licensee).

e. *Name of Project:* Tule River Hydroelectric Project.

f. *Location:* On the North Fork of the Middle Fork Tule River, Hossack Creek, and Doyle Springs, in Tulare County, California.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Ms. Elisabeth Rossi, License Coordinator, Pacific Gas and Electric Company, Mail Code: N11C, P.O. Box 770000, San Francisco, CA 94177. Phone (415) 973–3082.

i. *FERC Contact:* Mr. Mark Pawlowski, (202) 502–6052, or *mark.pawlowski@ferc.gov.*

j. Deadline for filing comments, motions to intervene, protests, and recommendations is 30 days from the issuance date of this notice by the Commission. The Commission strongly encourages electronic filing. Please file motions to intervene, protests, comments, or recommendations 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. Please include the project number (P–1333–062) on any comments, motions to intervene, protests, or recommendations filed.

k. Description of Request: The licensee requests a temporary variance to reduce minimum flows required by article 105 of the project's license. The licensee states that water conditions in the North Fork of the Middle Fork Tule River are critically dry, and requests that it be allowed to reduce the minimum flow release from Tule Diversion Dam and Doyle Springs Diversion Dam from 4 and 2 cubic feet per second (cfs), respectively, to 1 cfs. The purpose of this flow reduction is to maintain the integrity of, and prevent permanent damage to, the project's 1,021-foot-long redwood penstock by maintain a 2 cfs flow through the penstock. Due to the urgent nature of this request and to prevent permanent damage to the project's the Commission approved the licensee's request with conditions by order dated August 1, 2014. The approved temporary variance expires no later than 6 months from the date of the order. However, should the licensee request another temporary variance due to continued drought conditions once the current variance expires, the Commission will take into account any comments received, intervention requests, and protests received in its analysis of any future variance request.

l. Locations of the Application: A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. Comments, Protests, or Motions to Intervene: Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Filing and Service of Responsive Documents: Any filing must (1) bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'' as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). All comments, motions to intervene, or protests should relate to project works which are the subject of the license surrender. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. If an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

Dated: August 6, 2014.

Kimberly D. Bose,

Secretary.

[FR Doc. 2014–19039 Filed 8–11–14; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: PR14–47–000.
Applicants: Interstate Power and Light Company.
Description: Tariff filing per 284.123(b)(1) + (g): Statement of Operating Conditions to be effective 8/4/2014; TOFC: 1330.
Filed Date: 8/4/14.
Accession Number: 20140804–5110.
Comments Due: 5 p.m. ET 8/25/14.
284.123(g) Protests Due: 5 p.m. ET 10/3/14.

Docket Numbers: RP14–1160–000.
Applicants: WBI Energy Transmission, Inc.
Description: Withdrawal Non-Conforming Service Agreement Garden Creek II.
Filed Date: 8/5/14.
Accession Number: 20140805–5040.
Comments Due: 5 p.m. ET 8/18/14.

Docket Numbers: RP14–1170–000.
Applicants: Dominion Transmission, Inc.
Description: DTI—August 5, 2014 Service Agreement Termination Notice.
Filed Date: 8/5/14.
Accession Number: 20140805–5105.
Comments Due: 5 p.m. ET 8/18/14.

Docket Numbers: RP14–1171–000.
Applicants: Enable Gas Transmission, LLC.
Description: Negotiated Rate Filing—August 2014 LER 0222 Att A to be effective 8/5/2014.
Filed Date: 8/5/14.
Accession Number: 20140805–5140.
Comments Due: 5 p.m. ET 8/18/14.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified date(s). Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/*

docs-filing/efiling/filing-req.pdf. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: August 6, 2014.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2014–19003 Filed 8–11–14; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP14–1165–000.
Applicants: Cadeville Gas Storage LLC.
Description: CGS Section 6.4 Compliance Filing to be effective 8/1/2014.
Filed Date: 8/4/14.
Accession Number: 20140804–5001.
Comments Due: 5 p.m. ET 8/18/14.

Docket Numbers: RP14–1166–000.
Applicants: Perryville Gas Storage LLC.
Description: PGS Section 6.4 Compliance Filing to be effective 8/1/2014.
Filed Date: 8/4/14.
Accession Number: 20140804–5002.
Comments Due: 5 p.m. ET 8/18/14.

Docket Numbers: RP14–1168–000.
Applicants: WBI Energy Transmission, Inc.
Description: Tariff Revisions to be effective 9/1/2014.
Filed Date: 8/4/14.
Accession Number: 20140804–5048.
Comments Due: 5 p.m. ET 8/18/14.

Docket Numbers: RP14–1169–000.
Applicants: Monroe Gas Storage Company, LLC.
Description: MGS Section 6.8 Compliance Filing to be effective 8/1/2014.
Filed Date: 8/4/14.
Accession Number: 20140804–5123.
Comments Due: 5 p.m. ET 8/18/14.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

Filings in Existing Proceedings

Docket Numbers: RP14–1151–001.
Applicants: Questar Overthrust Pipeline Company.
Description: Non-conforming TSA No. 5226 to be effective 8/1/2014.
Filed Date: 8/4/14.
Accession Number: 20140804–5167.
Comments Due: 5 p.m. ET 8/18/14.

Any person desiring to protest in any of the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: August 5, 2014.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2014–19002 Filed 8–11–14; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC14–123–000.
Applicants: Osage Wind, LLC.
Description: Application for Authorization Under Section 203 of the Federal Power Act, Request for Shortened Notice Period, Expedited Consideration and Confidential Treatment of Osage Wind, LLC.
Filed Date: 8/4/14.
Accession Number: 20140804–5212.
Comments Due: 5 p.m. ET 8/25/14.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2211–003.
Applicants: Vandolah Power Company, L.L.C.
Description: Compliance to Baseline Tariff to be effective 8/6/2014.
Filed Date: 8/5/14.
Accession Number: 20140805–5067.
Comments Due: 5 p.m. ET 8/26/14.

Docket Numbers: ER10–2218–003.
Applicants: Orlando CoGen Limited, L.P.
Description: Compliance to Baseline Tariff to be effective 8/6/2014.
Filed Date: 8/5/14.
Accession Number: 20140805–5064.
Comments Due: 5 p.m. ET 8/26/14.

Docket Numbers: ER11–2370–004.
Applicants: Cambria CoGen Company.
Description: Cambria CoGen Company submits tariff filing per 35: Compliance to Baseline Tariff to be effective 8/6/2014.
Filed Date: 8/5/14.
Accession Number: 20140805–5084.
Comments Due: 5 p.m. ET 8/26/14.

Docket Numbers: ER13–298–003.
Applicants: New York Independent System Operator, Inc.
Description: NYISO Compliance-Eliminate Reference Level Cap on 10-minute Reserve to be effective 8/25/2014.
Filed Date: 8/5/14.
Accession Number: 20140805–5115.
Comments Due: 5 p.m. ET 8/26/14.

Docket Numbers: ER13–2318–003*; ER13–1430–003; ER10–2743–004; ER12–637–002; ER10–1936–003; ER13–1561–003; ER12–995–002; ER10–1892–004; ER10–1886–004; ER10–2793–004; ER10–1854–005; ER13–2317–003; ER10–2755–005; ER10–2739–008; ER11–3320–005; ER10–1872–004; ER14–2499–001; ER13–2319–003; ER10–2751–004; ER10–2744–006; ER10–2740–006; ER10–1859–004; ER13–2316–003; ER10–2742–004; ER10–1631–005; ER11–3321–005; ER14–19–003.*
Applicants: All Dams Generation, LLC, Arlington Valley Solar Energy II, LLC, Bluegrass Generation Company, L.L.C., Calhoun Power Company, LLC, Carville Energy LLC, Centinela Solar Energy, LLC, Cherokee County Cogeneration Partners, LLC, Columbia Energy LLC, Decatur Energy Center, LLC, DeSoto County Generating Company, LLC, Doswell Limited Partnership, Lake Lynn Generation, LLC, Las Vegas Power Company, LLC, LS Power Marketing, LLC, LSP University Park, LLC, Mobile Energy LLC, Oneta Power, LLC, PE Hydro Generation, LLC, Renaissance Power, L.L.C., Riverside Generating Company, L.L.C., Rocky Road Power, LLC, Santa Rosa Energy Center, LLC, Seneca Generation, LLC, Tilton Energy LLC, University Park Energy, LLC, Wallingford Energy LLC, West Deptford Energy, LLC.
Description: Notification of Change in Status of the LS Power Development, LLC subsidiaries.
Filed Date: 8/4/14.
Accession Number: 20140804–5214.
Comments Due: 5 p.m. ET 8/25/14.

Docket Numbers: ER14–2593–000.
Applicants: RE Columbia Two LLC.

Description: RE Columbia Two LLC—Certificate of Concurrence Filing to be effective 9/7/2014.

Filed Date: 8/4/14.

Accession Number: 20140804–5189.

Comments Due: 5 p.m. ET 8/25/14.

Docket Numbers: ER14–2594–000.

Applicants: RE Camelot LLC.

Description: RE Camelot LLC—Certificate of Concurrence to be effective 9/7/2014.

Filed Date: 8/5/14.

Accession Number: 20140805–5000.

Comments Due: 5 p.m. ET 8/26/14.

Docket Numbers: ER14–2595–000.

Applicants: PJM Interconnection, L.L.C.

Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii: Queue Position # Y2–042 ?Service Agreement No. 3915 to be effective 7/7/2014.

Filed Date: 8/5/14.

Accession Number: 20140805–5068.

Comments Due: 5 p.m. ET 8/26/14.

Docket Numbers: ER14–2596–000.

Applicants: NSTAR Electric Company, ISO New England Inc.

Description: NSTAR Electric Company submits tariff filing per 35.13(a)(2)(iii: ISO–NE., MBTA and NSTAR Local Service Agreement TSA–NSTAR–001 to be effective 5/1/2014.

Filed Date: 8/5/14.

Accession Number: 20140805–5074.

Comments Due: 5 p.m. ET 8/26/14.

Docket Numbers: ER14–2597–000.

Applicants: Town of Hanover

Description: Town of Hanover submits tariff filing per 35.12: Town of Hanover MBR Application to be effective 10/15/2014.

Filed Date: 8/5/14.

Accession Number: 20140805–5076.

Comments Due: 5 p.m. ET 8/26/14.

Docket Numbers: ER14–2598–000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: Midcontinent Independent System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: 2014–08–05_SA 2682 MidAmerican-MidAmerican Amended GIA (R39) to be effective 8/6/2014.

Filed Date: 8/5/14.

Accession Number: 20140805–5077.

Comments Due: 5 p.m. ET 8/26/14.

Docket Numbers: ER14–2599–000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: Midcontinent Independent System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: 2014–06–30 Bi-Directional EARS filing to be effective 3/1/2015.

Filed Date: 8/5/14.

Accession Number: 20140805–5104.

Comments Due: 5 p.m. ET 8/26/14.

Docket Numbers: ER14–2600–000.

Applicants: Southwest Power Pool, Inc.

Description: 1166R21 Oklahoma Municipal Power Authority NITSA and NOA to be effective 7/1/2014.

Filed Date: 8/5/14.

Accession Number: 20140805–5121.

Comments Due: 5 p.m. ET 8/26/14.

Docket Numbers: ER14–2601–000.

Applicants: Ameren Illinois Company.

Description: Ameren Illinois Company submits tariff filing per 35.13(a)(2)(iii: Letter Agreement Between AIC, IMEA, and Flora to be effective 7/7/2014.

Filed Date: 8/5/14.

Accession Number: 20140805–5137.

Comments Due: 5 p.m. ET 8/26/14.

Take notice that the Commission received the following public utility holding company filings:

Docket Numbers: PH14–5–001.

Applicants: LS Power Development, LLC.

Description: LS Power Development, LLC submits Notice of Non-Material Change in Fact of FERC 65–B Waiver Notification..

Filed Date: 8/4/14.

Accession Number: 20140804–5209.

Comments Due: 5 p.m. ET 8/25/14.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: August 5, 2014.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2014–19022 Filed 8–11–14; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PF14–11–000]

Columbia Gas Transmission, LLC; Notice of Intent To Prepare an Environmental Assessment for the Planned Tri-County Bare Steel Replacement Project and Request for Comments on Environmental Issues

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the Tri-County Bare Steel Replacement Project involving construction and operation of facilities by Columbia Gas Transmission, LLC (Columbia) in Allegheny, Greene, and Washington Counties, Pennsylvania. The Commission will use this EA in its decision-making process to determine whether the project is in the public convenience and necessity.

This notice announces the opening of the scoping process the Commission will use to gather input from the public and interested agencies on the project. Your input will help the Commission staff determine what issues they need to evaluate in the EA. Please note that the scoping period will close on September 5, 2014.

You may submit comments in written form. Further details on how to submit comments are in the Public Participation section of this notice.

This notice is being sent to the Commission's current environmental mailing list for this project. State and local government representatives should notify their constituents of this planned project and encourage them to comment on their areas of concern.

If you are a landowner receiving this notice, a pipeline company representative may contact you about the acquisition of an easement to construct, operate, and maintain the planned facilities. The company would seek to negotiate a mutually acceptable agreement. However, if the Commission approves the project, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail to produce an agreement, the pipeline company could initiate condemnation proceedings where compensation would be determined in accordance with state law.

A fact sheet prepared by the FERC entitled ''An Interstate Natural Gas Facility On My Land? What Do I Need To Know?'' is available for viewing on

the FERC Web site (*www.ferc.gov*). This fact sheet addresses a number of typically asked questions, including the use of eminent domain and how to participate in the Commission's proceedings.

Summary of the Planned Project

Columbia plans to replace approximately 32 miles of its existing Line 1570 with approximately 34 miles of 20-inch-diameter pipeline in Allegheny, Washington, and Greene Counties, Pennsylvania. The project would also include associated appurtenant facilities including bi-directional pig [1] launcher/receivers, cathodic protection, mainline valves, and taps. A majority of the planned project would be constructed utilizing the ''lift and lay'' technique and would by definition involve the removal of the existing Line 1570 pipeline. However, at several locations the new pipe would be installed offset from the existing Line 1570 pipeline. At these locations, Columbia would abandon in place the existing Line 1570 pipeline unless otherwise agreed upon with the landowner.

The Tri-County Bare Steel Replacement Project consists of the following:

- Segment 1: Hero Valve to Waynesburg Compressor Station in Greene County—replace approximately 14.2 miles of the existing Line 1570 with 20-inch-diameter pipeline;
- Segment 2: Redd Farm Station to Sharp Farm Station in Washington County—replace approximately 7 miles of the existing Line 1570 with approximately 8.1 miles of 20-inch-diameter pipeline; and
- Segment 3: Sharp Farm Station to Walker Farm Station in Washington and Allegheny Counties—replace approximately 11 miles of the existing Line 1570 with approximately 11.7 miles of 20-inch-diameter pipeline.

The general location of the project facilities is shown in appendix 1.[2]

Land Requirements for Construction

Construction and operation of the project will require the acquisition of temporary and permanent easements. To the extent feasible, the project's right-of-way would parallel or overlap the existing right-of-way and other utility corridors while providing a safe separation distance between the pipeline and existing facilities.

Columbia anticipates using a 75-foot-wide construction right-of-way, which includes the 50-foot permanent easement for operation. In areas where the project is co-located with the existing Line 1570, Columbia would overlap the existing right-of-way (generally by 25 feet), thereby minimizing the width of the new permanent right-of-way. Approximately 7.6 miles of the project would be greater than 30 feet from the existing Line 1570 centerline in order to avoid environmentally sensitive features and/or encroachments that exist in the Line 1570 permanent right-of-way.

The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us [3] to discover and address concerns the public may have about proposals. This process is referred to as scoping. The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this notice, the Commission requests public comments on the scope of the issues to address in the EA. We will consider all filed comments during the preparation of the EA.

In the EA we will discuss impacts that could occur as a result of the construction and operation of the planned project under these general headings:

- Geology and soils;
- land use;
- water resources, fisheries, and wetlands;
- cultural resources;
- vegetation and wildlife;
- air quality and noise;
- endangered and threatened species; and
- public safety.

We will also evaluate cumulative impacts and possible alternatives to the planned project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

Although no formal application has been filed, we have already initiated our NEPA review under the Commission's pre-filing process. The purpose of the pre-filing process is to encourage early involvement of interested stakeholders and to identify and resolve issues before the FERC receives an application. As part of our pre-filing review, we have begun to contact some federal and state agencies to discuss their involvement in the scoping process and the preparation of the EA.

The EA will present our independent analysis of the issues. The EA will be available in the public record through eLibrary. Depending on the comments received during the scoping process, we may also publish and distribute the EA to the public for an allotted comment period. We will consider all comments on the EA before we make our recommendations to the Commission. To ensure we have the opportunity to consider and address your comments, please carefully follow the instructions in the Public Participation section beginning on page 5.

With this notice, we are asking agencies with jurisdiction by law and/or special expertise with respect to the environmental issues related to this project to formally cooperate with us in the preparation of the EA.[4] Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the Public Participation section of this notice.

Consultations Under Section 106 of the National Historic Preservation Act

In accordance with the Advisory Council on Historic Preservation's implementing regulations for Section 106 of the National Historic Preservation Act, we are using this notice to initiate consultation with the Pennsylvania State Historic Preservation Office, and to solicit their views and those of other government agencies, interested Indian tribes, and the public on the project's potential effects on historic properties.[5] We will define the project-specific Area of Potential Effects (APE) in consultation with the SHPO as the project develops. On natural gas facility projects, the APE at a minimum encompasses all areas subject to ground disturbance (examples include the construction right-of-way, contractor/

[1] A ''pig'' is a tool that the pipeline company inserts into and pushes through the pipeline for cleaning the pipeline, conducting internal inspections, or other purposes.

[2] The appendices referenced in this notice will not appear in the **Federal Register**. Copies of the appendices were sent to all those receiving this notice in the mail and are available at *www.ferc.gov* using the link called ''eLibrary'' or from the Commission's Public Reference Room, 888 First Street NE., Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to eLibrary, refer to page 6 of this notice.

[3] ''We,'' ''us,'' and ''our'' refer to the environmental staff of the Commission's Office of Energy Projects.

[4] The Council on Environmental Quality regulations addressing cooperating agency responsibilities are at Title 40, Code of Federal Regulations, Part 1501.6.

[5] The Advisory Council on Historic Preservation regulations are at Title 36, Code of Federal Regulations, Part 800. Those regulations define historic properties as any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places.

pipe storage yards, and access roads). Our EA for this project will document our findings on the impacts on historic properties and summarize the status of consultations under Section 106.

Currently Identified Environmental Issues

We have already identified several issues that we think deserve attention based on a preliminary review of the planned facilities and the environmental information provided by Columbia; specifically, potential impacts on residences in close proximity to the right-of-way, as well as specific land use concerns. This preliminary list of issues may be changed based on your comments and our analysis.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please send your comments so that the Commission receives them in Washington, DC, on or before September 5, 2014.

For your convenience, there are three methods you can use to submit your comments to the Commission. In all instances, please reference the project docket number (PF14–11–000) with your submission. The Commission encourages electronic filing of comments and has expert staff available to assist you at (202) 502–8258 or *efiling@ferc.gov.*

(1) You can file your comments electronically using the *eComment* feature located on the Commission's Web site (*www.ferc.gov*) under the link to *Documents and Filings.* This is an easy method for interested persons to submit brief, text-only comments on a project;

(2) You can file your comments electronically using the *eFiling* feature located on the Commission's Web site (*www.ferc.gov*) under the link to *Documents and Filings.* With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''*eRegister.''* You must select the type of filing you are making. If you are filing a comment on a particular project, please select ''Comment on a Filing''; or

(3) You can file a paper copy of your comments by mailing them to the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Room 1A, Washington, DC 20426.

Environmental Mailing List

The environmental mailing list includes federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American Tribes; other interested parties; and local libraries and newspapers. This list also includes all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property may be used temporarily for project purposes, and anyone who submits comments on the project. We will update the environmental mailing list as the analysis proceeds to ensure that we send the information related to this environmental review to all individuals, organizations, and government entities interested in and/or potentially affected by the planned project.

If we publish and distribute the EA, copies will be sent to the environmental mailing list for public review and comment. If you would prefer to receive a paper copy of the document instead of the CD version or would like to remove your name from the mailing list, please return the attached Information Request (appendix 2).

Becoming an Intervenor

Once Columbia files its application with the Commission, you may want to become an ''intervenor'' which is an official party to the Commission's proceeding. Intervenors play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. An intervenor formally participates in the proceeding by filing a request to intervene. Instructions for becoming an intervenor are in the User's Guide under the ''e-filing'' link on the Commission's Web site. Please note that the Commission will not accept requests for intervenor status at this time. You must wait until the Commission receives a formal application for the project.

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC Web site (*www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on ''General Search'' and enter the docket number, excluding the last three digits in the Docket Number field (i.e., PF14–11). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *www.ferc.gov/docs-filing/esubscription.asp.*

Finally, public meetings or site visits will be posted on the Commission's calendar located at *www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

Dated: August 6, 2014 .

Kimberly D. Bose,

Secretary.

[FR Doc. 2014–19041 Filed 8–11–14; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP14–96–000]

Algonquin Gas Transmission, LLC; Notice of Availability of the Draft Environmental Impact Statement for the Proposed Algonquin Incremental Market Project

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared a draft environmental impact statement (EIS) for the Algonquin Incremental Market Project (AIM Project), proposed by Algonquin Gas Transmission, LLC (Algonquin) in the above-referenced docket. Algonquin requests authorization to expand its existing pipeline system from an interconnection at Ramapo, New York to deliver up to 342,000 dekatherms per day of natural gas transportation service to the Connecticut, Rhode Island, and Massachusetts markets.

The draft EIS assesses the potential environmental effects of the construction and operation of the AIM Project in accordance with the requirements of the National

Environmental Policy Act (NEPA). The FERC staff concludes that approval of the proposed project would result in some adverse environmental impacts; however, most of these impacts would be reduced to less-than-significant levels with the implementation of Algonquin's proposed mitigation and the additional measures recommended in the draft EIS.

The U.S. Environmental Protection Agency, the U.S. Army Corps of Engineers, and the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration participated as cooperating agencies in the preparation of the EIS. Cooperating agencies have jurisdiction by law or special expertise with respect to resources potentially affected by the proposal and participate in the NEPA analysis. Although the cooperating agencies provided input to the conclusions and recommendations presented in the draft EIS, the agencies will present their own conclusions and recommendations in their respective records of decision or determinations for the AIM Project.

The draft EIS addresses the potential environmental effects of the construction and operation of about 37.6 miles of pipeline composed of the following facilities:

- Replacement of 26.3 miles of existing pipeline with a 16- and 42-inch-diameter pipeline;
- extension of an existing loop [1] pipeline with about 3.3 miles of additional 12- and 36-inch-diameter pipeline within Algonquin's existing right-of-way; and
- installation of about 8.0 miles of new 16-, 24-, and 42-inch-diameter pipeline.

The AIM Project's proposed aboveground facilities consist of modifications to six existing compressor stations, to add a total 81,620 horsepower, in New York, Connecticut, and Rhode Island. Algonquin also proposes to abandon four existing compressor units for a total of 10,800 horsepower at one compressor station in New York.

The FERC staff mailed copies of the draft EIS to federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American tribes; potentially affected landowners and other interested individuals and groups; newspapers and libraries in the project area; and parties to this proceeding. Paper copy versions of this EIS were mailed to those specifically requesting them; all others received a CD version. In addition, the draft EIS is available for public viewing on the FERC's Web site (*www.ferc.gov*) using the eLibrary link. A limited number of copies are available for distribution and public inspection at: Federal Energy Regulatory Commission, Public Reference Room, 888 First Street NE., Room 2A, Washington, DC 20426, (202) 502–8371.

Any person wishing to comment on the draft EIS may do so. To ensure consideration of your comments on the proposal in the final EIS, it is important that the Commission receive your comments on or before September 29, 2014.

For your convenience, there are four methods you can use to submit your comments to the Commission. In all instances, please reference the project docket number (CP14–96–000) with your submission. The Commission encourages electronic filing of comments and has expert staff available to assist you at (202) 502–8258 or *efiling@ferc.gov.* Please carefully follow these instructions so that your comments are properly recorded.

(1) You can file your comments electronically using the eComment feature on the Commission's Web site (*www.ferc.gov*) under the link to Documents and Filings. This is an easy method for submitting brief, text-only comments on a project;

(2) You can file your comments electronically by using the eFiling feature on the Commission's Web site (*www.ferc.gov*) under the link to Documents and Filings. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''eRegister.'' If you are filing a comment on a particular project, please select ''Comment on a Filing'' as the filing type; or

(3) You can file a paper copy of your comments by mailing them to the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Room 1A, Washington, DC 20426.

(4) In lieu of sending written or electronic comments, the Commission invites you to attend one of the public comment meetings its staff will conduct in the project area to receive comments on the draft EIS. We encourage interested groups and individuals to attend and present oral comments on the draft EIS. Transcripts of the meetings will be available for review in eLibrary under the project docket number. All meetings will begin at 6:30 p.m. and are scheduled as follows:

Date	Location
Monday, September 8, 2014	Holiday Inn Dedham, 55 Ariadne Road, Dedham, MA 02026, (781) 329–1000.
Tuesday, September 9, 2014	Holiday Inn Norwich, 10 Laura Blvd., Norwich, CT 06360, (860) 889–5201.
Wednesday, September 10, 2014	Danbury City Hall, City Council Chambers, 155 Deer Hill Ave, Danbury, CT 06810, (203) 797–4514.
Thursday, September 11, 2014	Muriel H. Morabito Community Center, 29 Westbrook Drive, Cortlandt Manor, NY 10567, (914) 739–5845

Any person seeking to become a party to the proceeding must file a motion to intervene pursuant to Rule 214 of the Commission's Rules of Practice and Procedures (18 Code of Federal Regulations Part 385.214).[2] Only intervenors have the right to seek rehearing of the Commission's decision. The Commission grants affected landowners and others with environmental concerns intervenor status upon showing good cause by stating that they have a clear and direct interest in this proceeding which no other party can adequately represent. Simply filing environmental comments will not give you intervenor status, but you do not need intervenor status to have your comments considered.

Questions

Additional information about the project is available from the Commission's Office of External Affairs,

[1] A pipeline loop is a segment of pipe constructed parallel to an existing pipeline to increase capacity.

[2] See the previous discussion on the methods for filing comments.

at (866) 208–FERC, or on the FERC Web site (*www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on ''General Search,'' and enter the docket number excluding the last three digits in the Docket Number field (i.e., CP14–96). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at FercOnline *Support@ferc.gov* or toll free at (866) 208–3676; for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription that allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *www.ferc.gov/docs-filing/esubscription.asp.*

Dated: August 6, 2014.

Kimberly D. Bose,

Secretary.

[FR Doc. 2014–19036 Filed 8–11–14; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AC14–82–000]

Trans-Union Interstate Pipeline, L.P. (Trans-Union); Notice of Filing

Take notice that on April 15, 2014, Trans-Union Interstate Pipeline, L.P. (Trans-Union) submitted a request for a waiver of the reporting requirement to file the FERC Form 2–A for 2013. Trans-Union hereby notifies the Federal Energy Regulatory Commission (''Commission'') of a non-material change from the facts relied upon by the Commission in granting Trans-Union waivers of (1) the requirements to file a complete Form No. 2–A, (2) certain standards of conduct, and (3) certain North American Energy Standards Board (''NAESB'') standards. Grant of these waivers was based in part on Trans-Union's representation that it had only one shipper on its interstate pipeline—Union Power Partners, L.P. (''Union Power'), an affiliated, electric generator. However, pursuant to a three-year tolling agreement between Union Power and Entergy Arkansas, Inc. (''EAI''), EAI began receiving transportation service from Trans-Union on December 19, 2013 under a limited-term capacity release under Union Power's transportation agreement. This change in facts should not impact current or future waivers. Therefore, Trans-Union respectfully requests, under Rule 212 of the Commission's Rules of Practice and Procedure, 18 CFR 385.212, waiver of the requirement to file a complete Form No. 2–A for the calendar year 2013. The Commission has granted this waiver every year since 2006, most recently in a letter order issued in Docket No. AC13–99–000. Specifically, consistent with the Commission's May 21 Letter Order, Trans-Union is electronically filing concurrently herewith the pages of Form No. 2–A which are relevant to the determination of the annual charge adjustment (''ACA''), that is, pages 1 and 520, for calendar year 2013 and requests waiver of the requirement to file the remainder of the form.

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 or 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC. 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on August 27, 2014.

Dated: August 6, 2014.

Kimberly D. Bose,

Secretary.

[FR Doc. 2014–19037 Filed 8–11–14; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER14–2597–000]

Town of Hanover; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of the Town of Hanover's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability, is August 26, 2014.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public

Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: August 6, 2014.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2014–19024 Filed 8–11–14; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER14–2579–000]

Nalcor Energy Marketing Corporation; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of the Nalcor Energy Marketing Corporation's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability, is August 26, 2014.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: August 6, 2014.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2014–19023 Filed 8–11–14; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER14–1409–000]

ISO New England, Inc.; Notice of Motion for Disclosure of Redacted Information

On July 31, 2014, Belmont Municipal Light Department, Braintree Electric Light Department, Concord Municipal Light Plant, Georgetown Municipal Light Department, Groveland Electric Light Department, Hingham Municipal Lighting Plant, Littleton Electric Light and Water Department, Merrimac Municipal Light Department, Middleton Electric Light Department, Rowley Municipal Lighting Plant, Taunton Municipal Lighting Plant and Wellesley Municipal Light Plant (collectively, the Eastern Massachusetts Consumer-Owned Systems or EMCOS) jointly filed a motion pursuant to Rule 212 of the Commission's Rules of Practice and Procedure, to disclose in entirety ISO-New England's (ISO–NE) response to the Director, Division of Electric Power Regulation—East's deficiency letter issued June 27, 2014, notwithstanding ISO–NE's request to treat the redacted portions of its response as confidential. EMCOS also request that ISO–NE's complete response be re-noticed with adequate time to permit intervenors to evaluate the redacted information.

Answers to the motion must be filed by 5:00 p.m. Eastern time on Monday, August 11, 2014.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: August 6, 2014.

Kimberly D. Bose,

Secretary.

[FR Doc. 2014–19038 Filed 8–11–14; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No., 14593–000]

Patman Power, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On February 28, 2014, Wright Patman Power, 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 a hydropower project to be located at the U.S. Army Corps of Engineers' (Corps) Wright Patman Dam, on the Sulphur River near the town of Texarkana in Bowie County, Texas. 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) Three 48 inch-diameter, 300-foot-long steel penstocks; (2) three inline generation units with a total capacity of 4-megawatts; (3) a switchyard on the south bank adjacent to the dam; (4) a 1-mile-long, 138kV transmission line.

The project would have an average annual generation of 10,000 megawatt-hours and operate utilizing surplus water from the Wright Patman Lake, as directed by the Corps.

Applicant Contact: Mr. Magnús Jóhannesson, Wister Power, LLC, 46 Peninsula Center, Suite E, Rolling Hills Estates, CA 90274. (310) 699–6400.

FERC Contact: Christiane Casey, *christiane.casey@ferc.gov,* (202) 502–8577.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and five copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–14593) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: August 6, 2014.

Kimberly D. Bose,

Secretary.

[FR Doc. 2014–19040 Filed 8–11–14; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9915–10–Region 10]

Reissuance of the NPDES General Permit for Groundwater Remediation Facilities in Idaho (Permit Number IDG911000)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability of final NPDES General Permit.

SUMMARY: The Associate Director, Office of Water and Watersheds, EPA Region 10, is publishing this notice of availability of the final National Pollutant Discharge Elimination System (NPDES) General Permit for Groundwater Remediation Facilities in Idaho (the GWGP), Permit No. IDG911000. The GWGP authorizes groundwater discharges to waters of the United States in Idaho, as authorized by Section 402 of the Clean Water Act (CWA), 33 U.S.C. 1342. The GWGP contains effluent limitations and other requirements that ensure that these remediated groundwater discharges will not cause or contribute to impairments of the beneficial uses of the receiving waters or impair other surface water quality standards (WQS) codified at Idaho Administrative Procedures Act (IDAPA) 58.01.02

DATES: The issuance date of the GWGP is August 28, 2014. The GWGP shall become effective on September 15, 2014. New operators seeking coverage under the GWGP must submit a Notice of Intent (NOI) to discharge at least 180 days prior to the anticipated commencement of a discharge. Operators that have administratively extended coverage under the 2007 GWGP shall be authorized to discharge upon receipt of an EPA authorization letter after the GWGP becomes effective. These dischargers include Univar USA, Inc., PacifiCorp Idaho Falls Pole Yard, and McCall Oil and Chemical Company. A new facility seeking coverage, Boise State University (BSU), submitted an initial application on January 25, 2013 and additional NOI information on October 25, 2013. BSU will also be authorized to discharge under the GWGP upon receipt of an EPA authorization letter after the GWGP becomes effective.

ADDRESSES: Copies of the GWGP, the Response to Comments document, and the Fact Sheet may be found on the Region 10 Web site at *http://www.epa.gov/region10/water/npdes/generalpermits.html.* Copies of the documents are also available upon request. Written requests for copies of the documents may be submitted to EPA, Region 10, 1200 Sixth Avenue, Suite 900, OWW–130, Seattle, WA 98101. Electronic requests may be sent to: *washington.audrey@epa.gov.* Requests by telephone may be made to Audrey Washington at (206) 553–0523.

FOR FURTHER INFORMATION CONTACT: Jill Nogi at (206) 553–1841 or *nogi.jill@epa.gov*

SUPPLEMENTARY INFORMATION:

On June 30, 2012, the previous NPDES General Permit for Groundwater Remediation Facilities in Idaho (GWGP) expired. EPA solicited public comments on the draft GWGP in the **Federal Register** on April 3, 2014. The GWGP no longer provides authorization for groundwater discharges from mining operations. Those existing mining operations with an EPA administrative extension of coverage under the 2007 General Permit may continue to operate under the limitations and conditions specified under the 2007 General Permit until such time as a new Permit is issued for those facilities.

Notices of the draft GWGP were published in the Idaho Statesman and the Idaho Hispano newspapers on April 3, 2014, and the City of Nampa Parks and Recreation Summer Activity Guide on April 15, 2014. An informational public meeting was held in Boise on May 1, 2014. The 45-day comment period closed on May 19, 2014. Changes have been made to the GWGP in response to comments received during the public review period. All comments, along with the EPA's responses, are summarized in the Response to Comments document.

State Certification of the Idaho GWGP. Pursuant to Section 401 of the Clean Water Act, 33 U.S.C. 1341, on July 25, 2014, the State of Idaho Department of Environmental Quality (DEQ) certified that the conditions of the GWGP comply with State WQS at IDAPA 58.01.02, including the State's antidegradation policy.

Endangered Species Act. Section 7 of the Endangered Species Act (ESA), 16 U.S.C. 1531–1544, requires federal agencies to consult with the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (USFWS) if their actions have the potential to either beneficially or adversely affect any threatened or endangered species, or designated critical habitat.

EPA evaluated the GWGP and determined that the issuance of the GWGP will have no effect on any threatened, endangered, or candidate species; designated critical habitat; and therefore, ESA consultation was not required.

Essential Fish Habitat. The Magnuson-Stevens Fishery Conservation and Management Act requires EPA to consult with NOAA–NMFS when a proposed discharge has the potential to adversely affect an Essential Fish Habitat (EFH). EPA's EFH assessment concluded that the discharges authorized by the GWGP will not adversely affect EFH or those species regulated under a Federal Fisheries Management Plan.

Executive Order 12866. The Office of Management and Budget (OMB) exempts this action from the review

requirements of Executive Order 12866 pursuant to Section 6 of that order.

Paperwork Reduction Act. The information collection requirements of the GWGP are consistent with the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq.

Regulatory Flexibility Act. 5 U.S.C. 601 et seq., requires that EPA prepare a regulatory flexibility analysis on rules subject to the requirements of the Administrative Procedures Act [APA, 5 U.S.C. 553] that have a significant impact on a substantial number of small entities. However, EPA has concluded that NPDES General Permits are not rulemakings under the APA, and are therefore not subject to APA rulemaking requirements or the Regulatory Flexibility Act (RFA).

Unfunded Mandates Reform Act. Section 201 of the Unfunded Mandates Reform Act (UMRA), Public Law 104–4, generally requires federal agencies to assess the effects of their regulatory actions (defined to be the same as rules subject to the RFA) on tribal, state, and local governments and the private sector. However, the Idaho GWGP is not subject to the RFA, and are therefore not subject to the UMRA.

Appeal of Permit. Any interested person may appeal the Idaho GWGP in the Federal Court of Appeals in accordance with section 509(b)(1) of the Clean Water Act, 33 U.S.C. 1369(b)(1). This appeal must be filed within 120 days of the Permit issuance date. Persons affected by the Permit may not challenge the conditions of the Permit in further EPA proceedings (see 40 CFR 124.19). Instead, they may either challenge the Permit in court or apply for an individual NPDES Permit.

Authority: This action is taken under the authority of Section 402 of the Clean Water Act, 33 U.S.C. 1342. I hereby provide public notice of the final Permit action in accordance with 40 CFR 124.15(b).

Dated: August 4, 2014.

Christine Psyk,

Associate Director, Office of Water & Watersheds, Region 10, U.S. Environmental Protection Agency.

[FR Doc. 2014–19063 Filed 8–11–14; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–ORD–2014–0581; FRL–9915–07–ORD]

Notice of Availability of the Risk Assessment Forum White Paper: Probabilistic Risk Assessment Methods and Case Studies and Probabilistic Risk Assessment To Inform Decision Making: Frequently Asked Questions

AGENCY: Environmental Protection Agency.

ACTION: Notice of Availability.

SUMMARY: This notice announces the availability of ''Risk Assessment Forum White Paper: Probabilistic Risk Assessment Methods and Case Studies'' and its companion document ''Probabilistic Risk Assessment to Inform Decision Making: Frequently Asked Questions.'' The drafts were released for public comment, and externally peer reviewed by experts from academia, industry, environmental groups, and other government agencies.

DATES: The document will be available for use by EPA risk assessors and other interested parties on August 12, 2014.

ADDRESSES: *The Risk Assessment Forum White Paper: Probabilistic Risk Assessment Methods and Case Studies* and *Probabilistic Risk Assessment to Inform Decision Making: Frequently Asked Questions* are available electronically through the EPA Web site at *http://epa.gov/raf/prawhitepaper/index.htm.*

FOR FURTHER INFORMATION CONTACT: Rita S. Schoeny, Office of the Science Advisor, Mail Code 8105R, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number (202) 566–1127; fax number (202) 565–2911; or email: *schoeny.rita@epa.gov.*

SUPPLEMENTARY INFORMATION: PRA began playing an increasingly important role in Agency risk assessments following the 1997 release of EPA's *Policy for Use of Probabilistic Analysis in Risk Assessment at the U.S. Environmental Protection Agency* and publication of the *Guiding Principles for Monte-Carlo Analysis.* PRA was a major focus in an associated review of EPA risk assessment practices by the Science Advisory Board (SAB) (Letter from M. G. Morgan and R. T. Parkin, Science Advisory Board, to S. Johnson, U.S. Environmental Protection Agency. February 28, 2007. EPA/SAB–07/003). *http://yosemite.epa.gov/sab/sabproduct.nsf/55E1B2C78C6085EB8525729C00573A3E/$File/sab-07-003.pdf).* Both this white paper and the companion FAQ document address recommendations on risk assessment processes described in the U.S. National Research Council's (NRC) report *Science and Decisions: Advancing Risk Assessment.* The white paper and FAQ documents were released for public comment in September 2009 and underwent external peer review in May 2010.

PRA is a group of techniques that incorporate variability and uncertainty into the risk assessment process. PRA provides estimates of the range and likelihood of a hazard, exposure, or risk, rather than a single point estimate. It can provide a more complete characterization of risks, including uncertainties and variability, to protect more sensitive or vulnerable populations and lifestages. The information obtained from a PRA can be used by decision makers to weigh risks from decision alternatives, or to invest in research with the greatest impact on risk estimate uncertainty.

These documents describe how PRA can be applied to enhance the scientific foundation for decision making across the Agency. They were created in response to recommendation of numerous advisory bodies, including the SAB and NRC; these groups recommended that EPA incorporate probabilistic analyses into Agency decision-making processes. This white paper and accompanying FAQ explain how EPA can use probabilistic methods to address data, model, and scenario uncertainty and variability by capitalizing on the wide array of tools and methods that comprise PRA.

Both documents address issues such as variability and uncertainty, their relevance to decision making, and the PRA goal of providing quantitative characterization of the uncertainty and variability in estimates of hazard, exposure, or risk. The difference between the white paper and the FAQs document is the level of detail provided about PRA concepts and practices and the intended audience (e.g., risk assessors for the white paper vs. decision makers) for the FAQ document.

Dated: July 31, 2014.

Robert Kavlock,

Interim EPA Science Advisor.

[FR Doc. 2014–19065 Filed 8–11–14; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[AU Docket No. 14–78; DA 14–1018]

Auction of Advanced Wireless Services (AWS–3) Licenses Scheduled for November 13, 2014; Notice and Filing Requirements, Reserve Prices, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 97

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document announces the procedures, reserve prices, and minimum opening bids for the upcoming auction of AWS–3 licenses (Auction 97). This document is intended to familiarize prospective applicants with the procedures and other requirements for participation in the auction.

DATES: Applications to participate in Auction 97 must be filed prior to 6:00 p.m. Eastern Time (ET) on September 12, 2014. Bidding in Auction 97 is scheduled to begin on November 13, 2014.

FOR FURTHER INFORMATION CONTACT: *Wireless Telecommunications Bureau, Auctions and Spectrum Access Division:* For legal and general auction questions: Valerie Barrish (attorney) at (202) 418–0660; *Broadband Division:* For licensing and service rule questions: Genevieve Ross (attorney) or Janet Young (engineer) at (202) 418–2487. To request materials in accessible formats (Braille, large print, electronic files, or audio format) for people with disabilities, send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530 or (202) 418–0432 (TTY).

SUPPLEMENTARY INFORMATION: This is a summary of the *Auction 97 Procedures Public Notice* released on July 23, 2014. The complete text of the *Auction 97 Procedures Public Notice,* including all attachments and related Commission documents, is available for public inspection and copying from the FCC Reference Information Center, 445 12th Street SW., Room CY–A257, Washington, DC 20554 during its regular business hours. The *Auction 97 Procedures Public Notice* and related Commission documents also may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), 445 12th Street SW., Room CY–B402, Washington, DC 20554, telephone 202–488–5300, fax 202–488–5563, or Web site: *http://www.BCPIWEB.com.* The *Auction 97 Procedures Public Notice* and related documents also are available on the Internet at the Commission's Web site: *http://wireless.fcc.gov/auctions/97/,* or by using the search function for AU Docket No. 14–78 Commission's Electronic Comment Filing System (ECFS) Web page at *http://www.fcc.gov/cgb/ecfs/.*

I. General Information

A. Introduction

1. The Wireless Telecommunications Bureau (Bureau) established the procedures, reserve prices, and minimum opening bid amounts for the upcoming auction of 1,614 Advanced Wireless Services licenses in the 1695–1710 MHz, 1755–1780 MHz, and 2155–2180 MHz bands (collectively, the AWS–3 bands). This auction, which is designated as Auction 97, is scheduled to start on November 13, 2014. The *Auction 97 Procedures Public Notice* provided an overview of the procedures, terms, and conditions governing Auction 97 and the post-auction application and payment processes.

2. The Federal Communications Commission (Commission or FCC) is offering the licenses in Auction 97 pursuant to the Middle Class Tax Relief and Job Creation Act of 2012 (Spectrum Act). The Spectrum Act requires, among other things, that the Commission allocate for commercial use and license spectrum in certain specified frequency bands using a system of competitive bidding no later than February 2015. In February 2013, the National Telecommunications and Information Administration (NTIA) identified the 1695–1710 MHz band for reallocation from Federal use to non-Federal use in satisfaction of its Spectrum Act obligation. In the *AWS–3 Report and Order,* 79 FR 32365, June 4, 2014, the Commission identified the 1755–1780 MHz band in satisfaction of the Spectrum Act's requirement that it identify fifteen megahertz of contiguous spectrum in addition to the bands specifically identified in the Spectrum Act.

3. On May 19, 2014, the Bureau released the *Auction 97 Comment Public Notice* 79 FR 31327, June 2, 2014, seeking comment on competitive bidding procedures to be used in Auction 97. Ten comments, eight reply comments, ten *ex parte* filings, and four brief comments were submitted in response to the *Auction 97 Comment Public Notice.*

4. Based on the record and after considering comments provided in response to the *Auction 97 Comment Public Notice,* the *Auction 97 Procedures Public Notice,* establishes procedures for, among other things: (1) Using the Commission's standard simultaneous multiple-round (SMR) auction format in a single auction event subject to uniform bidding procedures for the unpaired 1695–1710 MHz band and the paired 1755–1780 MHz/2155–2180 MHz bands, except that bidding will close on a band after five consecutive rounds in which no bidding activity occurs on licenses in that band provided that the reserve for that band has been met; (2) filing short-form applications to participate in Auction 97 during a ten-business day window that closes on September 12, 2014; (3) limited information disclosure, to enhance competition by safeguarding against potential anti-competitive auction strategies; (4) submission of a statement by each applicant for any license in the 1755–1780 MHz band acknowledging that it has considered and accepts the risks of potential interference from Federal systems to its planned operations in certain geographic zones; (5) an aggregate reserve price for the 1695–1710 MHz license of approximately $580 million and a separate aggregate reserve price for the paired 1755–1780 MHz/2155–2180 MHz licenses of approximately $10.07 billion; (6) minimum opening bids for each license using a calculation based on $0.15 per MHz-pop for paired licenses and $0.05 per MHz-pop for unpaired licenses with a revision to the Bureau's method for incorporating price information from past auctions; (7) minimum acceptable bid amounts based on an activity-based formula under which bids in subsequent rounds may be between 10–20% higher than the provisionally winning bid; and (8) filing long-form applications in accordance with the schedule specified in the Commission's rules, but establishing a deadline for down payments and final payments from winning bidders that will occur no earlier than January 2015.

5. In addition, the *Auction 97 Procedures Public Notice* concludes that any requests for temporary, limited relief from the former defaulter rule are beyond the scope of this proceeding and notes that such requests are being addressed separately.

B. Description of Licenses To Be Offered in Auction 97

6. The 65 megahertz of AWS–3 spectrum available in Auction 97 will be licensed on a geographic area basis. Of the 1,614 licenses offered in Auction 97, 880 will be Economic Area (EA) licenses and 734 will be Cellular Market Area (CMA) licenses. The AWS–3 frequencies will be licensed in five and

ten megahertz blocks, with each license having a total bandwidth of five, ten, or twenty megahertz.

7. The 1695–1710 MHz band will be licensed in an unpaired configuration for low-power mobile transmit (i.e., uplink) operations. The 1755–1780 MHz band will be licensed paired with the 2155–2180 MHz band, with the 1755–1780 MHz band authorized for low-power mobile transmit (i.e., uplink) operations and the 2155–2180 MHz band authorized for base station and fixed (i.e., downlink) operations. A complete list of the licenses offered in Auction 97 is available in Attachment A to the *Auction 97 Procedures Public Notice.*

C. Rules and Disclaimers

1. Relevant Authority

8. Prospective applicants must familiarize themselves thoroughly with the Commission's general competitive bidding rules, including Commission decisions in proceedings regarding competitive bidding procedures, application requirements, and obligations of Commission licensees. Prospective bidders should also familiarize themselves with the Commission's rules relating to the AWS–3 frequencies, including incumbency issues for AWS–3 licensees, Federal and non-Federal relocation and sharing and cost sharing obligations, protection of Federal and non-Federal incumbent operations, and rules relating to applications, environment, practice and procedure. All bidders must also be thoroughly familiar with the procedures, terms and conditions contained in the *Auction 97 Procedures Public Notice* and any future public notices that may be issued in this proceeding.

9. The terms contained in the Commission's rules, relevant orders, and public notices are not negotiable. The Commission may amend or supplement the information contained in its public notices at any time, and will issue public notices to convey any new or supplemental information to applicants. It is the responsibility of all applicants to remain current with all Commission rules and with all public notices pertaining to this auction. Copies of most auctions-related Commission documents, including public notices, can be retrieved from the FCC Auctions Internet site at *http://www.wireless.fcc.gov/auctions.*

2. Prohibited Communications and Compliance With Antitrust Laws

10. To ensure the competitiveness of the auction process, 47 CFR 1.2105(c) prohibits auction applicants for licenses in any of the same or overlapping geographic license areas from communicating with each other about bids, bidding strategies, or settlements unless such applicants have identified each other on their short-form applications (FCC Form 175) as parties with whom they have entered into agreements pursuant to 47 CFR 1.2105(a)(2)(viii).

a. Entities Subject to 47 CFR 1.2105

11. 47 CFR 1.2105(c)'s prohibition on certain communications will apply to any applicants that submit short-form applications seeking to participate in a Commission auction for licenses in the same or overlapping geographic license area. Thus, unless they have identified each other on their short-form applications as parties with whom they have entered into agreements under 47 CFR 1.2105(a)(2)(viii), applicants for any of the same or overlapping geographic license areas must affirmatively avoid all communications with or disclosures to each other that affect or have the potential to affect bids or bidding strategy. In some instances, this prohibition extends to communications regarding the post-auction market structure. This prohibition applies to all applicants that submit short-form applications regardless of whether such applicants ultimately become qualified bidders or actually bid.

12. Applicants are also reminded that, for purposes of this prohibition on certain communications, 47 CFR 1.2105(c)(7)(i) defines ''applicant'' as including all officers and directors of the entity submitting a short-form application to participate in the auction, all controlling interests of that entity, as well as all holders of partnership and other ownership interests and any stock interest amounting to 10 percent or more of the entity, or outstanding stock, or outstanding voting stock of the entity submitting a short-form application. For example, where an individual served as an officer for two or more applicants, the Bureau has found that the bids and bidding strategies of one applicant are conveyed to the other applicant, and, absent a disclosed bidding agreement, an apparent violation of 47 CFR 1.2105(c) occurs.

13. Individuals and entities subject to 47 CFR 1.2105(c) should take special care in circumstances where their employees may receive information directly or indirectly relating to any competing applicant's bids or bidding strategies. The Bureau has not addressed a situation where non-principals (i.e., those who are not officers or directors, and thus not considered to be the applicant) receive information regarding a competing applicant's bids or bidding strategies and whether that information should be presumed to be communicated to the applicant.

14. An exception to the prohibition on certain communications allows non-controlling interest holders to obtain interests in more than one competing applicant without violating 47 CFR 1.2105(c) provided specified conditions are met (including a certification that no prohibited communications have occurred or will occur), but that exception does not extend to controlling interest holders.

15. Auction 97 applicants selecting licenses for any of the same or overlapping geographic license areas are encouraged not to use the same individual as an authorized bidder. A violation of 47 CFR 1.2105(c) could occur if an individual acts as the authorized bidder for two or more competing applicants, and conveys information concerning the substance of bids or bidding strategies between such applicants. Similarly, if the authorized bidders are different individuals employed by the same organization (e.g., law firm, engineering firm or consulting firm), a violation likewise could occur. In such a case, at a minimum, applicants should certify on their applications that precautionary steps have been taken to prevent communication between authorized bidders, and that the applicant and its bidders will comply with 47 CFR 1.2105(c).

b. Prohibition Applies Until Down Payment Deadline

16. 47 CFR 1.2105(c)'s prohibition on certain communications begins at the short-form application filing deadline and ends at the down payment deadline after the auction closes, which will be announced in a future public notice.

c. Prohibited Communications

17. Applicants must not communicate directly or indirectly about bids or bidding strategy to other applicants in this auction. 47 CFR 1.2105(c) prohibits not only communication about an applicant's own bids or bidding strategy, it also prohibits communication of another applicant's bids or bidding strategy. While 47 CFR 1.2105(c) does not prohibit non-auction-related business negotiations among auction applicants, each applicant must remain vigilant so as not to directly or indirectly communicate information that affects, or could affect, bids, bidding strategy, or the negotiation of settlement agreements.

18. Applicants are cautioned that the Commission remains vigilant about prohibited communications taking place in other situations. For example, the Commission has warned that prohibited communications concerning bids and bidding strategies may include communications regarding capital calls or requests for additional funds in support of bids or bidding strategies to the extent such communications convey information concerning the bids and bidding strategies directly or indirectly. Moreover, the Commission has found a violation of 47 CFR 1.2105(c) where an applicant used the Commission's bidding system to disclose its bidding strategy in a manner that explicitly invited other auction participants to cooperate and collaborate in specific markets, and has placed auction participants on notice that the use of its bidding system to disclose market information to competitors will not be tolerated and will subject bidders to sanctions. Applicants also should use caution in their dealings with other parties, such as members of the press, financial analysts, or others who might become conduits for the communication of prohibited bidding information. For example, where limited information disclosure procedures are in place, as is the case for Auction 97, an applicant's statement to the press that it has lost bidding eligibility and intends to stop bidding in the auction could give rise to a finding of a 47 CFR 1.2105(c) violation. Similarly, an applicant's public statement of intent not to participate in Auction 97 bidding could also violate the rule.

19. Applicants are also hereby placed on notice that public disclosure of information relating to bidder interests and bidder identities that has not yet been made public by the Commission at the time of disclosure may violate the provisions of 47 CFR 1.2105(c) that prohibit certain communications. This is so even though similar types of information were revealed prior to and during other Commission auctions subject to different information procedures.

20. In addition, when completing short-form applications, each applicant should avoid any statements or disclosures that may violate 47 CFR 1.2105(c), particularly in light of the limited information procedures in effect for Auction 97. Specifically, an applicant should avoid including any information in its short-form applications that might convey information regarding its license selection, such as using applicant names that refer to licenses being offered, referring to certain licenses or markets in describing bidding agreements, or including any information in attachments that may otherwise disclose the applicant's license selections. Likewise, an Auction 97 applicant must not disclose to others whether it has filed the acknowledgement concerning interference obligations that is required of each applicant that seeks to bid on any license in the 1755–1780 MHz band, as that information would reveal information regarding its license selection. The Bureau intends to withhold from public disclosure all information concerning the existence of such applicant statements until after the close of the auction.

d. Disclosure of Bidding Agreements and Arrangements

21. The Commission's rules do not prohibit applicants from entering into otherwise lawful bidding agreements before filing their short-form applications, as long as they disclose the existence of the agreement(s) in their short-form applications. Applicants must identify in their short-form applications all parties with whom they have entered into any agreements, arrangements, or understandings of any kind relating to the licenses being auctioned, including any agreements relating to post-auction market structure.

22. If parties agree in principle on all material terms prior to the short-form application filing deadline, each party to the agreement must identify the other party or parties to the agreement on its short-form application under 47 CFR 1.2105(c), even if the agreement has not been reduced to writing. If the parties have not agreed in principle by the short-form filing deadline, they should not include the names of parties to discussions on their applications, and they may not continue negotiation, discussion or communication with any other applicants after the short-form application filing deadline.

23. 47 CFR 1.2105(c) does not prohibit non-auction-related business negotiations among auction applicants. However, certain discussions or exchanges could touch upon impermissible subject matters because they may convey pricing information and bidding strategies. Such subject areas include, but are not limited to, issues such as management, sales, local marketing agreements, and other transactional agreements.

e. 47 CFR 1.2105(c) Certification

24. By electronically submitting a short-form application, each applicant in Auction 97 certifies its compliance with 47 CFR 1.2105(c). In particular, an applicant must certify under penalty of perjury it has not entered and will not enter into any explicit or implicit agreements, arrangements or understandings of any kind with any parties, other than those identified in the application, regarding the amount of the applicant's bids, bidding strategies, or the particular licenses on which it will or will not bid. However, the Bureau cautions that merely filing a certifying statement as part of an application will not outweigh specific evidence that a prohibited communication has occurred, nor will it preclude the initiation of an investigation when warranted. The Commission has stated that it intends to scrutinize carefully any instances in which bidding patterns suggest that collusion may be occurring. Any applicant found to have violated 47 CFR 1.2105(c) may be subject to sanctions.

f. Duty To Report Prohibited Communications

25. 47 CFR 1.2105(c)(6) provides that any applicant that makes or receives a communication that appears to violate 47 CFR 1.2105(c) must report such communication in writing to the Commission immediately, and in no case later than five business days after the communication occurs. The Commission has clarified that each applicant's obligation to report any such communication continues beyond the five-day period after the communication is made, even if the report is not made within the five-day period.

26. In addition, 47 CFR 1.65 requires an applicant to maintain the accuracy and completeness of information furnished in its pending application and to notify the Commission of any substantial change that may be of decisional significance to that application. Thus, 47 CFR 1.65 requires an auction applicant to notify the Commission of any substantial change to the information or certifications included in its pending short-form application. An applicant is therefore required by 47 CFR 1.65 to report to the Commission any communication the applicant has made to or received from another applicant after the short-form application filing deadline that affects or has the potential to affect bids or bidding strategy, unless such communication is made to or received from a party to an agreement identified under 47 CFR 1.2105(a)(2)(viii).

27. 47 CFR 1.65(a) and 1.2105(c) require each applicant in competitive bidding proceedings to furnish additional or corrected information within five days of a significant occurrence, or to amend its short-form

application no more than five days after the applicant becomes aware of the need for amendment. These rules are intended to facilitate the auction process by making the information available promptly to all participants and to enable the Bureau to act expeditiously on those changes when such action is necessary.

g. Procedure for Reporting Prohibited Communications

28. A party reporting any communication pursuant to 47 CFR 1.65, 1.2105(a)(2), or 1.2105(c)(6) must take care to ensure that any report of a prohibited communication does not itself give rise to a violation of 47 CFR 1.2105(c). For example, a party's report of a prohibited communication could violate the rule by communicating prohibited information to other applicants through the use of Commission filing procedures that would allow such materials to be made available for public inspection.

29. 47 CFR 1.2105(c) requires parties to file only a single report concerning a prohibited communication and to file that report with Commission personnel expressly charged with administering the Commission's auctions. This rule is designed to minimize the risk of inadvertent dissemination of information in such reports. Any reports required by 47 CFR 1.2105(c) must be filed consistent with the instructions set forth in the *Auction 97 Procedures Public Notice.* For Auction 97, such reports must be filed with Margaret W. Wiener, the Chief of the Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, by the most expeditious means available. Any such report should be submitted by email to Ms. Wiener at the following email address: *auction97@fcc.gov.* If you choose instead to submit a report in hard copy, any such report must be delivered only to Margaret W. Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street SW., Room 6423, Washington, DC 20554.

30. A party seeking to report such a prohibited communication should consider submitting its report with a request that the report or portions of the submission be withheld from public inspection by following the procedures specified in 47 CFR 0.459. Such parties also are encouraged to coordinate with the Auctions and Spectrum Access Division staff about the procedures for submitting such reports. The *Auction 97 Procedures Public Notice* provides additional guidance on procedures for submitting application-related information.

h. Winning Bidders Must Disclose Terms of Agreements

31. Each applicant that is a winning bidder will be required to disclose in its long-form applications the specific terms, conditions, and parties involved in any agreement it has entered into. This applies to any bidding consortia, joint venture, partnership, or agreement, understanding, or other arrangement entered into relating to the competitive bidding process, including any agreement relating to the post-auction market structure. Failure to comply with the Commission's rules can result in enforcement action.

i. Additional Information Concerning Rule Prohibiting Certain Communications

32. A summary listing of documents issued by the Commission and the Bureau addressing the application of 47 CFR 1.2105(c) may be found in Attachment F to the *Auction 97 Procedures Public Notice.* These documents are available on the Commission's auction Web page at *http://wireless.fcc.gov/auctions/prohibited_communications.*

j. Antitrust Laws

33. Regardless of compliance with the Commission's rules, applicants remain subject to the antitrust laws, which are designed to prevent anticompetitive behavior in the marketplace. Compliance with the disclosure requirements of 47 CFR 1.2105(c) will not insulate a party from enforcement of the antitrust laws. For instance, a violation of the antitrust laws could arise out of actions taking place well before any party submitted a short-form application. The Commission has cited a number of examples of potentially anticompetitive actions that would be prohibited under antitrust laws: For example, actual or potential competitors may not agree to divide territories in order to minimize competition, regardless of whether they split a market in which they both do business, or whether they merely reserve one market for one and another market for the other. Similarly, the Bureau previously reminded potential applicants and others that even where the applicant discloses parties with whom it has reached an agreement on the short-form application, thereby permitting discussions with those parties, the applicant is nevertheless subject to existing antitrust laws.

34. To the extent the Commission becomes aware of specific allegations that suggest that violations of the federal antitrust laws may have occurred, the Commission may refer such allegations to the United States Department of Justice for investigation. If an applicant is found to have violated the antitrust laws or the Commission's rules in connection with its participation in the competitive bidding process, it may be subject to forfeiture of its upfront payment, down payment, or full bid amount and may be prohibited from participating in future auctions, among other sanctions.

3. Incumbency Issues

35. The AWS–3 bands are currently being used for a variety of government and non-government services. In the *AWS–3 Report and Order,* the Commission allocated the 1695–1710 MHz and 1755–1780 MHz bands for commercial use. Licenses in 1695–1710 MHz band are being made available on a shared basis with incumbent Federal meteorological-satellite (MetSat) data users. The Commission adopted twenty-seven Protection Zones for the 1695–1710 MHz band in the *AWS–3 Report and Order.* Pursuant to 47 CFR 2.106, US note 88, forty-seven Federal earth stations located in these zones will operate on a co-equal, primary basis with commercial AWS–3 licensees. To facilitate coordination, uplink/mobile transmit devices in the 1695–1710 MHz band must be under the control of, or associated with, a base station as a means to facilitate shared use of the band and prevent interference to Federal operations. Licenses in the 1755–1780 MHz band are being made available on a shared basis with a limited number of Federal incumbents indefinitely, while some of the Federal systems will over time relocate out of the band. Pursuant to 47 CFR 2.106, US note 91, Federal systems located in the Protection Zones adopted by the Commission for the 1755–1780 MHz band in the *AWS–3 Report and Order* will operate on a co-equal, primary basis with commercial AWS licensees. The Federal systems that will relocate from this band pursuant to an approved transition plan will operate on a primary basis until they are reaccommodated. To facilitate coordination, uplink/mobile transmit devices in the 1755–1780 MHz band must be under the control of, or associated with, a base station as a means to facilitate shared use of the band and prevent interference to Federal operations. Licenses to operate in the 1695–1710 MHz and 1755–1780 MHz bands are subject to the condition that the licensee must not cause harmful interference to an incumbent Federal

entity relocating from these bands under an approved Transition Plan. This condition remains in effect until NTIA terminates the applicable authorization of the incumbent Federal entity. In addition, AWS–3 licensees in the 1755–1780 MHz band must agree to accept interference from incumbent Federal users while they remain authorized to operate in the band. The 2155–2180 MHz band is already allocated for exclusive non-Federal, commercial use. Although there are no Federal users currently licensed or operating in this band, there are non-Federal incumbent Fixed Microwave and Broadband Radio Service licensees in the band. AWS–3 licensees will have to protect or relocate and/or share in the cost of relocating such incumbent licensees.

36. AWS–3 licensees in the 1695–1710 MHz and 1755–1780 MHz bands are required to successfully coordinate with Federal incumbent users in these bands prior to operating in designated protection zones. The *AWS–3 Report and Order* established that 1695–1710 MHz licensees operating at certain power levels would be required to coordinate with Federal incumbents in those protection zones, and higher-powered operations would generally require nationwide coordination. Similarly, operations in the 1755–1780 MHz band are subject to successful coordination with Federal incumbents in the protection zones adopted for that band, with the default coordination zone being nationwide. Prior to commencing operations in the 1755–1780 MHz band, an AWS–3 licensee must reach a coordination arrangement on an operator-to-operator basis with each Federal agency that has an assignment with United States and Possessions (USP) authority. The *FCC/NTIA Coordination Procedures Public Notice* contains various refinements to the previously-defined protection zones for each of these bands. That Public Notice also provides information and guidance on the overall coordination process for these bands, as contemplated by the *AWS–3 Report and Order,* including informal pre-coordination discussion and the formal process of submitting coordination requests to, and receiving responses to coordination requests from, relevant Federal agencies. The Bureau encourages each potential applicant to carefully review these coordination requirements and the policies and procedures adopted by the Commission to implement them, and to consider the impact of those requirements and policies on its business plans.

4. Commercial Spectrum Enhancement Act/Spectrum Act Requirements

37. The spectrum in the 1695–1710 MHz and 1755–1780 MHz bands is covered by a Congressional mandate that requires that auction proceeds fund the estimated relocation or sharing costs of incumbent Federal entities. In 2004, the Commercial Spectrum Enhancement Act (CSEA) established a Spectrum Relocation Fund (SRF) to reimburse eligible Federal agencies operating on certain frequencies that have been reallocated from Federal to non-Federal use for the cost of relocating their operations. The SRF is funded with cash proceeds attributable to ''eligible frequencies'' in an auction of licenses involving such frequencies. The Spectrum Act amendments to the CSEA require Federal agencies authorized to use eligible frequencies to submit a transition plan no later than 240 days before an auction for such frequencies is scheduled to begin. The CSEA requires the NTIA to notify the Commission at least six months in advance of a scheduled auction of eligible frequencies of eligible Federal entities' estimated relocation or sharing costs and the timelines for such relocation or sharing. The NTIA must make the transition plans available on its Web site (with the exception of any classified information contained therein) no later than 120 days before the auction's scheduled start date.

38. On May 13, 2014, pursuant to the CSEA, the NTIA notified the Commission of the estimated relocation or sharing costs and relocation timelines for eligible Federal entities assigned to frequencies in the 1695–1710 MHz and 1755–1780 MHz bands. The NTIA reported that the total estimated relocation or sharing costs for the 1695–1710 MHz band equal $527,069,000, and that the total estimated relocation or sharing costs for the 1755–1780 MHz band equal $4,575,603,000.

39. In addition to requiring that specified auction proceeds be deposited in the SRF, the CSEA, as amended by the Spectrum Act, requires that the total cash proceeds from any auction of eligible frequencies must equal at least 110 percent of the estimated relocation or sharing costs provided to the Commission by NTIA, and prohibits the Commission from concluding any auction of eligible frequencies that falls short of this revenue requirement. In the *CSEA/Part 1 Declaratory Ruling,* the Commission determined, among other things, that total cash proceeds for purposes of meeting the CSEA's revenue requirement means winning bids net of any applicable bidding credit discounts at the end of bidding. Thus, whether CSEA's revenue requirements regarding eligible frequencies have been met at the end of an auction involving such frequencies depends upon whether winning bids that are attributable to such spectrum, net of any applicable bidding credit discounts, equal at least 110 percent of estimated relocation costs. In the *CSEA/Part 1 Report and Order,* the Commission, among other things, modified its reserve price rule pursuant to the CSEA to ensure that the CSEA's revenue requirement would be met.

5. International Coordination

40. Potential bidders seeking licenses for geographic areas adjacent to the Canadian and Mexican border should be aware that the use of some or all of the AWS–3 frequencies they acquire in the auction are subject to international agreements with Canada and Mexico. As the Commission noted in the *AWS–3 Report and Order,* the Commission routinely works with the United States Department of State and Canadian and Mexican government officials to ensure the efficient use of the spectrum as well as interference-free operations in the border areas near Canada and Mexico. Until such time as any adjusted agreements, as needed, between the United States, Mexico and/or Canada can be agreed to, operations in the AWS–3 frequency bands must not cause harmful interference across the border, consistent with the terms of the agreements currently in force.

6. Quiet Zones

41. AWS–3 licensees must individually apply for and receive a separate license for each transmitter if the proposed operation would affect the radio quiet zones set forth in the Commission's rules.

7. Spectrum Screen for Competitive Review of Secondary Market Transactions

42. In its recent *Mobile Spectrum Holdings Report and Order,* the Commission concluded that, instead of administering its case-by-case review of auction winners' mobile spectrum holdings at the long-form application stage, it would determine prior to an auction whether an *ex ante* application of a band-specific mobile spectrum holding limit is necessary for the initial licensing of a band through competitive bidding. For the initial licensing of the AWS–3 band through competitive bidding, the Commission found that, on balance, it is not in the public interest to adopt a band-specific mobile spectrum holdings limit.

43. The Commission's spectrum screen is a tool used to help achieve the Commission's policy of facilitating access to spectrum in a manner that promotes competition. In its competitive review of secondary market transactions, the Commission applies an initial screen to help identify for case-by-case review local markets where changes in spectrum holdings resulting from the proposed transaction may be of particular concern. The Commission observed in the *Mobile Spectrum Holdings Report and Order* that, notwithstanding whether a band-specific mobile spectrum holding limit is applied to the initial licensing of a band through competitive bidding, the band would be included in the Commission's application of its spectrum screen for competitive review of subsequent secondary market transactions if the band is deemed suitable and available for the provision of mobile telephony/mobile broadband services. Further, in the *Mobile Spectrum Holdings Report and Order,* the Commission updated its spectrum screen to reflect the current suitability and availability of spectrum for the provision of mobile telephony/broadband services. In particular, in its consideration of AWS–3 spectrum, the Commission added the 65 megahertz of AWS–3 spectrum being offered in Auction 97 to the spectrum screen on a market-by-market basis as it becomes available. Thus, the spectrum in these bands will be counted in the spectrum screen in a particular market once all relocating Federal incumbent systems in that market are within three years of completing relocation according to the Federal agency Transition Plans. Spectrum in the 2155–2180 MHz band will be counted in the spectrum screen for a particular market at the same time the Commission counts the paired 1755–1780 MHz band in that market in the screen. The Bureau encourages each potential Auction 97 applicant to carefully review the *Mobile Spectrum Holdings Report and Order* to understand how these policies might apply to its particular situation.

8. Due Diligence

44. The Bureau reminds each potential bidder that it is solely responsible for investigating and evaluating all technical and marketplace factors that may have a bearing on the value of the licenses that it is seeking in this auction. Each bidder is responsible for assuring that, if it wins a license, it will be able to build and operate facilities in accordance with the Commission's rules. The Commission makes no representations or warranties about the use of this spectrum for particular services. Applicants should be aware that a Commission auction represents an opportunity to become a Commission licensee, subject to certain conditions and regulations, and that the Commission's statutory authority, under the Communications Act, to add, modify and eliminate rules governing spectrum use, as the public interest warrants, applies equally to all licenses, whether acquired through the competitive bidding process or otherwise. In addition, a Commission auction does not constitute an endorsement by the Commission of any particular service, technology, or product, nor does a Commission license constitute a guarantee of business success.

45. An applicant should perform its due diligence research and analysis before proceeding, as it would with any new business venture. In particular, the Bureau strongly encourages each potential bidder to review all Commission orders and public notices establishing rules and policies for the AWS–3 bands, including incumbency issues for AWS–3 licensees, Federal and non-Federal relocation and sharing and cost sharing obligations, and protection of Federal and non-Federal incumbent operations. Additionally, each potential bidder should perform technical analyses or refresh their previous analyses to assure itself that, should it become a winning bidder for any Auction 97 license, it will be able to build and operate facilities that will fully comply with all applicable technical and regulatory requirements. The Bureau strongly encourages each applicant to inspect any prospective transmitter sites located in, or near, the service area for which it plans to bid, confirm the availability of such sites, and to familiarize itself with the Commission's rules regarding the National Environmental Policy Act.

46. The Bureau strongly encourages each applicant to conduct its own research prior to Auction 97 in order to determine the existence of pending administrative or judicial proceedings, including pending allocation rulemaking proceedings, that might affect its decision to participate in the auction. The Bureau strongly encourages each participant in Auction 97 to continue such research throughout the auction. The due diligence considerations mentioned in the *Auction 97 Procedures Public Notice* do not comprise an exhaustive list of steps that should be undertaken prior to participating in this auction. As always, the burden is on the potential bidder to determine how much research to undertake, depending upon specific facts and circumstances related to its interests.

47. The Bureau also reminds each applicant that pending and future judicial proceedings, as well as pending and future proceedings before the Commission—including applications, applications for modification, rulemaking proceedings, requests for special temporary authority, waiver requests, petitions to deny, petitions for reconsideration, informal objections, and applications for review—may relate to particular applicants or the licenses available in Auction 97 (or the terms and conditions thereof, including all applicable Commission rules and regulations). Each prospective applicant is responsible for assessing the likelihood of the various possible outcomes and for considering the potential impact on licenses available in this auction.

48. The Bureau calls special attention in this auction to the requirements presented by the temporary and indefinite sharing of portions of the AWS–3 bands by incumbent Federal users and AWS–3 licensees, which may vary by geography and frequency. The *FCC/NTIA Coordination Procedures Public Notice* contains additional information regarding the extent of sharing in the AWS–3 bands, refinements to the protection zones adopted in the *AWS–3 Report and Order,* and information and guidance on the overall coordination process between commercial and Federal users. Additionally, the CSEA, as amended by the Spectrum Act, stipulates that Federal agencies will receive reimbursement for their costs in relocating their operations from, or sharing, the ''eligible frequencies'' offered in this auction based on their approved transition plans, which the NTIA will make available to the public. The Bureau expects that the information in both the *FCC/NTIA Coordination Procedures Public Notice* and the federal agency transition plans will be material to an applicant's potential participation in Auction 97. Therefore, the Bureau strongly encourages each applicant to closely review these materials, as well as future releases from the Commission and the NTIA concerning these issues, and to carefully consider the technical and economic implications for commercial use of the AWS–3 bands.

49. Applicants are solely responsible for identifying associated risks and for investigating and evaluating the degree to which such matters may affect their ability to bid on, otherwise acquire, or make use of the licenses available in

Auction 97. Each potential bidder is responsible for undertaking research to ensure that any licenses won in this auction will be suitable for its business plans and needs. Each potential bidder must undertake its own assessment of the relevance and importance of information gathered as part of its due diligence efforts.

9. Use of Integrated Spectrum Auction System

50. Bidders will be able to participate in Auction 97 over the Internet using the Commission's Web-based Integrated Spectrum Auction System (ISAS or FCC Auction System). The Commission makes no warranty whatsoever with respect to the FCC Auction System. In no event shall the Commission, or any of its officers, employees, or agents, be liable for any damages whatsoever (including, but not limited to, loss of business profits, business interruption, loss of business information, or any other loss) arising out of or relating to the existence, furnishing, functioning, or use of the FCC Auction System that is accessible to qualified bidders in connection with this auction. Moreover, no obligation or liability will arise out of the Commission's technical, programming, or other advice or service provided in connection with the FCC Auction System.

10. Environmental Review Requirements

51. Licensees must comply with the Commission's rules regarding implementation of the National Environmental Policy Act and other federal environmental statutes. The construction of a wireless antenna facility is a federal action, and the licensee must comply with the Commission's environmental rules for each such facility. These environmental rules require, among other things, that the licensee consult with expert agencies having environmental responsibilities, including the U.S. Fish and Wildlife Service, the State Historic Preservation Office, the U.S. Army Corps of Engineers, and the Federal Emergency Management Agency (through the local authority with jurisdiction over floodplains). In assessing the effect of facility construction on historic properties, the licensee must follow the provisions of the FCC's Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process. The licensee must prepare an environmental assessment for any facility that may have a significant impact in or on wilderness areas, wildlife preserves, threatened or endangered species, designated critical habitats, historical or archaeological sites, Native American religious sites, floodplains, surface features, or migratory birds. In addition, the licensee must prepare an environmental assessment for any facility that includes high intensity white lights in residential neighborhoods or excessive radio frequency emission.

D. Auction Specifics

1. Bidding Methodology

52. The bidding methodology for Auction 97 will be a simultaneous multiple round format. The Commission will conduct this auction over the Internet using the FCC Auction System. Qualified bidders are permitted to bid electronically via the Internet or by telephone using the telephonic bidding option. All telephone calls are recorded.

2. Pre-Auction Dates and Deadlines

53. The following dates and deadlines, as announced in the *Auction 97 Procedures Public Notice* apply: (1) Auction tutorial available (via Internet) by August 28, 2014; (2) short-Form Application (FCC Form 175) Filing Window Opens on August 28, 2014; 12:00 noon ET; (3) short-Form Application (FCC Form 175) Filing Window Deadline closes on September 12, 2014; 6:00 p.m. ET; (4) upfront Payments (via wire transfer) due by October 15, 2014; 6:00 p.m. ET; (5) Mock Auction begins on November 10, 2014; and (6) Auction 97 begins on November 13, 2014.

54. In order to provide sufficient time for Commission staff to complete review of short-form applications and for Auction 97 applicants to work with staff to address any deficiencies with their applications, the Bureau is unable to grant in full the joint request of CCA, CTIA, and NTCA to set a short-form deadline of September 24, 2014. Those parties assert setting the deadline near the end of that month would facilitate the association members' ability to participate in business negotiations and panel discussions, including panels on the AWS–3 auction, at industry conferences scheduled during September 2014 without risk of running afoul of 47 CFR 1.2105(c)'s prohibited communications period. The Bureau understands that two of three of those events will have concluded by September 12, 2014, which is the alternative date they request.

3. Requirements for Participation

55. Those wishing to participate in this auction must: (1) Submit a short-form application (FCC Form 175) electronically prior to 6:00 p.m. ET, on September 12, 2014, following the electronic filing procedures set forth in Attachment D to the *Auction 97 Procedures Public Notice;* (2) submit a sufficient upfront payment and an FCC Remittance Advice Form (FCC Form 159) by 6:00 p.m. ET, on October 15, 2014, following the procedures and instructions set forth in Attachment E; and (3) comply with all provisions outlined in the *Auction 97 Procedures Public Notice* and applicable Commission rules.

II. Short-Form Application (FCC Form 175) Requirements

A. General Information Regarding Short-Form Applications

56. An application to participate in an FCC auction, referred to as a short-form application or FCC Form 175, provides information used to determine whether the applicant is legally, technically, and financially qualified to participate in Commission auctions for licenses or permits. The short-form application is the first part of the Commission's two-phased auction application process. In the first phase, parties desiring to participate in the auction must file a streamlined, short-form application in which they certify under penalty of perjury as to their qualifications. Eligibility to participate in bidding is based on the applicant's short-form application and certifications and on its upfront payment. In the second phase, each winning bidder must file a more comprehensive long-form application (FCC Form 601) and have a complete and accurate ownership disclosure information report (FCC Form 602) on file with the Commission.

57. Every entity and individual seeking a license available in Auction 97 must file a short-form application electronically via the FCC Auction System prior to 6:00 p.m. ET on September 12, 2014, following the procedures prescribed in Attachment D to the *Auction 97 Procedures Public Notice.* If an applicant claims eligibility for a bidding credit, the information provided in its FCC Form 175 will be used to determine whether the applicant is eligible for the claimed bidding credit. Applicants filing a short-form application are subject to the Commission's anti-collusion rules beginning at the deadline for filing.

58. Applicants bear full responsibility for submitting accurate, complete and timely short-form applications. All applicants must certify on their short-form applications under penalty of perjury that they are legally, technically, financially and otherwise qualified to

hold a license. Each applicant should read carefully the instructions set forth in Attachment D to the *Auction 97 Procedures Public Notice* and should consult the Commission's rules to ensure that, in addition to the materials, all the information required is included within its short-form application.

59. An individual or entity may not submit more than one short-form application for a single auction. If a party submits multiple short-form applications for any license(s) in the same or overlapping geographic area(s), only one of its applications can be found to be complete when reviewed for completeness and compliance with the Commission's rules.

60. Applicants should note that submission of a short-form application (and any amendments thereto) constitutes a representation by the person certifying the application that he or she is an authorized representative of the applicant with authority to bind the applicant, that he or she has read the form's instructions and certifications, and that the contents of the application, its certifications, and any attachments are true and correct. Applicants are not permitted to make major modifications to their applications; such impermissible changes include a change of the certifying official to the application. Submission of a false certification to the Commission may result in penalties, including monetary forfeitures, license forfeitures, ineligibility to participate in future auctions, and/or criminal prosecution.

B. License Selection

61. An applicant must select the licenses on which it wants to bid from the ''Eligible Licenses'' list on its short-form application. Applicants must review and verify their license selections before the deadline for submitting short-form applications. License selections cannot be changed after the short-form application filing deadline. The FCC Auction System will not accept bids on licenses that were not selected on the applicant's short-form application.

C. Disclosure of Bidding Arrangements

62. An applicant will be required to identify in its short-form application all real parties in interest with whom it has entered into any agreements, arrangements, or understandings of any kind relating to the licenses being auctioned, including any agreements relating to post-auction market structure.

63. Each applicant will also be required to certify under penalty of perjury in its short-form application that it has not entered and will not enter into any explicit or implicit agreements, arrangements or understandings of any kind with any parties, other than those identified in the application, regarding the amount of its bids, bidding strategies, or the particular licenses on which it will or will not bid. If an applicant has had discussions, but has not reached an agreement by the short-form application filing deadline, it should not include the names of parties to the discussions on its application and may not continue such discussions with any applicants after the deadline.

64. After the filing of short-form applications, the Commission's rules do not prohibit a party holding a non-controlling, attributable interest in one applicant from acquiring an ownership interest in or entering into a joint bidding arrangement with other applicants, provided that (i) the attributable interest holder certifies that it has not and will not communicate with any party concerning the bids or bidding strategies of more than one of the applicants in which it holds an attributable interest, or with which it has entered into a joint bidding arrangement; and (ii) the arrangements do not result in a change in control of any of the applicants. While 47 CFR 1.2105(c) does not prohibit non-auction-related business negotiations among auction applicants, the Bureau reminds applicants that certain discussions or exchanges could touch upon impermissible subject matters because they may convey pricing information and bidding strategies. Further, compliance with the disclosure requirements of 47 CFR 1.2105(c) will not insulate a party from enforcement of the antitrust laws.

D. Ownership Disclosure Requirements

65. Each applicant must comply with the uniform Part 1 ownership disclosure standards and provide information required by 47 CFR 1.2105 and 1.2112. Specifically, in completing the short-form application, an applicant will be required to fully disclose information on the real party- or parties-in-interest and the ownership structure of the applicant, including both direct and indirect ownership interests of 10 percent or more, as prescribed in 47 CFR 1.2105 and 1.2112. Each applicant is responsible for ensuring that information submitted in its short-form application is complete and accurate.

66. In certain circumstances, an applicant's most current ownership information on file with the Commission, if in an electronic format compatible with the short-form application (FCC Form 175) (such as information submitted in an FCC Form 602 or in an FCC Form 175 filed for a previous auction using ISAS) will automatically be entered into the applicant's short-form application. Each applicant must carefully review any information automatically entered to confirm that it is complete and accurate as of the deadline for filing the short-form application. Any information that needs to be corrected or updated must be changed directly in the short-form application.

E. Foreign Ownership Disclosure Requirements

67. Section 310 of the Communications Act requires the Commission to review foreign investment in radio station licenses and imposes specific restrictions on who may hold certain types of radio licenses. The provisions of section 310 apply to applications for initial radio licenses, applications for assignments and transfers of control of radio licenses, and spectrum leasing arrangements under the Commission's secondary market rules. In completing the short-form application (FCC Form 175), an applicant will be required to disclose information concerning any foreign ownership of the applicant. An applicant must certify in its short-form application that, as of the deadline for filing a short-form application to participate in Auction 97, the applicant either is in compliance with the foreign ownership provisions of section 310 or has filed a petition for declaratory ruling requesting Commission approval to exceed the applicable foreign ownership limit or benchmark in section 310(b) that is pending before, or has been granted by, the Commission.

F. National Security Certification Requirement for Auction 97 Applicants

68. Section 6004 of the Spectrum Act prohibits a person who has been, for reasons of national security, barred by any agency of the Federal Government from bidding on a contract, participating in an auction, or receiving a grant from participating in any auction that is required or authorized to be conducted pursuant to the Spectrum Act. In 2013, the Commission amended its rules to implement this mandate by adding a certification to the various other certifications that a party must make in any short-form application. Pursuant to this rule, any applicant seeking to participate in Auction 97 must certify in its short-form application, under penalty of perjury, that the applicant and all of the related individuals and entities required to be disclosed on its application are not person(s) who have

been, for reasons of national security, barred by any agency of the Federal Government from bidding on a contract, participating in an auction, or receiving a grant, and who are thus statutorily prohibited from participating in such a Commission auction. As with other required certifications, an auction applicant's failure to include the required certification in its short-form application by the applicable filing deadline would render its application unacceptable for filing, and its application would be dismissed with prejudice.

G. Acknowledgement Statement for Auction 97 Applicants

69. The Bureau adopts its proposal to require each applicant selecting any license in the 1755–1780 MHz band to submit with its short-form application a signed statement acknowledging that the applicant's operations the 1755–1780 MHz band may be subject to interference from Federal systems, that the applicant must accept interference from incumbent Federal operations, and that the applicant has considered these risks before submitting any bids for applicable licenses in Auction 97. The specific text that must be included in the required acknowledgement statement is contained in Attachment G to the *Auction 97 Procedures Public Notice.* The acknowledgement statement must be signed by the same individual that signs the application on behalf of the applicant. Guidance on submitting the acknowledgement statement can be found in Attachment D to the *Auction 97 Procedures Public Notice.*

70. Incumbent Federal users are currently operating in the 1695–1710 MHz and 1755–1780 MHz bands. In the *AWS–3 Report and Order,* the Commission adopted rules to address commercial operations in these bands in light of the temporary and indefinite sharing of the bands by Federal incumbent users and commercial licensees, including a requirement that commercial licensees operate on a co-equal, primary operations with Federal systems, and a requirement that licensees in the 1755–1780 MHz band accept interference from Federal systems as long as such systems remain in the band.

71. The Bureau disagrees with the recommendation of Spectrum Financial Partners that it should not require an acknowledgement on the grounds that this would be an unnecessary paperwork burden and applicant's acceptance of such interference obligations is already adequately covered by the due diligence instructions that apply to all auctions. As both T-Mobile and AT&T recognize, it may be useful for each bidder for these frequencies to sign a statement acknowledging that it has given consideration to potential interference issues for this band. AT&T and T-Mobile request that the required statement be narrowly drafted, and seek assurances that the acknowledgement does not give rise to any new obligations for the 1755–1780 MHz band beyond those set out in the Commission's rules. They also encourage the Commission to promote disclosure by federal agencies of as much information as possible about the potential interference environment. The Bureau notes that the text of the acknowledgement statement is narrowly tailored and expressly states that it does not supersede the licensee's rights and obligations specified by law, rule, or other Commission action.

H. Designated Entity Provisions

72. Eligible applicants in Auction 97 may claim small business bidding credits and applicants should review carefully the Commission's decisions regarding the designated entity provisions.

1. Bidding Credits for Small Businesses

73. A bidding credit represents an amount by which a bidder's winning bid will be discounted. For Auction 97, bidding credits will be available to small businesses and consortia thereof.

a. Bidding Credit Eligibility Criteria

74. In the *AWS–3 Report and Order,* the Commission adopted small business bidding credits to promote and facilitate the participation of small businesses in competitive bidding for licenses in the AWS–3 bands.

75. The level of bidding credit is determined as follows: (1) a bidder with attributed average annual gross revenues that do not exceed $40 million for the preceding three years will receive a 15 percent discount on its winning bid; and (2) a bidder with attributed average annual gross revenues that do not exceed $15 million for the preceding three years will receive a 25 percent discount on its winning bid.

76. Bidding credits are not cumulative; qualifying applicants receive either the 15 percent or the 25 percent bidding credit on its winning bid, but not both. Applicants should note that unjust enrichment provisions apply to a winning bidder that utilizes a bidding credit and subsequently seeks to assign or transfer control of its license to an entity not qualifying for the same level of bidding credit.

b. Revenue Disclosure on Short-Form Application

77. An entity applying as a small business must provide gross revenues for the preceding three years of each of the following: (1) The applicant, (2) its affiliates, (3) its controlling interests, (4) the affiliates of its controlling interests, and (5) the entities with which it has an attributable material relationship. Certification that the average annual gross revenues of such entities and individuals for the preceding three years do not exceed the applicable limit is not sufficient. Additionally, if an applicant is applying as a consortium of small businesses, this information must be provided for each consortium member.

2. Attributable Interests

a. Controlling Interests

78. Controlling interests of an applicant include individuals and entities with either *de facto* or *de jure* control of the applicant. Typically, ownership of greater than 50 percent of an entity's voting stock evidences *de jure* control. *De facto* control is determined on a case-by-case basis. The following are some common indicia of *de facto* control: (1) The entity constitutes or appoints more than 50 percent of the board of directors or management committee; (2) the entity has authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities of the licensee; and (3) the entity plays an integral role in management decisions.

79. Applicants should refer to 47 CFR 1.2110(c)(2) and Attachment D to the *Auction 97 Procedures Public Notice* to understand how certain interests are calculated in determining control. For example, pursuant to 47 CFR 1.2110(c)(2)(ii)(F), officers and directors of an applicant are considered to have controlling interest in the applicant.

b. Affiliates

80. Affiliates of an applicant or controlling interest include an individual or entity that (1) directly or indirectly controls or has the power to control the applicant, (2) is directly or indirectly controlled by the applicant, (3) is directly or indirectly controlled by a third party that also controls or has the power to control the applicant, or (4) has an ''identity of interest'' with the applicant. The Commission's definition of an affiliate of the applicant encompasses both controlling interests of the applicant and affiliates of controlling interests of the applicant. For more information regarding affiliates, applicants should refer to 47 CFR 1.2110(c)(5) and Attachment D to

the *Auction 97 Procedures Public Notice.*

c. Material Relationships

81. The Commission requires the consideration of certain leasing and resale (including wholesale) relationships—referred to as ''attributable material relationships''—in determining designated entity eligibility for bidding credits. An applicant or licensee has an ''attributable material relationship'' when it has one or more agreements with any individual entity for the lease or resale (including under a wholesale agreement) of, on a cumulative basis, more than 25 percent of the spectrum capacity of any individual license held by the applicant or licensee. The attributable material relationship will cause the gross revenues of that entity and its attributable interest holders to be attributed to the applicant or licensee for the purposes of determining the applicant's or licensee's (i) eligibility for designated entity benefits and (ii) liability for ''unjust enrichment'' on a license-by-license basis.

82. The Commission grandfathered material relationships in existence before the release of the *Designated Entity Second Report and Order,* meaning that those preexisting relationships alone would not cause the Commission to examine a designated entity's ongoing eligibility for existing benefits or its liability for unjust enrichment. The Commission did not, however, grandfather preexisting material relationships for determinations of an applicant's or licensee's designated entity eligibility for future auctions or in the context of future assignments, transfers of control, spectrum leases, or other reportable eligibility events. Rather, in such circumstances, the Commission reexamines the applicant's or licensee's designated entity eligibility, taking into account all existing material relationships, including those previously grandfathered. The Commission has recently waived the bright-line application of 47 CFR 1.2110(b)(3)(iv)'s attributable material relationship rule that would otherwise trigger the automatic attribution of the lessee's gross revenues to a designated entity (DE) applicant, where its leased licenses were not subject to DE benefits and, at the time the leases became effective, the DE applicant held no other licenses subject to DE benefits. To the extent that the requesting entity and any other similarly situated parties certify that they are qualified to claim DE benefits in any upcoming auction and become winning bidders, they will be required to demonstrate at the long-form application stage that the specific facts and circumstances of their spectrum lease agreements do not require attribution of the lessees' gross revenues in their respective cases.

d. Gross Revenue Exceptions

83. The Commission has also made other modifications to its rules governing the attribution of gross revenues for purposes of determining designated entity eligibility. For example, the Commission has clarified that, in calculating an applicant's gross revenues under the controlling interest standard, it will not attribute to the applicant the personal net worth, including personal income, of its officers and directors.

84. The Commission has also exempted from attribution to the applicant the gross revenues of the affiliates of a rural telephone cooperative's officers and directors, if certain conditions specified in 47 CFR 1.2110(b)(3)(iii) are met. An applicant claiming this exemption must provide, in an attachment, an affirmative statement that the applicant, affiliate and/or controlling interest is an eligible rural telephone cooperative within the meaning of 47 CFR 1.2110(b)(3)(iii), and the applicant must supply any additional information as may be required to demonstrate eligibility for the exemption from the attribution rule. Applicants seeking to claim this exemption must meet all of the conditions. Additional guidance on claiming this exemption may be found in Attachment D to the *Auction 97 Procedures Public Notice.*

e. Bidding Consortia

85. A consortium of small businesses is a conglomerate organization composed of two or more entities, each of which individually satisfies the definition of a small business. Thus, each member of a consortium of small businesses that applies to participate in Auction 97 must individually meet the criteria for small businesses. Each consortium member must disclose its gross revenues along with those of its affiliates, its controlling interests, the affiliates of its controlling interests, and any entities having an attributable material relationship with the member. Although the gross revenues of the consortium members will not be aggregated for purposes of determining the consortium's eligibility as a small business, this information must be provided to ensure that each individual consortium member qualifies for any bidding credit awarded to the consortium.

I. Tribal Lands Bidding Credit

86. To encourage the growth of wireless services in federally recognized tribal lands, the Commission has implemented a tribal lands bidding credit. Applicants do not provide information regarding tribal lands bidding credits on their short-form applications. Instead, winning bidders may apply for the tribal lands bidding credit after the auction when they file their more detailed, long-form applications.

J. Provisions Regarding Former and Current Defaulters

87. Current defaulters or delinquents are not eligible to participate in Auction 97, but former defaulters or delinquents can participate so long as they are otherwise qualified and make upfront payments that are fifty percent more than would otherwise be necessary. An applicant is considered a ''current defaulter'' or a ''current delinquent'' when it, any of its affiliates, any of its controlling interests, or any of the affiliates of its controlling interests, is in default on any payment for any Commission construction permit or license (including a down payment) or is delinquent on any non-tax debt owed to any Federal agency as of the filing deadline for short-form applications. An applicant is considered a ''former defaulter'' or a ''former delinquent'' when it, any of its affiliates, any of its controlling interests, or any of the affiliates of its controlling interests, have defaulted on any Commission construction permit or license or been delinquent on any non-tax debt owed to any Federal agency, but have since remedied all such defaults and cured all of the outstanding non-tax delinquencies.

88. Four trade associations have jointly requested that the Commission grant a limited, temporary waiver of the Commission's ''former defaulter'' rule, 47 CFR 1.2106(a), as to two categories of debt for Auction 97 applicants. The Bureau concludes that any requests for temporary, limited relief from the ''former defaulter'' rule are beyond the scope of the *Auction 97 Procedures Public Notice,* which is limited to establishing procedures for the upcoming auction of AWS–3 licenses. The Bureau notes, however, that such requests are being addressed separately.

89. On the short-form application, an applicant must certify under penalty of perjury that it, its affiliates, its controlling interests, and the affiliates of its controlling interests, as defined by 47 CFR 1.2110, are not in default on any payment for a Commission construction

permit or license (including down payments) and that it is not delinquent on any non-tax debt owed to any Federal agency. Each applicant must also state under penalty of perjury whether it, its affiliates, its controlling interests, and the affiliates of its controlling interests, have ever been in default on any Commission construction permit or license or have ever been delinquent on any non-tax debt owed to any Federal agency. Prospective applicants are reminded that submission of a false certification to the Commission is a serious matter that may result in severe penalties, including monetary forfeitures, license revocations, exclusion from participation in future auctions, and/or criminal prosecution.

90. Applicants are encouraged to review the Bureau's previous guidance on default and delinquency disclosure requirements in the context of the short-form application process. For example, it has been determined that, to the extent that Commission rules permit late payment of regulatory or application fees accompanied by late fees, such debts will become delinquent for purposes of 47 CFR 1.2105(a) and 1.2106(a) only after the expiration of a final payment deadline. Therefore, with respect to regulatory or application fees, the provisions of 47 CFR 1.2105(a) and 1.2106(a) regarding default and delinquency in connection with competitive bidding are limited to circumstances in which the relevant party has not complied with a final Commission payment deadline. Parties are also encouraged to consult with the Wireless Telecommunications Bureau's Auctions and Spectrum Access Division staff if they have any questions about default and delinquency disclosure requirements.

91. The Commission considers outstanding debts owed to the United States Government, in any amount, to be a serious matter. The Commission adopted rules, including a provision referred to as the ''red light rule,'' that implement its obligations under the Debt Collection Improvement Act of 1996, which governs the collection of debts owed to the United States. Under the red light rule, applications and other requests for benefits filed by parties that have outstanding debts owed to the Commission will not be processed. In the same rulemaking order, the Commission explicitly declared, however, that its competitive bidding rules ''are not affected'' by the red light rule. As a consequence, the Commission's adoption of the red light rule does not alter the applicability of any of its competitive bidding rules, including the provisions and certifications of 47 CFR 1.2105 and 1.2106, with regard to current and former defaults or delinquencies.

92. Applicants are reminded, however, that the Commission's Red Light Display System, which provides information regarding debts currently owed to the Commission, may not be determinative of an auction applicant's ability to comply with the default and delinquency disclosure requirements of 47 CFR 1.2105. Thus, while the red light rule ultimately may prevent the processing of long-form applications by auction winners, an auction applicant's lack of current ''red light'' status is not necessarily determinative of its eligibility to participate in an auction or of its upfront payment obligation.

93. Moreover, prospective applicants in Auction 97 should note that any long-form applications filed after the close of bidding will be reviewed for compliance with the Commission's red light rule, and such review may result in the dismissal of a winning bidder's long-form application.

K. Optional Applicant Status Identification

94. Applicants owned by members of minority groups and/or women, as defined in 47 CFR 1.2110(c)(3), and rural telephone companies, as defined in 47 CFR 1.2110(c)(4), may identify themselves regarding this status in filling out their short-form applications. This applicant status information is collected for statistical purposes only and assists the Commission in monitoring the participation of ''designated entities'' in its auctions.

L. Minor Modifications to Short-Form Applications

95. After the deadline for filing initial applications, an Auction 97 applicant is permitted to make only minor changes to its application. Permissible minor changes include, among other things, deletion and addition of authorized bidders (to a maximum of three) and revision of addresses and telephone numbers of the applicants and their contact persons. An applicant is not permitted to make a major modification to its application (e.g., change of license selection, change control of the applicant, change the certifying official, or claim eligibility for a higher percentage of bidding credit) after the initial application filing deadline. Thus, any change in control of an applicant—resulting from a merger, for example—will be considered a major modification, and the application will consequently be dismissed.

96. If an applicant wishes to make permissible minor changes to its short-form application, such changes should be made electronically to its short-form application using the FCC Auction System whenever possible. For the change to be submitted and considered by the Commission, be sure to click on the SUBMIT button. After the revised application has been submitted, a confirmation page will be displayed stating the submission time, submission date, and a unique file number.

97. An applicant cannot use the FCC Auction System outside of the initial and resubmission filing windows to make changes to its short-form application for other than administrative changes (e.g., changing certain contact information or the name of an authorized bidder). If these or other permissible minor changes need to be made outside of these windows, the applicant must submit a letter briefly summarizing the changes and subsequently update its short-form application in the FCC Auction System once it is available. Moreover, after the filing window has closed, the system will not permit applicants to make certain changes, such as the applicant's legal classification and license selections.

98. Any letter describing changes to an applicant's short-form application must be submitted by email to *auction97@fcc.gov*. The email summarizing the changes must include a subject or caption referring to Auction 97 and the name of the applicant, for example, ''Re: Changes to Auction 97 Short-Form Application of ABC Corp.'' The Bureau requests that parties format any attachments to email as Adobe® Acrobat® (PDF) or Microsoft® Word documents. Questions about short-form application amendments should be directed to the Auctions and Spectrum Access Division at (202) 418–0660.

99. As with the short-form application, any application amendment and related statements of fact must be certified by an authorized representative of the applicant with authority to bind the applicant. Applicants should note that submission of any such amendment or related statement of fact constitutes a representation by the person certifying that he or she is an authorized representative with such authority, and that the contents of the amendment or statement of fact are true and correct.

100. Applicants must not submit application-specific material through the Commission's Electronic Comment Filing System, which was used for submitting comments regarding Auction 97. Further, parties submitting information related to their applications

should use caution to ensure that their submissions do not contain confidential information or communicate information that would violate 47 CFR 1.2105(c) or the limited information procedures adopted for Auction 97. A party seeking to submit information that might reflect non-public information, such as an applicant's license selections, upfront payment amount, or bidding eligibility, should consider submitting any such information along with a request that the filing or portions of the filing be withheld from public inspection until the end of the prohibition of certain communications pursuant to 47 CFR 1.2105(c).

M. Maintaining Current Information in Short-Form Applications

101. 47 CFR 1.65 and 1.2105(b) requires an applicant to maintain the accuracy and completeness of information furnished in its pending application and in competitive bidding proceedings to furnish additional or corrected information to the Commission within five days of a significant occurrence, or to amend a short form application no more than five days after the applicant becomes aware of the need for the amendment. Changes that cause a loss of or reduction in the percentage of bidding credit specified on the originally-submitted application must be reported immediately, and no later than five business days after the change occurs. If an amendment reporting changes is a ''major amendment,'' as defined by 47 CFR 1.2105, the major amendment will not be accepted and may result in the dismissal of the application. After the short-form filing deadline, applicants may make only minor changes to their applications. For changes to be submitted and considered by the Commission, be sure to click on the SUBMIT button in the FCC Auction System. In addition, an applicant cannot update its short-form application using the FCC Auction System after the initial and resubmission filing windows close. If information needs to be submitted pursuant to 47 CFR 1.65 after these windows close, a letter briefly summarizing the changes must be submitted by email to *auction97@fcc.gov*. This email must include a subject or caption referring to Auction 97 and the name of the applicant. The Bureau requests that parties format any attachments to email as Adobe® Acrobat® (PDF) or Microsoft® Word documents. A party seeking to submit information that might reflect non-public information, such as an applicant's license selections, upfront payment amount, or bidding eligibility, should consider submitting any such information along with a request that the filing or portions of the filing be withheld from public inspection until the end of the prohibition of certain communications pursuant to 47 CFR 1.2105(c).

III. Pre-Auction Procedures

A. Online Auction Tutorial—Available August 28, 2014

102. No later than Thursday, August 28, 2014, an auction tutorial will be available on the Auction 97 Web page for prospective bidders to familiarize themselves with the auction process. This online tutorial will provide information about pre-auction procedures, completing short-form applications, auction conduct, the FCC Auction Bidding System, auction rules, and AWS–3 service rules. The tutorial will also provide an avenue to ask Commission staff questions about the auction, auction procedures, filing requirements, and other matters related to this auction.

103. The Bureau believes parties interested in participating in this auction will find the interactive, online tutorial an efficient and effective way to further their understanding of the auction process. The tutorial will allow viewers to navigate the presentation outline, review written notes, listen to audio recordings of the notes, and search for topics using a text search function. Additional features of this web-based tool include links to auction-specific Commission releases, email links for contacting Commission licensing and auctions staff, a timeline with deadlines for auction preparation, and screen shots of the online application and bidding system. The tutorial will be accessible through a web browser with Adobe Flash Player.

104. The auction tutorial will be accessible from the Commission's Auction 97 Web page at *http://wireless.fcc.gov/auctions/97/* through an ''Auction Tutorial'' link. Once posted, this tutorial will remain available and accessible anytime for reference in connection with the procedures outlined in the *Auction 97 Procedures Public Notice.*

105. Spectrum Financial Partners asks that the Bureau clarify the online interactive auction tutorial to include a clear description of the various fields in the downloadable reports, which might not be familiar to those taking part in a Commission auction for the first time. Spectrum Financial Partners also urges the Bureau to do more to make the auction tutorial more broadly available, perhaps even by posting a video version of the interactive tutorial on YouTube. The Bureau finds the description of the various fields in the downloadable reports contained in its auction materials to be sufficiently clear, even for first-time bidders. The Bureau's ISAS Bidder's Guide''—which is sent by overnight delivery to all qualified bidders in advance of the mock auction and which is also available to the public in the FCC Auction System—provides additional information. The Bureau therefore declines to make the changes to the tutorial materials requested by Spectrum Financial Partners. In addition, because the Bureau's auction tutorial is publicly-available on the Auction 97 Web site and is accessible 24 hours a day, 7 days a week, it is already widely accessible, and the Bureau is not persuaded that there is any need to create other formats of the tutorial.

B. Short-Form Applications—Due Prior to 6:00 p.m. ET on September 12, 2014

106. In order to be eligible to bid in this auction, applicants must first follow the procedures set forth in Attachments D and E to the *Auction 97 Procedures Public Notice* to submit a short-form application (FCC Form 175) electronically via the FCC Auction System. This short-form application must be submitted prior to 6:00 p.m. ET on September 12, 2014. Late applications will not be accepted. No application fee is required, but an applicant must submit a timely upfront payment to be eligible to bid.

107. Applications may generally be filed at any time beginning at noon ET on August 28, 2014, until the filing window closes at 6:00 p.m. ET on September 12, 2014. Applicants are strongly encouraged to file early and are responsible for allowing adequate time for filing their applications. There are no limits or restrictions on the number of times an application can be updated or amended until the filing deadline on September 12, 2014.

108. An applicant must always click on the SUBMIT button on the ''Certify & Submit'' screen to successfully submit its FCC Form 175 and any modifications; otherwise the application or changes to the application will not be received or reviewed by Commission staff. Additional information about accessing, completing, and viewing the FCC Form 175 is included in Attachment D to the *Auction 97 Procedures Public Notice.* FCC Auctions Technical Support is available at (877) 480–3201, option nine; (202) 414–1250; or (202) 414–1255 (text telephone (TTY)); hours of service are Monday through Friday, from 8:00 a.m. to 6:00 p.m. ET. In order to provide better

service to the public, all calls to Technical Support are recorded.

C. Application Processing and Minor Corrections

109. After the deadline for filing short-form applications, the Commission will process all timely submitted applications to determine which are complete, and subsequently will issue a public notice identifying (1) those that are complete, (2) those that are rejected, and (3) those that are incomplete or deficient because of minor defects that may be corrected. The public notice will include the deadline for resubmitting corrected applications.

110. After the application filing deadline on September 12, 2014, applicants can make only minor corrections to their applications. They will not be permitted to make major modifications (e.g., change license selection, change control of the applicant, change the certifying official, or claim eligibility for a higher percentage of bidding credit).

111. Commission staff will communicate only with an applicant's contact person or certifying official, as designated on the short-form application, unless the applicant's certifying official or contact person notifies the Commission in writing that applicant's counsel or other representative is authorized to speak on its behalf. Authorizations may be sent by email to *auction97@fcc.gov.*

D. Upfront Payments—Due October 15, 2014

112. In order to be eligible to bid in this auction, an upfront payment must be submitted and accompanied by an FCC Remittance Advice Form (FCC Form 159). After completing its short-form application, an applicant will have access to an electronic version of the FCC Form 159 that can be printed and sent by fax to U.S. Bank in St. Louis, Missouri. All upfront payments must be made as instructed in this Public Notice and must be received in the proper account at U.S. Bank before 6:00 p.m. ET on October 15, 2014.

1. Making Upfront Payments by Wire Transfer

113. Wire transfer payments must be received before 6:00 p.m. ET on October 15, 2014. No other payment method is acceptable. To avoid untimely payments, applicants should discuss arrangements (including bank closing schedules) with their bankers several days before they plan to make the wire transfer, and allow sufficient time for the transfer to be initiated and completed before the deadline. The specific information needed to make upfront payments is outlined in the *Auction 97 Procedures Public Notice.*

114. At least one hour before placing the order for the wire transfer (but on the same business day), applicants must fax a completed FCC Form 159 (Revised 2/03) to U.S. Bank at (314) 418–4232. On the fax cover sheet, write ''Wire Transfer—Auction Payment for Auction 97.'' In order to meet the upfront payment deadline, an applicant's payment must be credited to the Commission's account for Auction 97 before the deadline.

115. Each applicant is responsible for ensuring timely submission of its upfront payment and for timely filing of an accurate and complete FCC Remittance Advice Form (FCC Form 159). An applicant should coordinate with its financial institution well ahead of the due date regarding its wire transfer and allow sufficient time for the transfer to be initiated and completed prior to the deadline. The Commission repeatedly has cautioned auction participants about the importance of planning ahead to prepare for unforeseen last-minute difficulties in making payments by wire transfer. Each applicant also is responsible for obtaining confirmation from its financial institution that its wire transfer to U.S. Bank was successful and from Commission staff that its upfront payment was timely received and that it was deposited into the proper account. To receive confirmation from Commission staff, contact Gail Glasser of the Office of Managing Director's Auctions Accounting Group at (202) 418–0578, or alternatively, Theresa Meeks at (202) 418–2945.

116. Please note the following information regarding upfront payments: (1) All payments must be made in U.S. dollars; (2) all payments must be made by wire transfer; (3) upfront payments for Auction 97 go to a lockbox number different from the lockboxes used in previous Commission auctions; and (4) failure to deliver a sufficient upfront payment as instructed by the October 15, 2014, deadline will result in dismissal of the short-form application and disqualification from participation in the auction.

2. FCC Form 159

117. An accurate and complete FCC Remittance Advice Form (FCC Form 159, Revised 2/03) must be faxed to U.S. Bank to accompany each upfront payment. Proper completion of this form is critical to ensuring correct crediting of upfront payments. Detailed instructions for completion of FCC Form 159 are included in Attachment E to the *Auction 97 Procedures Public Notice.* An electronic pre-filled version of the FCC Form 159 is available after submitting the FCC Form 175. Payers using the pre-filled FCC Form 159 are responsible for ensuring that all of the information on the form, including payment amounts, is accurate. The FCC Form 159 can be completed electronically, but it must be filed with U.S. Bank by fax.

3. Upfront Payments and Bidding Eligibility

118. The Commission has delegated to the Bureau the authority and discretion to determine appropriate upfront payments for each auction. An upfront payment is a refundable deposit made by each bidder to establish its eligibility to bid on licenses. Upfront payments help deter frivolous or insincere bidding, and provide the Commission with a source of funds in the event that the bidder incurs liability during the auction.

119. Applicants that are former defaulters must make upfront payments that are fifty percent greater than non-former defaulters. For purposes of this calculation, the ''applicant'' includes the applicant itself, its affiliates, its controlling interests, and affiliates of its controlling interests, as defined by 47 CFR 1.2110.

120. An applicant must make an upfront payment sufficient to obtain bidding eligibility for the licenses on which it will bid. The Bureau proposed in the *Auction 97 Comment Public Notice* that the amount of the upfront payment would determine a bidder's initial bidding eligibility, i.e., the maximum number of bidding units on which a bidder may place bids. Under the Bureau's proposal, in order to bid on a particular license, a qualified bidder must have selected the license on its FCC Form 175 and must have a current eligibility level that meets or exceeds the number of bidding units assigned to that license. At a minimum, therefore, an applicant's total upfront payment must be enough to establish eligibility to bid on at least one of the licenses selected on its FCC Form 175 for Auction 97, or else the applicant will not be eligible to participate in the auction. An applicant does not have to make an upfront payment to cover all licenses the applicant selected on its FCC Form 175, but only enough to cover the maximum number of bidding units that are associated with licenses on which it wishes to place bids and hold provisionally winning bids in any given round. The total upfront payment does

not affect the total dollar amount the bidder may bid on any given license.

121. In the *Auction 97 Comment Public Notice,* the Bureau proposed to make the upfront payments equal to approximately one-half of the minimum opening bids. The Bureau further proposed that each license be assigned a specific number of bidding units, equal to one bidding unit per dollar of the upfront payment listed for the license. The number of bidding units for each license will remain constant throughout the auction. The Bureau did not receive any comments on its proposals for calculating upfront payments or assigning bidding units to each license, and thus adopts upfront payments that are approximately one-half of the minimum opening bids. The Bureau notes that, because the minimum opening bids the Bureau adopts in the *Auction 97 Procedures Public Notice* differ from those proposed, the number of bidding units and the upfront payment amount associated with each license are different than those that were proposed in the *Auction 97 Comment Public Notice.* The complete list of licenses for Auction 97 and the specific number of bidding units and associated upfront payment for each license are set forth in Attachment A _to the *Auction 97 Procedures Public Notice*.

122. In calculating its upfront payment amount, an applicant should determine the maximum number of bidding units on which it may wish to be active (bid on or hold provisionally winning bids on) in any single round, and submit an upfront payment amount covering that number of bidding units. In order to make this calculation, an applicant should add together the bidding units for all licenses on which it seeks to be active in any given round. Each applicant should check its calculations carefully, as there is no provision for increasing a bidder's eligibility after the upfront payment deadline.

123. If a bidder wishes to bid on License A (with 30,000 bidding units) and License B (with 28,000 bidding units) in a round, it must have selected both of these licenses on its FCC Form 175 and purchased at least 58,000 bidding units (30,000 + 28,000) of bidding eligibility. If a bidder only wishes to bid on one of these licenses, purchasing 30,000 bidding units would allow the bidder to bid on either license, but not both at the same time. If the bidder purchased only 28,000 bidding units, it would have enough eligibility to bid on License B but could not bid on License A.

124. If an applicant is a former defaulter, it must calculate its upfront payment for all of its identified licenses by multiplying the number of bidding units on which it wishes to be active by 1.5. In order to calculate the number of bidding units to assign to former defaulters, the Commission will divide the upfront payment received by 1.5 and round the result up to the nearest bidding unit.

E. Applicant's Wire Transfer Information for Purposes of Refunds of Upfront Payments

125. To ensure that refunds of upfront payments are processed in an expeditious manner, the Commission is requesting that all pertinent information be supplied. Applicants can provide the information electronically during the initial short-form application filing window after the form has been submitted. (Applicants are reminded that information submitted as part of an FCC Form 175 will be available to the public. For that reason, wire transfer information should not be included in an FCC Form 175. Wire transfer instructions can also be faxed to the Commission using the instructions provided in the *Auction 97 Procedures Public Notice.*

F. Auction Registration

126. Approximately ten days before the auction, the Bureau will issue a public notice announcing all qualified bidders for the auction. Qualified bidders are those applicants with submitted short-form applications that are deemed timely-filed, accurate, and complete, provided that such applicants have timely submitted an upfront payment that is sufficient to qualify them to bid.

127. All qualified bidders are automatically registered for the auction. Registration materials will be distributed prior to the auction by overnight mail. The mailing will be sent only to the contact person at the contact address listed in the FCC Form 175 and will include the SecurID® tokens that will be required to place bids, the ''Integrated Spectrum Auction System (ISAS) Bidder's Guide,'' and the Auction Bidder Line phone number.

128. Qualified bidders that do not receive this registration mailing will not be able to submit bids. Therefore, if this mailing is not received by noon on Thursday, November 6, 2014, call the Auctions Hotline at (717) 338–2868. Receipt of this registration mailing is critical to participating in the auction, and each applicant is responsible for ensuring it has received all of the registration material.

129. In the event that SecurID® tokens are lost or damaged, only a person who has been designated as an authorized bidder, the contact person, or the certifying official on the applicant's short-form application may request replacements. To request replacement of these items, call Technical Support at (877) 480–3201, option nine; (202) 414–1250; or (202) 414–1255 (TTY).

G. Remote Electronic Bidding

130. The Commission will conduct this auction over the Internet, and telephonic bidding will be available as well. Only qualified bidders are permitted to bid. Each applicant should indicate its bidding preference—electronic or telephonic—on its FCC Form 175. In either case, each authorized bidder must have its own SecurID® token, which the Commission will provide at no charge. Each applicant with one authorized bidder will be issued two SecurID® tokens, while applicants with two or three authorized bidders will be issued three tokens. For security purposes, the SecurID® tokens, the telephonic bidding telephone number, and the ''Integrated Spectrum Auction System (ISAS) Bidder's Guide'' are only mailed to the contact person at the contact address listed on the FCC Form 175. Each SecurID® token is tailored to a specific auction. SecurID® tokens issued for other auctions or obtained from a source other than the FCC will not work for Auction 97.

131. Please note that the SecurID® tokens can be recycled, and the Bureau encourages bidders to return the tokens to the FCC. Pre-addressed envelopes will be provided to return the tokens once bidding has closed.

H. Mock Auction—November 10, 2014

132. All qualified bidders will be eligible to participate in a mock auction on Monday, November 10, 2014. The mock auction will enable bidders to become familiar with the FCC Auction System prior to the auction. The Bureau strongly recommends that all bidders participate in the mock auction. Details will be announced by public notice.

133. DISH requests that the Bureau conduct at least one, but preferably two, mock auctions at least one week before the auction begins, and that the mock auction(s) offer the same number of licenses as the auction itself to match the actual auction's scenarios as closely as possible. In keeping with the Bureau's practice in most auctions, it will hold a mock auction shortly before the start of Auction 97 that will offer a sampling of licenses available in the auction. Based on the Bureau's

experience, this approach provides adequate practice and avoids the need to lengthen the time period between the short-form application deadline and the start of bidding.

IV. Auction

134. The first round of bidding for Auction 97 will begin on Thursday, November 13, 2014. The initial bidding schedule will be announced in a public notice listing the qualified bidders, which is released approximately 10 days before the start of the auction.

A. Auction Structure

1. Simultaneous Multiple Round Auction

135. In the *Auction 97 Comment Public Notice,* the Bureau proposed to auction all licenses in Auction 97 in a single auction using a standard simultaneous multiple-round (SMR) auction format. This format offers every license for bid at the same time and consists of successive bidding rounds in which eligible bidders may place bids on individual licenses. A bidder may bid on, and potentially win, any number of licenses.

136. With one exception, all commenters that discussed this issue support using a standard SMR auction format without any form of package bidding. AT&T notes that this format has been used successfully for two decades and that the wireless industry is extremely familiar with it. AT&T maintains that using this design for Auction 97 will promote a competitive and fair auction where both large and small bidders are familiar with the format and can make informed choices in an efficient manner. Verizon Wireless supports the use of package bidding in Auction 97, and proposes allowing applicants to bid on a nationwide package of licenses in the H, I, and J Blocks. Verizon Wireless maintains that package bidding will increase participation and bidding competition because it allows bidders to bid on both the value of the individual EA licenses and the value of obtaining spectrum nationwide over a consistent set of frequencies. Verizon Wireless also claims that the risk of failing to acquire all licenses in a business plan (the ''exposure problem'') may inhibit participation because, for some bidders, the potential for acquisition of all desired licenses is needed to support individual license bid amounts. However, US Cellular asserts that Verizon Wireless has previously made clear that the availability of larger license areas, such as the EA-based licenses being offered in Auction 97, would significantly mitigate the ''exposure risks'' it would face if it could not bid on packages of smaller license areas.

137. The Bureau concludes, based on the record and in light of its experience with previous spectrum auctions, including auctions of Advanced Wireless Services (AWS) licenses, that a standard SMR format will provide bidders with a simple and efficient means of bidding on single or multiple licenses and will offer adequate opportunity for bidders in Auction 97 to aggregate licenses in order to obtain the level of coverage they desire consistent with their business plans. The Bureau therefore adopts a standard SMR auction format for Auction 97. Accordingly, bids will be accepted on all licenses in each round of the auction until bidding stops on every license unless otherwise announced.

2. Single Auction With a Single Set of Procedures and Requirements for the Unpaired and Paired Bands

138. A number of commenters ask (to varying degrees) that the Bureau recognize the differences between the unpaired and paired bands when adopting procedures and requirements for Auction 97 by establishing separate bidding eligibility, activity waivers, and stopping rules for the bands. They submit that it is not likely that licenses in the bands could be used as close substitutes because they have different technical characteristics and likely uses, and that combined procedures could enable bidders to use bidding strategies designed to hurt smaller competitors and new entrants, which could deter competition. These commenters advocate establishing separate upfront payment requirements and bidding eligibility for the unpaired and paired bands to prevent a bidder from gaming eligibility and activity requirements by ''parking'' bidding eligibility on licenses in one band to lock competitors out of that spectrum or distract from its real interests. They argue that such strategic parking enables larger competitors to drive up the cost of spectrum they have no real interest in winning, and could cause smaller competitors or new entrants to drop out of the auction early, thereby potentially depressing auction revenues. They maintain that separate eligibility and activity requirements will avoid such results.

139. AT&T and Verizon Wireless support a single auction with a single set of procedures. Verizon Wireless submits that separate auctions would significantly increase auction complexity, limit applicants' bidding flexibility, inhibit competition for the 1695–1710 MHz band, and decrease auction revenues. AT&T argues that commenters' arguments in support of adopting separate procedures and requirements are premised on the false assumptions that the different technical characteristics of the bands warrant separate auction treatment, and that employing common auction procedures for both bands will encourage parking. Both AT&T and Verizon Wireless maintain that other bidders may view the bands as substitutable or complementary and, if so, public interest objectives are best promoted by allowing the market to reflect substitutability through a single set of auction procedures. They also contend that commenters' concerns about parking are misplaced, because an applicant bidding solely on the 1695–1710 MHz band to preserve eligibility will quickly move its bids as soon as the reserve is met, and thus eligibility ''parkers'' will not drive up the price any higher than otherwise required to meet the reserve.

140. Auction 97 will offer paired and unpaired licenses in a single auction subject to one set of procedures and requirements. Particularly where, as here, interested parties are divided on whether licenses being offered may be characterized as substitutes, such information may best be discovered through a competitive bidding process. Offering both the paired and unpaired bands in the same auction will allow market forces to determine the degree to which market participants view the AWS–3 spectrum blocks as substitutable. The Bureau's approach is grounded in its experience with past auctions where the degree to which licenses may be characterized as substitutable or complementary differs depending upon the perspective of each auction participant. Providing for two different sets of bidding eligibility, activity waivers, and stopping rules would disadvantage bidders interested in both paired and unpaired blocks by forcing them to manage two separate pools of eligibility, which would reduce their ability to pursue backup strategies as prices rise. Whether in one auction or two simultaneous auctions, requiring bidders interested in both blocks to deal with separate sets of bidding actions would invite confusion and could lead to mistakes in bidding. Elsewhere in the *Auction 97 Procedures Public Notice,* the Bureau describes procedures that are intended to ameliorate the parking concerns raised by commenters. Accordingly, the Bureau will conduct Auction 97 under a single set of

procedures and requirements covering both the unpaired and paired bands.

3. Limited Information Disclosure Procedures: Information Available to Bidders Before and During the Auction

141. Consistent with its practice in several prior wireless spectrum auctions, the Bureau proposed in the *Auction 97 Comment Public Notice* to withhold, until after the close of bidding, public release of (1) bidders' license selections on their short-form applications (FCC Form 175), (2) the amounts of bidders' upfront payments and bidding eligibility, and (3) information that may reveal the identities of bidders placing bids and taking other bidding-related actions. The Bureau sought comment on the proposal to implement limited information disclosure procedures and on any alternatives for Auction 97.

142. The Bureau received several comments on its proposal to employ limited information disclosure procedures for Auction 97, both in support and in opposition. The limited information disclosure procedures used in past auctions have helped safeguard against potential anticompetitive behavior such as retaliatory bidding and collusion, and after carefully considering the record on this issue, the Bureau finds nothing that persuades it to depart from its now-established practice of implementing these procedures in wireless spectrum auctions. The Bureau disagrees with the assertions of commenters that argue that limited information disclosure procedures are unnecessary or harmful to smaller bidders, and concludes that the competitive benefits associated with limiting information disclosure support adoption of such procedures and outweigh the potential benefits of full disclosure. Accordingly, the Bureau adopts the limited information disclosure procedures proposed in the *Auction 97 Comment Public Notice.* Thus, after the conclusion of each round, the Bureau will disclose all relevant information about the bids placed and/or withdrawn except the identities of the bidders performing the actions and the net amounts of the bids placed or withdrawn. As in past auctions conducted with limited information procedures, the Bureau will indicate, for each license, the minimum acceptable bid amount for the next round and whether the license has a provisionally winning bid. After each round, the Bureau will also release, for each license, the number of bidders that placed a bid on the license and the amounts of those bids. Furthermore, the Bureau will indicate whether any proactive waivers were submitted in each round, and the Bureau will release the stage transition percentage — the percentages of licenses (as measured in bidding units) on which there were new bids — for the round. In addition, bidders can log in to the FCC Auction System to see, after each round, whether their own bids are provisionally winning. The Bureau will provide descriptions and/or samples of publicly-available and bidder-specific (non-public) results files prior to the start of the auction.

143. The Bureau, however, retains the discretion not to use limited information procedures if it, after examining the level of potential competition based on the short-form applications filed for Auction 97, determines that the circumstances indicate that limited information procedures would not be an effective tool for deterring anti-competitive behavior. For example, if only two applicants become qualified to participate in the bidding, limited information procedures would be ineffective in preventing bidders from knowing the identity of the competing bidder and, therefore, limited information procedures would not serve to deter attempts at signaling and retaliatory bidding behavior.

144. *Other Issues.* Information disclosure procedures established for this auction will not interfere with the administration of, or compliance with, the Commission's prohibition of certain communications. 47 CFR 1.2105(c)(1) provides that, after the short-form application filing deadline, all applicants for licenses in any of the same or overlapping geographic license areas are prohibited from disclosing to each other in any manner the substance of bids or bidding strategies until after the down payment deadline, subject to specified exceptions.

145. In Auction 97, the Commission will not disclose information regarding license selection or the amounts of bidders' upfront payments and bidding eligibility. The Commission will disclose the other portions of applicants' short-form applications through its online database, and certain application-based information through public notices.

146. To assist applicants in identifying other parties subject to 47 CFR 1.2105(c), the Bureau will notify separately each applicant in Auction 97 whether applicants with short-form applications to participate in pending auctions, including but not limited to Auction 97, have applied for licenses in any of the same or overlapping geographic areas as that applicant. Specifically, after the Bureau conducts its initial review of applications to participate in Auction 97, it will send to each applicant in Auction 97 a letter that lists the other applicants that have pending short-form applications for licenses in any of the same or overlapping geographic areas. The list will identify the other applicants by name but will not list their license selections. As in past auctions, additional information regarding other applicants that is needed to comply with 47 CFR 1.2105(c)—such as the identities of other applicants' controlling interests and entities with a greater than ten percent ownership interest—will be available through the publicly-accessible online short-form application database.

147. When completing short-form applications, applicants should avoid any statements or disclosures that may violate the Commission's prohibition of certain communications, pursuant to 47 CFR 1.2105(c), particularly in light of the Commission's procedures regarding the availability of certain information in Auction 97. While applicants' license selections will not be disclosed until after Auction 97 closes, the Commission will disclose other portions of short-form applications through its online database and public notices. Accordingly, applicants should avoid including any information in their short-form applications that might convey information regarding license selections. For example, applicants should avoid using applicant names that refer to licenses being offered, referring to certain licenses or markets in describing bidding agreements, or including any information in attachments that may otherwise disclose applicants' license selections.

148. If an applicant is found to have violated the Commission's rules or the antitrust laws in connection with its participation in the competitive bidding process, the applicant may be subject to various sanctions, including forfeiture of its upfront payment, down payment, or full bid amount and prohibition from participating in future auctions.

149. The Bureau hereby warns applicants that the direct or indirect communication to other applicants or the public disclosure of non-public information (e.g., bid withdrawals, proactive waivers submitted, reductions in eligibility) could violate the Commission's limited information disclosure procedures and 47 CFR 1.2105(c). To the extent an applicant believes that such a disclosure is required by law or regulation, including regulations issued by the SEC, the Bureau strongly urges that the applicant

consult with the Commission staff in the Auctions and Spectrum Access Division before making such disclosure.

4. Eligibility and Activity Rules

150. The Bureau will use upfront payments to determine initial (maximum) eligibility (as measured in bidding units) for Auction 97. The amount of the upfront payment submitted by a bidder determines initial bidding eligibility, the maximum number of bidding units on which a bidder may be active. Each license is assigned a specific number of bidding units as listed in Attachment A to the *Auction 97 Procedures Public Notice.* Bidding units assigned to each license do not change as prices change during the auction. Upfront payments are not attributed to specific licenses. Rather, a bidder may place bids on any of the licenses selected on its FCC Form 175 as long as the total number of bidding units associated with those licenses does not exceed its current eligibility. Eligibility cannot be increased during the auction; it can only remain the same or decrease. Thus, in calculating its upfront payment amount, an applicant must determine the maximum number of bidding units it may wish to bid on or hold provisionally winning bids on in any single round, and submit an upfront payment amount covering that total number of bidding units. At a minimum, an applicant's upfront payment must cover the bidding units for at least one of the licenses it selected on its FCC Form 175. The total upfront payment does not affect the total dollar amount a bidder may bid on any given license.

151. In order to ensure that an auction closes within a reasonable period of time, an activity rule requires bidders to bid actively throughout the auction, rather than wait until late in the auction before participating. Bidders are required to be active on a specific percentage of their current bidding eligibility during each round of the auction. A bidder's activity level in a round is the sum of the bidding units associated with licenses covered by the bidder's new bids in the round and its provisionally winning bids from the previous round. If a bidder removes bids in the current round or withdraws provisionally winning bids, those bids no longer count towards the bidder's activity.

152. The minimum required activity is expressed as a percentage of the bidder's current eligibility, and increases by stage as the auction progresses. Because these auction stage and stage transition procedures have proven successful in maintaining the pace of previous auctions, the Bureau adopts them for Auction 97. Failure to maintain the requisite activity level will result in the use of an activity rule waiver, if any remain, or a reduction in the bidder's eligibility, possibly curtailing or eliminating the bidder's ability to place additional bids in the auction.

5. Auction Stages

153. In the *Auction 97 Comment Public Notice,* the Bureau proposed to conduct the auction in two stages and employ an activity rule. Under the Bureau's proposal, a bidder desiring to maintain its current bidding eligibility would be required to be active on licenses representing at least 80 percent of its current bidding eligibility during each round of Stage One, and at least 95 percent of its current bidding eligibility in Stage Two. US Cellular supports the Bureau's proposal to divide the auction into two stages, and opposes adopting a third stage with a 98 percent activity requirement. Aloha Partners asks the Bureau to add a third stage with a 100 percent activity requirement and would require that minimum acceptable bids be 20 percent higher than provisionally winning bids, and recommends that this third stage be implemented when the number of new provisionally winning bids falls below ten bids.

154. The Bureau sees no need to establish, at this time, a third stage with a 100 percent eligibility requirement as requested by Aloha Partners. Based on its past experience, the Bureau believes that two stages with 80 percent and 95 percent activity requirements should facilitate the auction progressing at a reasonable pace. In some of the Bureau's earlier auctions, it established three stages using 80 percent, 90 percent, and 98 percent activity requirements. In many of these auctions, however, implementing Stage Two had little effect in terms of increasing bidding activity, and Stage Three was implemented shortly thereafter. Based on this experience, the Bureau has generally moved away from three-stage auctions in favor of two-stage auctions. Moreover, a 95 percent threshold allows bidders slightly more flexibility than a higher requirement would in fulfilling their activity requirements during the final stage of the auction. Accordingly, the Bureau declines to establish a third stage with a 100 percent activity threshold at this time. The Bureau notes that it has the discretion to further alter the activity requirements (by, for example, establishing a 98 or 100 percent threshold) before and/or during the auction as circumstances warrant. The Bureau also has other mechanisms by which to influence the speed of the auction if it determines that such steps are necessary. Therefore, the Bureau will conduct the auction in two stages as follows:

155. Stage One: During the first stage of the auction, a bidder desiring to maintain its current bidding eligibility will be required to be active on licenses representing at least 80 percent of its current bidding eligibility in each bidding round. Failure to maintain the required activity level will result in the use of an activity rule waiver or, if the bidder has no activity rule waivers remaining, a reduction in the bidder's bidding eligibility in the next round. During Stage One, reduced eligibility for the next round will be calculated by multiplying the bidder's current round activity (the sum of bidding units of the bidder's provisionally winning bids and bids during the current round) by five-fourths (5/4).

156. Stage Two: During the second stage of the auction, a bidder desiring to maintain its current bidding eligibility is required to be active on 95 percent of its current bidding eligibility. Failure to maintain the required activity level will result in the use of an activity rule waiver or, if the bidder has no activity rule waivers remaining, a reduction in the bidder's bidding eligibility in the next round. During Stage Two, reduced eligibility for the next round will be calculated by multiplying the bidder's current round activity (the sum of bidding units of the bidder's provisionally winning bids and bids during the current round) by twenty-nineteenths (20/19).

157. CAUTION: Since activity requirements increase in Stage Two, bidders must carefully check their activity during the first round following a stage transition to ensure that they are meeting the increased activity requirement. This is especially critical for bidders that have provisionally winning bids and do not plan to submit new bids. In past auctions, some bidders have inadvertently lost bidding eligibility or used an activity rule waiver because they did not re-verify their activity status at stage transitions. Bidders may check their activity against the required activity level by logging into the FCC Auction System.

158. When the Bureau moves the auction from Stage One to Stage Two, it will first alert bidders by announcement in the bidding system. The Bureau has the discretion to further alter the activity requirements before and/or during the auction as circumstances warrant.

6. Stage Transitions

159. In the *Auction 97 Comment Public Notice,* the Bureau proposed that it would advance the auction to the next stage (i.e., from Stage One to Stage Two) after considering a variety of measures of auction activity, including, but not limited to, the percentages of licenses (as measured in bidding units) on which there are new bids, the number of new bids, and the increase in revenue. The Bureau further proposed that it would retain the discretion to change the activity requirements during the auction. For example, the Bureau could decide not to transition to Stage Two if it believes the auction is progressing satisfactorily under the Stage One activity requirement, or to transition to Stage Two with an activity requirement that is higher or lower than 95 percent. The Bureau proposed to alert bidders of stage advancements by announcement during the auction. The Bureau received no comments on this issue.

160. The Bureau adopts its proposal for stage transitions. Thus, the auction will start in Stage One. The Bureau will regulate the pace of the auction by announcement. The Bureau retains the discretion to transition the auction to Stage Two, to add an additional stage with a higher activity requirement, not to transition to Stage Two, and to transition to Stage Two with an activity requirement that is higher or lower than 95 percent. This determination will be based on a variety of measures of auction activity, including, but not limited to, the number of new bids and the percentages of licenses (as measured in bidding units) on which there are new bids.

7. Activity Rule Waivers

161. The Bureau proposed in the *Auction 97 Comment Public Notice* that each bidder in the auction be provided with three activity rule waivers. The Bureau received no comments on this issue. Therefore, the Bureau adopts its proposal to provide bidders with three activity rule waivers. Bidders may use an activity rule waiver in any round during the course of the auction. Use of an activity rule waiver preserves the bidder's eligibility despite its activity in the current round being below the required minimum activity level. An activity rule waiver applies to an entire round of bidding and not to a particular license. Waivers can be either proactive or automatic and are principally a mechanism for auction participants to avoid the loss of bidding eligibility in the event that exigent circumstances prevent them from placing a bid in a particular round.

162. The FCC Auction System assumes that a bidder with insufficient activity would prefer to apply an activity rule waiver (if available) rather than lose bidding eligibility. Therefore, the system will automatically apply a waiver at the end of any bidding round in which a bidder's activity level is below the minimum required unless (1) the bidder has no activity rule waivers remaining or (2) the bidder overrides the automatic application of a waiver by reducing eligibility. If no waivers remain and the activity requirement is not satisfied, the FCC Auction System will permanently reduce the bidder's eligibility, possibly curtailing or eliminating the ability to place additional bids in the auction.

163. A bidder with insufficient activity may wish to reduce its bidding eligibility rather than use an activity rule waiver. If so, the bidder must affirmatively override the automatic waiver mechanism during the bidding round by using the ''reduce eligibility'' function in the FCC Auction System. In this case, the bidder's eligibility is permanently reduced to bring it into compliance with the activity rule. Reducing eligibility is an irreversible action; once eligibility has been reduced, a bidder will not be permitted to regain its lost bidding eligibility, even if the round has not yet closed.

164. Finally, a bidder may apply an activity rule waiver proactively as a means to keep the auction open without placing a bid. If a proactive waiver is applied (using the ''apply waiver'' function in the FCC Auction System) during a bidding round in which no bids are placed or withdrawn, the auction will remain open and the bidder's eligibility will be preserved. However, an automatic waiver applied by the FCC Auction System in a round in which there are no new bids, withdrawals, or proactive waivers will not keep the auction open. A bidder cannot submit a proactive waiver after bidding in a round, and applying a proactive waiver will preclude it from placing any bids in that round. Applying a waiver is irreversible: Once a bidder submits a proactive waiver, the bidder cannot unsubmit the waiver even if the round has not yet ended.

8. Auction Stopping Rules

165. In the *Auction 97 Comment Public Notice,* the Bureau proposed to employ a simultaneous stopping rule under its SMR proposal. Under this rule, all licenses remain available for bidding until bidding stops simultaneously on every license. More specifically, bidding will close on all licenses after the first round in which no bidder submits any new bids, applies a proactive waiver, or withdraws any provisionally winning bids. Thus, under the Bureau's SMR proposal, unless it announce alternative stopping procedures, the simultaneous stopping rule will be used in this auction, and bidding will remain open on all licenses until bidding stops on every license.

166. The Bureau also proposed that it retain discretion to exercise and of the following alternative versions of the simultaneous stopping rule for Auction 97: (1) The auction would close for all licenses after the first round in which no bidder applies a waiver, withdraws a provisionally winning bid, or places any new bids on a license for which it is not the provisionally winning bidder. Thus, absent any other bidding activity, a bidder placing a new bid on a license for which it is the provisionally winning bidder would not keep the auction open under this modified stopping rule; (2) the auction would close for all licenses after the first round in which no bidder applies a waiver, withdraws a provisionally winning bid, or places any new bids on a license that is not FCC-held; thus, absent any other bidding activity, a bidder placing a new bid on a license that does not already have a provisionally winning bid (an FCC-held license) would not keep the auction open under this modified stopping rule; (3) the auction would close using a modified version of the simultaneous stopping rule that combines Option (1) and Option (2); (4) the auction would end after a specified number of additional rounds (special stopping rule); if the Bureau invokes this special stopping rule, it will accept bids in the specified final round(s), after which the auction will close; or (5) the auction would remain open even if no bidder places any new bids, applies a waiver, or withdraws any provisionally winning bids; in this event, the effect will be the same as if a bidder had applied a waiver, and the activity rule will apply as usual, and a bidder with insufficient activity will either lose bidding eligibility or use a waiver.

167. The Bureau proposed to exercise alternative versions of the simultaneous stopping rule only in certain circumstances, for example, where the auction is proceeding unusually slowly or quickly, there is minimal overall bidding activity, or it appears likely that the auction will not close within a reasonable period of time or will close prematurely (e.g., before bidder have had an adequate opportunity to satisfy any applicable reserve prices). The Bureau noted that before exercising these options, the Bureaus is likely to attempt to change the pace of the

auction by, for example, changing the number of bidding rounds per day and/or the minimum acceptable bids. The Bureau also proposed to retain the discretion to exercise any of these options with or without prior announcement during the auction.

168. As part of their general request that the Bureau adopt separate procedures and requirements for the paired and unpaired bands, several parties ask the Bureau to apply its stopping rules separately to the paired and unpaired bands. T-Mobile suggests the Bureau apply the stopping rules based on activity within a particular band rather than the activity across all licenses. Under T-Mobile's proposal, if bidding stops on one of the bands, the auction for that band would close. T-Mobile submits that this will add certainty to the auction process and avoid delaying the close of the auction any longer than necessary, and claims that leaving the entire auction open even when interest in one band diminishes may prompt insincere bidding by allowing bidders interested in one band to park bids in another merely to preserve eligibility, thereby artificially prolonging the auction. DISH and New America Foundation/Public Knowledge advocate separate stopping rules for the unpaired and paired bands, arguing that combined procedures for bands that they consider to be non-substitutable could enable bidders to employ bidding strategies designed to hurt smaller competitors and new entrants, which could deter competition and suppress revenues. Like T-Mobile, DISH and New America Foundation/Public Knowledge are concerned that applying the stopping rules based on activity across all licenses could facilitate strategic parking and permit bidders to pursue the very ''wait and see'' approach the eligibility and activity rules are designed to prevent. CCA echoes the sentiments of T-Mobile, DISH, and New America Foundation/Public Knowledge regarding parking and argues that such behavior could be prevented by adopting separate stopping rules for the bands.

169. The Bureau adopts procedures to address these commenters' concerns that bidding activity could stop on one band well before it stops on the other. The Bureau generally adopts its proposed stopping rules but does so on a per-band basis described as follows. After no more than five consecutive rounds in which no bids have been placed or withdrawn for licenses in one of the two bands (i.e., the unpaired 1695–1710 MHz band and the paired 1755–1780/2155–280 MHz band), no bidder has placed a proactive waiver, and the associated reserve price has been met, the Bureau will close the bidding for that band. Accordingly, bidders will no longer be able to place new bids for licenses in the band, nor will they be able to withdraw any provisional winning bids for licenses in the band. The Bureau's decision to end the auction for a given band in this manner for Auction 97 does not pre-judge how we may approach stopping rules in any future auctions, including those in which the same or similar facts and circumstances exist. The Bureau reserves the right to close bidding for a band after fewer than five consecutive rounds without bidding activity. The Bureau will notify bidders with an announcement in the FCC Auction System before bidding closes for one of the bands.

170. Aloha Partners agrees that there should be a mechanism to end the auction when the number of bids decreases to low levels, but expresses concern that the proposed special stopping rule could be misused by a bidder that has remaining eligibility in the last round by bidding on licenses that it may not have shown an interest in previously. As an alternative, Aloha Partners recommends the Bureau instead add a third stage, to be implemented when the number of new winning bids falls below ten bids, that would require a bidder to have activity covering 100 percent of its eligibility and would require minimum acceptable bids be 20 percent higher than provisionally winning bids. The Bureau declines to adopt Aloha Partners' request for a third stage with a 100 percent eligibility requirement in lieu of its special stopping rule.

171. Aside from the per-band departure from its past procedure, the Bureau retains the discretion to employ the alternative versions of the stopping rule, with or without prior announcement during the auction. The Bureau will not, however, employ the first alternative (Option 1) for a band if the reserve price for that band has not been met. Bidders will continue to have the opportunity to place bids in a given band at least until the reserve price for that band is met.

9. Auction Delay, Suspension, or Cancellation

172. In the *Auction 97 Comment Public Notice,* the Bureau proposed that, by public notice or by announcement during the auction, it may delay, suspend, or cancel the auction in the event of natural disaster, technical obstacle, administrative or weather necessity, evidence of an auction security breach or unlawful bidding activity, or for any other reason that affects the fair and efficient conduct of competitive bidding. The Bureau received no comment on this issue.

173. Because this approach has proven effective in resolving exigent circumstances in previous auctions, the Bureau adopts these proposals regarding auction delay, suspension, or cancellation. By public notice or by announcement during the auction, the Bureau may delay, suspend, or cancel the auction in the event of natural disaster, technical obstacle, administrative or weather necessity, evidence of an auction security breach or unlawful bidding activity, or for any other reason that affects the fair and efficient conduct of competitive bidding. In such cases, the Bureau, in its sole discretion, may elect to resume the auction starting from the beginning of the current round or from some previous round, or cancel the auction in its entirety. Network interruption may cause the Bureau to delay or suspend the auction. The Bureau emphasize that it will exercise of this authority solely at its discretion, and not as a substitute for situations in which bidders may wish to apply their activity rule waivers.

B. Bidding Procedures

1. Round Structure

174. The initial schedule of bidding rounds will be announced in the public notice listing the qualified bidders, which is released approximately ten days before the start of the auction. Each bidding round is followed by the release of round results. Details regarding formats and locations of round results will also be included in the qualified bidders public notice. Multiple bidding rounds may be conducted each day.

175. The Bureau has the discretion to change the bidding schedule in order to foster an auction pace that reasonably balances speed with the bidders' needs to study round results and adjust their bidding strategies. The Bureau may change the amount of time for the bidding rounds, the amount of time between rounds, or the number of rounds per day, depending upon bidding activity and other factors.

2. Reserve Price and Minimum Opening Bids

a. Reserve Price

176. The Commission is statutorily obliged to consider and balance a variety of public interests and objectives when establishing service rules and licensing procedures with respect to the public spectrum resource. These objectives include promoting recovery for the public a portion of the value of

that resource. Certain of the frequencies in the AWS–3 bands are ''eligible frequencies'' under the CSEA, and the CSEA requires that auction proceeds fund the estimated relocation or sharing costs of incumbent federal entities operating on these frequencies. In view of this, the Bureau establishes reserve prices for the AWS–3 licenses offered in Auction 97.

177. The CSEA requires that the total cash proceeds attributable to ''eligible frequencies'' be at least 110 percent of the total estimated relocation or sharing costs provided to the Commission pursuant to the CSEA before the Commission may conclude an auction involving such frequencies. If this condition is not met, the CSEA requires the Commission to cancel the auction. For purposes of determining whether the CSEA's revenue requirement has been met, the Commission has determined that ''total cash proceeds'' means winning bids net of any applicable bidding credit discounts at the end of bidding (e.g., exclusive of any Tribal lands bidding credit).

178. Pursuant to the CSEA, on May 13, 2014, the NTIA notified the Commission that the total estimated relocation or sharing costs for the 1695–1710 MHz band equal $527,069,000, and that the total estimated relocation or sharing costs for the 1755–1780 MHz band equal $4,575,603,000. Accordingly, in the *Auction 97 Comment Public Notice,* the Bureau proposed to establish one aggregate reserve price for the 1695–1710 MHz band and a separate aggregate reserve price for the paired 1755–1780/2155–2180 MHz band.

179. The Bureau proposed to establish an aggregate reserve price of $579,775,900 for the licenses in the 1695–1710 MHz band. This aggregate reserve price is 110 percent of total estimated relocation or sharing costs of $527,069,000 provided by the NTIA for this band and, therefore, the minimum reserve price required by the CSEA. Given that the 1695–1710 MHz band consists entirely of ''eligible frequencies,'' the Bureau propose that the winning bid for each license in this band, net of any applicable bidding credit discounts at the end of bidding (e.g., exclusive of any Tribal lands bidding credit), will be counted toward meeting the reserve price for the band. Thus, the aggregate reserve price will be met if the total winning bids for the licenses in the 1695–1710 MHz band, net of any applicable bidding credit discounts at the end of bidding (e.g., exclusive of any Tribal lands bidding credit), is at least $579,775,900.

180. The 1755–1780 MHz band will be licensed paired with the 2155–2180 MHz band. The lower half of the frequencies in each paired license, i.e., those in the 1755–1780 MHz band, are ''eligible frequencies'' and are thus subject to CSEA requirements. To meet CSEA's requirements, the Bureau proposed to establish an aggregate reserve price of $5,033,163,300 for the 1755–1780 MHz frequencies. This aggregate reserve price is 110 percent of total estimated relocation or sharing costs of $4,575,603,000 for the 1755–1780 MHz band provided by the NTIA and, therefore, the minimum reserve price required by CSEA. Because these frequencies are one half of the frequencies authorized for use by each of the 1755–1780/2155–2180 MHz paired licenses, the Bureau propose that one-half of each winning bid for each of the paired 1755–1780/2155–2180 MHz licenses, net of any applicable bidding credit discounts at the end of bidding, will be counted toward meeting the reserve price. The aggregate reserve price will be met if one half of the total winning bids for the licenses in the 1755–1780/2155–2180 MHz band, net of any applicable bidding credit discounts at the end of bidding (e.g., exclusive of any Tribal lands bidding credit), is at least $5,033,163,300. Therefore, the winning ''net'' bids for the paired 1755–1780/2155–2180 MHz licenses must be at least twice that amount, or $10,066,326,600, in order for the Commission to conclude the auction.

181. C Spire supports the Bureau's proposal to use an aggregate reserve for the AWS–3 spectrum bands. A few commenters asked the Bureau to treat the unpaired and paired bands differently with respect to meeting the reserve prices. T-Mobile argues that there is no reason that the entire auction should be declared invalid if the reserve price is not met for one band and that, consistent with CSEA, only the auction for the particular band that failed to meet the reserve should be cancelled.

182. The Bureau adopts its proposed reserve prices for Auction 97 and its proposals for implementing them. Consistent with the Bureau's past treatment of spectrum bands that are subject to separate reserve prices, and based on its reading of CSEA, the Bureau will treat the unpaired and paired bands separately with respect to meeting their respective reserve prices. Thus, if the reserve price is met or exceeded for a given band, the auction for that band will be deemed to be successful and licenses in that band will be assigned. If the reserve price for the other band is not met, the auction for that band will, as required by CSEA, be cancelled as to only that band.

183. In light of the Bureau's proposal to adopt procedures for limited information disclosure for Auction 97, if information regarding net bid amounts is not provided during the auction, the Bureau proposed in the *Auction 97 Comment Public Notice* to issue an announcement in the FCC Auction System, viewable by bidders and the general public, stating that a reserve price has been met immediately following the first round in which that occurs. The Bureau received no comment this proposal, and therefore adopts it for Auction 97. As the Bureau noted in the *Auction 97 Comment Public Notice,* due to factors such as bid withdrawals and the effect of bidding credits, an announcement that the reserve price has been met following a round of the auction does not guarantee that the reserve price will continue to be met. Accordingly, the Bureau will make a further announcement in the FCC Auction System after any round in which the reserve price status changes.

184. When determining whether a reserve price has been met, the Bureau will use net bid amounts that take into account bidding credits. The Bureau will not count any withdrawn bids toward meeting a reserve price. Thus, the Bureau will count only the current provisionally winning bid on a license when determining whether a reserve price has been met.

b. Minimum Opening Bids

185. In addition to proposing aggregate reserve prices, the Bureau proposed in the *Auction 97 Comment Public Notice* to establish minimum opening bid amounts for each license in Auction 97. The Bureau believes a minimum opening bid amount, which has been used in other auctions, is an effective bidding tool for accelerating the competitive bidding process.

186. In the *Auction 97 Comment Public Notice,* the Bureau proposed to calculate minimum opening bid amounts on a license-by-license basis using a formula based on bandwidth and license area population, similar to its approach in many previous spectrum auctions. The Bureau proposed to use a calculation based on $0.15 per megahertz of bandwidth per population (per MHz-pop) for paired licenses and $0.05 per MHz-pop for unpaired licenses. Additionally, the Bureau proposed, as it did for Auction 96, to adjust minimum opening bid amounts based on past auction results, in order to reflect historical price differences among different geographic areas. The Bureau further proposed a minimum of

$2,500 per license. For the license covering the Gulf of Mexico, the Bureau proposed to set the minimum opening bid at $2,000 per megahertz.

187. Commenters presented a number of perspectives on the Bureau's proposal. Verizon Wireless, CCA, C Spire, and NTCA advocate using $0.05 per MHz-pop to set the minimum opening bids. Verizon Wireless also objects to the Bureau's proposal to vary the calculation of minimum opening bid amounts across license areas. Spectrum Financial Partners recommends a change to the Bureau's proposed method for reflecting historical price differences by excluding the results of Auction 96. AT&T acknowledges the merits of the Bureau's proposal to vary the calculation of minimum opening bid amounts across license areas, but suggests an alternative method. AT&T recognizes the value of adjusting minimum opening bids to account for regional price differences, but contends that making these adjustments on a license-by-license basis perpetuates anomalous bidding patterns from past auctions (which may have involved eligibility parking and inefficient pricing) into Auction 97. For these reasons, AT&T offers refinements that it believes would help prevent both inefficient allocation of bidding units and eligibility parking during the auction. AT&T proposes that the Bureau rank the licenses by population; group them into deciles; sum its proposed minimum opening bid amounts for the licenses in the decile; and then, based on population, redistribute that subtotal among the licenses in the decile. After careful consideration of the record, the Bureau finds AT&T's arguments compelling and adopts AT&T's proposal in a modified form.

188. The Bureau will calculate minimum opening bid amounts as follows. The Bureau continues to use underlying prices of $0.15 per MHz-pop for paired licenses and $0.05 per MHz-pop for unpaired licenses, and the Bureau continues to adjust amounts based on relative price information from previous auctions. The Bureau changes its method of incorporating past price information, however, in several ways. The Bureau will no longer use the relative price information from Auction 96 in its calculations for the EA licenses. The Bureau revises its method of incorporating past price information by using a variation of the decile-based approach suggested by AT&T. Rather than grouping by population decile, the Bureau will group the licenses by historical MHz-pop *price* deciles. For each decile the Bureau uses the *lowest* index price value and apply it to all of the markets in that decile. As proposed in the *Auction 97 Comment Public Notice,* the Bureau will round the results using its standard rounding procedures. Finally, the Bureau adopts a minimum of $1,000 per license, and adopts its proposal to set the minimum opening bids for licenses covering the Gulf of Mexico at $2,000 per megahertz.

189. The Bureau finds that this approach accommodates several of the concerns raised in the record. The use of deciles smooths the opening bid amounts in a way that reduces the impact of price variation from previous auctions. Basing the deciles on a price index (rather than a population index), however, ensures that the Bureau does not exclude significant past price differences between similarly-sized markets in its calculations. The use of the lowest unit price for each decile, rather than the average price, ensures that minimum opening bids for licenses within a decile are not averaged up to the arithmetic mean price of the decile. As a result of these changes, the minimum opening bids the Bureau adopts are over 25 percent less than the ones proposed in the *Auction 97 Comment Public Notice.* The Bureau does not believe that it risks overpricing licenses by basing the minimum opening bid amounts on $0.15 and $0.05 per MHz-pop, especially given the substantial reserve prices adopted for this auction. These minimum opening bid amounts should, as intended, help to accelerate the competitive bidding process. The minimum opening bid amount for each AWS–3 license available in Auction 97, calculated pursuant to the procedures is set forth in Attachment A to the *Auction 97 Procedures Public Notice.*

3. Bid Amounts

190. In the *Auction 97 Comment Public Notice,* the Bureau proposed that in each round, eligible bidders be able to place a bid on a given license using one or more pre-defined bid amounts. Under the proposal, the FCC Auction System interface will list the acceptable bid amounts for each license. The Bureau received no comment on this proposal and therefore adopts it for Auction 97.

a. Minimum Acceptable Bids

191. The first of the acceptable bid amounts is called the minimum acceptable bid amount. The minimum acceptable bid amount for a license will be equal to its minimum opening bid amount until there is a provisionally winning bid on the license. After there is a provisionally winning bid for a license, the minimum acceptable bid amount for that license will be equal to the amount of the provisionally winning bid plus a percentage of that bid amount calculated using the activity-based formula. In general, the percentage will be higher for a license receiving many bids than for a license receiving few bids. In the case of a license for which the provisionally winning bid has been withdrawn, the minimum acceptable bid amount will equal the second highest bid received for the license.

192. The percentage of the provisionally winning bid used to establish the minimum acceptable bid amount (the additional percentage) is calculated based on an activity index at the end of each round. The activity index is a weighted average of (a) the number of distinct bidders placing a bid on the license, and (b) the activity index from the prior round. The additional percentage is determined as one plus the activity index times a minimum percentage amount, with the result not to exceed a given maximum. The additional percentage is then multiplied by the provisionally winning bid amount to obtain the minimum acceptable bid for the next round. The formula and examples are shown in Attachment B to the *Auction 97 Procedures Public Notice.* The Bureau proposed in the *Auction 97 Comment Public Notice* to initially set the weighting factor at 0.5, the minimum percentage at 0.1 (10%), and the maximum percentage at 0.3 (30%). Hence, at these initial settings, the minimum acceptable bid for a license will be between ten percent and thirty percent higher than the provisionally winning bid, depending upon the bidding activity covering the license.

193. All parties that commented on the Bureau's proposal to initially set the maximum acceptable bid percentage at 30 percent advocate lowering the maximum to 20 percent because they are concerned that the proposed maximum of up to 30 percent would accelerate prices too quickly, thereby discouraging bidder participation and/or causing bidders to drop out of the auction. The Bureau recognizes commenters' concerns that very rapid increases in minimum acceptable bids may potentially discourage bidder participation, inhibit price discovery, and create bid approval issues. At the same time, since the Bureau is under a statutory mandate to license the spectrum being offered in Auction 97 by February 2015, it is necessary that the auction move at a reasonably fast pace. Taking commenter concerns into account, the Bureau concludes that an initial maximum acceptable bid percentage of 20 percent will allow the

auction to proceed at a reasonably fast pace while at the same time providing bidders the flexibility to bid up to the full value they assign to licenses. The Bureau therefore adopts an initial maximum acceptable bid percentage of 20 percent for Auction 97. The Bureau will begin the auction with the weighting factor set at 0.5, the minimum percentage at 0.1 (10%), and the maximum percentage at 0.2 (20%). The Bureau reiterates that it has the discretion to modify minimum acceptable bid amounts—by changing the activity-based formula parameters or by imposing or modifying a cap on the dollar amount of bid increments—as the Bureau sees fit during the auction.

b. Additional Bid Amounts

194. Consistent with the Bureau's practice in past wireless spectrum auctions, it proposed in the *Auction 97 Comment Public Notice* to calculate any additional bid amounts using the minimum acceptable bid amount and a bid increment percentage—more specifically, by multiplying the minimum acceptable bid by one plus successively higher multiples of the bid increment percentage. If, for example, the bid increment percentage is five percent, the calculation of the first additional acceptable bid amount is (minimum acceptable bid amount) * (1 + 0.05), rounded or (minimum acceptable bid amount) * 1.05, rounded; the second additional acceptable bid amount equals the minimum acceptable bid amount times one plus two times the bid increment percentage, rounded, or (minimum acceptable bid amount) * 1.10, rounded; etc. The Bureau will round the results using the Commission's standard rounding procedures for auctions. The Bureau proposed in the *Auction 97 Comment Public Notice* initially to set the bid increment percentage at five percent. The Bureau received no comment on this proposal and therefore adopts it for Auction 97.

195. The Bureau also proposed in the *Auction 97 Comment Public Notice* to begin the auction with nine acceptable bid amounts per license (the minimum acceptable bid amount and eight additional bid amounts). The Bureau received no comment on this proposal. The Bureau therefore adopts nine acceptable bid amounts per license, which is consistent with its past practice for most spectrum auctions.

c. Bid Amount Changes

196. The Bureau retains the discretion to change the minimum acceptable bid amounts, the additional bid amounts, the number of acceptable bid amounts, and the parameters of the formulas used to calculate minimum acceptable bid amounts and additional bid amounts if the Bureau determines that circumstances so dictate. Further, the Bureau retains the discretion to do so on a license-by-license basis. The Bureau also retains the discretion to limit (a) the amount by which a minimum acceptable bid for a license may increase compared with the corresponding provisionally winning bid, and (b) the amount by which an additional bid amount may increase compared with the immediately preceding acceptable bid amount. For example, if the Bureau set a $10 million limit on increases in minimum acceptable bid amounts over provisionally winning bids, and the activity-based formula calculates a minimum acceptable bid amount that is $20 million higher than the provisionally winning bid on a license, the minimum acceptable bid amount would instead be capped at $10 million above the provisionally winning bid. The Bureau sought comment in the *Auction 97 Comment Public Notice* on the circumstances under which it should employ such a limit, factors it should consider when determining the dollar amount of the limit, and the tradeoffs in setting such a limit or changing other parameters—such as changing the minimum acceptable bid percentage, the bid increment percentage, or the number of acceptable bid amounts.

197. The Bureau received no comment on this proposal. Therefore, the Bureau will start the auction without a limit on the dollar amount by which minimum acceptable bids and additional bid amounts may increase. The Bureau retains the discretion to change the minimum acceptable bid amounts, the minimum acceptable bid percentage, the bid increment percentage, and the number of acceptable bid amounts if the Bureau determine that circumstances so dictate. Further, the Bureau retains the discretion to do so on a license-by-license basis. If the Bureau exercises this discretion, it will alert bidders by announcement in the FCC Auction System during the auction.

4. Provisionally Winning Bids

198. At the end of each bidding round, a ''provisionally winning bid'' will be determined based on highest bid amount received for each license. A provisionally winning bid will remain the provisionally winning bid until there is a higher bid on the license at the close of a subsequent round. Provisionally winning bids at the end of the auction become the winning bids. Bidders are reminded that provisionally winning bids count toward activity for purposes of the activity rule.

199. In the *Auction 97 Comment Public Notice,* the Bureau proposed to use a random number generator to select a single provisionally winning bid in the event of identical high bid amounts being submitted on a license in a given round (i.e., tied bids). Under this approach, the FCC Auction System will assign a random number to each bid upon submission. The tied bid with the highest random number wins the tiebreaker, and becomes the provisionally winning bid. Bidders, regardless of whether they hold a provisionally winning bid, can submit higher bids in subsequent rounds. However, if the auction were to end with no other bids being placed, the winning bidder would be the one that placed the provisionally winning bid. The Bureau received no comment on its tied bids proposal and therefore adopts it for Auction 97.

5. Bidding

200. All bidding will take place remotely either through the FCC Auction System or by telephonic bidding. There will be no on-site bidding during Auction 97. Please note that telephonic bid assistants are required to use a script when entering bids placed by telephone. Telephonic bidders are therefore reminded to allow sufficient time to bid by placing their calls well in advance of the close of a round. The length of a call to place a telephonic bid may vary; please allow a minimum of ten minutes.

201. A bidder's ability to bid on specific licenses is determined by two factors: (1) the licenses selected on the bidder's FCC Form 175 and (2) the bidder's eligibility. The bid submission screens will allow bidders to submit bids on only those licenses the bidder selected on its FCC Form 175.

202. In order to access the bidding function of the FCC Auction System, bidders must be logged in during the bidding round using the passcode generated by the SecurID® token and a personal identification number (PIN) created by the bidder. Bidders are strongly encouraged to print a ''round summary'' for each round after they have completed all of their activity for that round.

203. In each round, eligible bidders will be able to place bids on a given license in any of up to nine pre-defined bid amounts. For each license, the FCC Auction System will list the acceptable bid amounts in a drop-down box. Bidders use the drop-down box to select

from among the acceptable bid amounts. The FCC Auction System also includes an ''upload'' function that allows text files containing bid information to be uploaded.

204. Until a bid has been placed on a license, the minimum acceptable bid amount for that license will be equal to its minimum opening bid amount. Once there are bids on a license, minimum acceptable bids for the following round will be determined.

205. During a round, an eligible bidder may submit bids for as many licenses as it wishes (providing that it is eligible to bid on the specific license), remove bids placed in the current bidding round, withdraw provisionally winning bids from previous rounds, or permanently reduce eligibility. If a bidder submits multiple bids for the same license in the same round, the system takes the last bid entered as that bidder's bid for the round. Bidding units associated with licenses for which the bidder has removed or withdrawn bids do not count towards current activity.

206. Finally, bidders are cautioned to select their bid amounts carefully because bidders that withdraw a provisionally winning bid from a previous round, even if the bid was mistakenly or erroneously made, are subject to bid withdrawal payments.

6. Bid Removal and Bid Withdrawal

207. In the *Auction 97 Comment Public Notice,* the Bureau proposed bid removal and bid withdrawal procedures. The Bureau sought comment on permitting a bidder to remove a bid before the close of the round in which the bid was placed. With respect to bid withdrawals, the Bureau proposed limiting each bidder to withdrawing provisionally winning bids in no more than two rounds during the auction. The rounds in which a bidder withdraws provisionally winning bids—if it chooses to do so—are at each bidder's discretion.

208. The Bureau received no comment on its proposals. The proposed procedures will provide each bidder with appropriate flexibility during the auction; therefore, the Bureau adopts these proposals for Auction 97.

a. Bid Removal

209. Before the close of a bidding round, a bidder has the option of removing any bids placed in that round. By using the ''remove bids'' function in the FCC Auction System, a bidder may effectively ''undo'' any bid placed within that round. A bidder removing a bid placed in the same round is not subject to withdrawal payments. If a bid is placed on a license during a round, it will count towards the activity for that round; but when that bid is then removed during the same round it was placed, the activity associated with it is also removed, i.e., a bid that is removed does not count toward bidding activity.

b. Bid Withdrawal

210. Once a round closes, a bidder may no longer remove a bid. However, in a later round, a bidder may withdraw provisionally winning bids from previous rounds using the ''withdraw bids'' function in the FCC Auction System. A provisionally winning bidder that withdraws its provisionally winning bid from a previous round during the auction is subject to the bid withdrawal payments specified in 47 CFR 1.2104(g). Once a bid withdrawal is submitted during a round, that withdrawal cannot be unsubmitted even if the round has not yet ended.

211. If a provisionally winning bid is withdrawn, the minimum acceptable bid amount will equal the amount of the second highest bid received for the license, which may be less than, or in the case of tied bids, equal to, the amount of the withdrawn bid. The Commission will serve as a placeholder provisionally winning bidder on the license until a new bid is submitted on that license.

c. Calculation of Bid Withdrawal Payment

212. Generally, the Commission imposes payments on bidders that withdraw provisionally winning bids during the course of an auction. If a bidder withdraws its bid and there is no higher bid in the same or subsequent auction(s), the bidder that withdrew its bid is responsible for the difference between its withdrawn bid and the winning bid in the same or subsequent auction(s). If there are multiple bid withdrawals on a single license and no subsequent higher bid is placed and/or the license is not won in the same auction, the payment for each bid withdrawal will be calculated based on the sequence of bid withdrawals and the amounts withdrawn. No withdrawal payment will be assessed for a withdrawn bid if either the subsequent winning bid or any subsequent intervening withdrawn bid, in either the same or subsequent auction(s), equals or exceeds that withdrawn bid. Thus, a bidder that withdraws a bid will not be responsible for any final withdrawal payment if there is a subsequent higher bid in the same or subsequent auction(s).

213. 47 CFR 1.2104(g)(1) sets forth the payment obligations of a bidder that withdraws a provisionally winning bid on a license during the course of an auction, and provides for the assessment of interim bid withdrawal payments. In the *Auction 97 Comment Public Notice,* the Bureau proposed to establish an interim withdrawal payment of ten percent of the withdrawn bid for Auction 97.

214. The Bureau received no comment on this proposal and therefore adopts it for Auction 97. The Commission will assess an interim withdrawal payment equal to ten percent of the amount of the withdrawn bids. The ten percent interim payment will be applied toward any final bid withdrawal payment that will be assessed after subsequent auction of the license. Assessing an interim bid withdrawal payment ensures that the Commission receives a minimal withdrawal payment pending assessment of any final withdrawal payment. 47 CFR 1.2104(g) provides specific examples showing application of the bid withdrawal payment rule.

7. Round Results

215. Limited information about the results of a round will be made public after the conclusion of the round. Specifically, after a round closes, the Bureau will make available for each license its current provisionally winning bid amount, the minimum acceptable bid amount for the following round, the amounts of all bids placed on the license during the round, and whether the license is FCC-held. The system will also provide an entire license history detailing all activity that has taken place on a license with the ability to sort by round number. The reports will be publicly accessible. Moreover, after the auction closes, the Bureau will make available complete reports of all bids placed during each round of the auction, including bidder identities.

216. DISH proposes several refinements to the Bureau's standard round result information and procedures. Specifically, DISH recommends that the Bureau (1) publish auction system specifications at least four weeks before the start of Auction 97 and consider releasing sample data files; (2) provide an auction application programming interface (API) for several different types of auction statistics and bid actions; (3) provide, after the close of each round, the total current bidder eligibility by bidding unit, the number of bidders that have reduced eligibility, and information about the total number of waivers used in the prior round. Spectrum Financial Partners requests that, in addition to making round result

reports available in TXT and XML formats in the FCC Auction System, the Bureau also make them available on an FTP site (preferably in XLS or CVS format) that can be automatically polled for updates and downloaded and processed more mechanically.

217. The Bureau respectfully declines to adopt any of these proposals. Any modifications to the FCC Auction System or related infrastructure must be considered in the context of priorities, resources, and time for testing prior to the auction. Additionally, some of the information requested by DISH is purposefully not provided as part of the Bureau's limited information procedures.

8. Auction Announcements

218. The Commission will use auction announcements to report necessary information such as schedule changes and stage transitions. All auction announcements will be available by clicking a link in the FCC Auction System. DISH asks that, in addition to posting notices to the FCC Auction System, the Bureau communicate new auction announcements in several ways, to include at least emails and text messages. While communicating new auction announcements in this manner might be convenient for participants, the Bureau declines to do so. Using email and/or text messages would introduce risk by increasing reliance on systems outside of the Commission's control. As with DISH's suggested changes to the Bureau's round results procedures, modifications to the FCC Auction System, related infrastructure, or procedures must also be considered in the context of priorities, resources, and time for testing prior to the auction. The Bureau concludes that providing auction announcements in the FCC Auction System, has been an effective and efficient way to communicate necessary information to auction participants in past auctions, and that this will be the case for Auction 97 as well.

V. Post-Auction Procedures

219. Shortly after bidding has ended, the Commission will issue a public notice declaring the auction closed, identifying the winning bidders, and establishing the deadlines for submitting down payments, final payments, long-form applications, and ownership disclosure information reports.

A. Down Payments

220. The Commission's rules provide that, unless otherwise specified by public notice, within ten business days after release of the auction closing public notice, each winning bidder must submit sufficient funds (in addition to its upfront payment) to bring its total amount of money on deposit with the Commission for Auction 97 to twenty percent of the net amount of its winning bids (gross bids less any applicable small business bidding credit). Since it is currently not known when Auction 97 will end and thus whether post-auction payments will be due in late 2014 or early 2015, several commenters request that the Bureau announce in advance of the auction that down payments will be due in early 2015 to enable potential bidders to make the necessary financial arrangements to ensure their ability to participate in Auction 97. The Bureau recognizes that uncertainties regarding the year in which down payments will be due could affect potential applicants from a capital planning perspective, which could in turn affect participation in the auction. Accordingly, the Bureau exercises its discretion under 47 CFR 1.2107(b) to set the down payment deadline for Auction 97 to be the later of January 7, 2015, or ten business days after release of the auction closing public notice.

B. Final Payments

221. The Commission's rules provide that each winning bidder must submit the balance of the net amount of its winning bids within ten business days after the applicable deadline for submitting down payments. The same parties that ask the Bureau to announce in advance of the auction that down payments will be due in early 2015 request that the Bureau make a similar announcement concerning the due date for final payments. Because the Bureau exercises its discretion to set the down payment deadline in early 2015, it sets the final payment deadline to be the later of January 21, 2015 or ten business days after the applicable deadline for submitting down payments.

C. Long-Form Application (FCC Form 601)

222. The Commission's rules provide that, within ten business days after release of the auction closing notice, winning bidders must electronically submit a properly completed long-form application (FCC Form 601) for the license(s) they won through Auction 97. CCA and US Cellular request that the Bureau clarify that long-form applications will be due in 2015. Given the Spectrum Act's mandate to license the spectrum being offered in Auction 97 by February 2015, the Bureau declines to modify the timing for winning bidders to submit their long-form applications and will require these forms to be filed according to the schedule specified in the Commission's rules.

223. Winning bidders claiming eligibility for a small business bidding credit must demonstrate their eligibility for the bidding credit. Further instructions on these and other filing requirements will be provided to winning bidders in the auction closing public notice.

224. Winning bidders organized as bidding consortia must comply with the long-form application procedures established in the *CSEA/Part 1 Report and Order.* Specifically, each member (or group of members) of a winning consortium seeking separate licenses will be required to file a separate long-form application for its respective license(s). If the license is to be partitioned or disaggregated, the member (or group) filing the long-form application must provide the relevant partitioning or disaggregation agreement in its long-form application. In addition, if two or more consortium members wish to be licensed together, they must first form a legal business entity, and any such entity must meet the applicable designated entity criteria.

D. Ownership Disclosure Information Report (FCC Form 602)

225. Within ten business days after release of the auction closing public notice, each winning bidder must also comply with the ownership reporting requirements in 47 CFR 1.913, 1.919, and 1.2112 by submitting an ownership disclosure information report for wireless telecommunications services (FCC Form 602) with its long-form application.

226. If an applicant already has a complete and accurate FCC Form 602 on file in ULS, it is not necessary to file a new report, but applicants must verify that the information on file with the Commission is complete and accurate. If the applicant does not have an FCC Form 602 on file, or if it is not complete and accurate, the applicant must submit one.

227. When an applicant submits a short-form application, ULS automatically creates an ownership record. This record is not an FCC Form 602, but may be used to pre-fill the FCC Form 602 with the ownership information submitted on the applicant's short-form application. Applicants must review the pre-filled information and confirm that it is complete and accurate as of the filing date of the long-form application before certifying and submitting the FCC Form

602. Further instructions will be provided to winning bidders in the auction closing public notice.

E. Tribal Lands Bidding Credit

228. A winning bidder that intends to use its license(s) to deploy facilities and provide services to federally recognized tribal lands that are unserved by any telecommunications carrier or that have a wireline penetration rate equal to or below 85 percent is eligible to receive a tribal lands bidding credit as set forth in 47 CFR 1.2107 and 1.2110(f). A tribal lands bidding credit is in addition to, and separate from, any other bidding credit for which a winning bidder may qualify.

229. Unlike other bidding credits that are requested prior to the auction, a winning bidder applies for the tribal lands bidding credit after the auction when it files its long-form application (FCC Form 601). When initially filing the long-form application, the winning bidder will be required to advise the Commission whether it intends to seek a tribal lands bidding credit, for each license won in the auction, by checking the designated box(es). After stating its intent to seek a tribal lands bidding credit, the applicant will have 180 days from the close of the long-form application filing window to amend its application to select the specific tribal lands to be served and provide the required tribal government certifications. Licensees receiving a tribal lands bidding credit are subject to performance criteria as set forth in 47 CFR 1.2110(f)(3)(vii).

230. For additional information on the tribal lands bidding credit, including how the amount of the credit is calculated, applicants should review the Commission's rulemaking proceeding regarding tribal lands bidding credits and related public notices. Relevant documents can be viewed on the Commission's Web site by going to *http://wireless.fcc.gov/auctions/* and clicking on the Tribal Lands Credits link.

F. Default and Disqualification

231. Any winning bidder that defaults or is disqualified after the close of the auction (i.e., fails to remit the required down payment within the prescribed period of time, fails to submit a timely long-form application, fails to make full payment, or is otherwise disqualified) will be subject to the payments described in 47 CFR 1.2104(g)(2). This payment consists of a deficiency payment, equal to the difference between the amount of the Auction 97 bidder's winning bid and the amount of the winning bid the next time a license covering the same spectrum is won in an auction, plus an additional payment equal to a percentage of the defaulter's bid or of the subsequent winning bid, whichever is less.

232. As noted in the *Auction 97 Comment Public Notice,* the percentage of the bid that a defaulting bidder must pay in addition to the deficiency will depend on the auction format ultimately chosen for a particular auction. The amount can range from three percent up to a maximum of twenty percent, established in advance of the auction and based on the nature of the service and the inventory of the licenses being offered. As the Bureau noted in the *Auction 97 Comment Public Notice,* the Commission explained in the *CSEA/Part 1 Report and Order* that defaults weaken the integrity of the auction process and may impede the deployment of service to the public, and that an additional default payment of up to twenty percent will be more effective in deterring defaults than the three percent used in some earlier auctions. However, the Bureau does not believe the detrimental effects of any defaults in Auction 97 are likely to be unusually great. Balancing these considerations, the Bureau proposed to establish an additional default payment for Auction 97 of fifteen percent of the applicable bid. The Bureau received no comment on this proposal and therefore adopts it for Auction 97.

233. Finally, in the event of a default, the Commission has the discretion to re-auction the license or offer it to the next highest bidder (in descending order) at its final bid amount. In addition, if a default or disqualification involves gross misconduct, misrepresentation, or bad faith by an applicant, the Commission may declare the applicant and its principals ineligible to bid in future auctions, and may take any other action that it deems necessary, including institution of proceedings to revoke any existing authorizations held by the applicant.

G. Refund of Remaining Upfront Payment Balance

234. After the auction, applicants that are not winning bidders or are winning bidders whose upfront payment exceeded the total net amount of their winning bids may be entitled to a refund of some or all of their upfront payment. All refunds will be returned to the payer of record, as identified on the FCC Form 159, unless the payer submits written authorization instructing otherwise. Bidders should not request a refund of their upfront payments before the Commission releases a public notice declaring the auction closed, identifying the winning bidders, and establishing the deadlines for submitting down payments, long-form applications, and final payments.

235. Bidders are encouraged to file their refund information electronically using the Refund Information icon found on the *Auction Application Manager* page or through the Wire Transfer for Refund Purposes link available on the *Auction Application Submit Confirmation* page in the FCC Auction System. If an applicant has completed the refund instructions electronically, the refund will be sent automatically. If an applicant has not completed the refund instructions electronically, the applicant must send a written request.

Federal Communications Commission.

Gary D. Michaels,

Deputy Chief, Auctions and Spectrum Access Division, WTB.

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FEDERAL COMMUNICATIONS COMMISSION

[DA 14–995]

Notice of Debarment

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: The Enforcement Bureau (the ''Bureau'') debars Bryan J. Cahoon from the schools and libraries universal service support mechanism (or ''E-Rate Program'') for a period of three years. The Bureau takes this action to protect the E-Rate Program from waste, fraud, and abuse.

DATES: Debarment commences on the date Mr. Bryan J. Cahoon receives the debarment letter or August 12, 2014, whichever date comes first, for a period of three years.

FOR FURTHER INFORMATION CONTACT: Joy M. Ragsdale, Attorney Advisor, Federal Communications Commission, Enforcement Bureau, Investigations and Hearings Division, Room 4–C330, 445 12th Street SW., Washington, DC 20554. Joy Ragsdale may be contacted by telephone at (202) 418–1697 or by email at *Joy.Ragsdale@fcc.gov.* If Ms. Ragsdale is unavailable, you may contact Ms. Theresa Cavanaugh, Chief, Investigations and Hearings Division, by telephone at (202) 418–1420 and by email at *Terry.Cavanaugh@fcc.gov.*

SUPPLEMENTARY INFORMATION: The Bureau debarred Mr. Bryan J. Cahoon from the schools and libraries service support mechanism for a period of three

years pursuant to 47 CFR 54.8. Attached is the debarment letter, DA 14–995, which was mailed to Mr. Cahoon and released on July 15, 2014. The complete text of the notice of debarment is available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portal II, 445 12th Street SW., Room CY–A257, Washington, DC 20554. In addition, the complete text is available on the FCC's Web site at *http://www.fcc.gov.* The text may also be purchased from the Commission's duplicating inspection and copying during regular business hours at the contractor, Best Copy and Printing, Inc., Portal II, 445 12th Street SW., Room CY–B420, Washington, DC 20554, telephone (202) 488–5300 or (800) 378–3160, facsimile (202) 488–5563, or via email *http://www.bcpiweb.com.*

Federal Communications Commission.

Theresa Z. Cavanaugh,

Chief, Investigations and Hearings Division, Enforcement Bureau.

July 15, 2014

DA 14–995

SENT VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED AND E-MAIL

Mr. Bryan J. Cahoon
Register Number 95443–038
FMC Devens
Federal Medical Center
P.O. Box 879
Ayer, MA 01432

Re: Notice of Debarment, FCC Case No. EB–IHD–13–00010969

Dear Mr. Cahoon:

The Federal Communications Commission (Commission) hereby notifies you that, pursuant to Section 54.8 of its rules, you are prohibited from participating in activities associated with or relating to the schools and libraries universal service support mechanism (E-Rate program) for three years from either the date of your receipt of this Notice of Debarment or of its publication in the **Federal Register**, whichever is earlier in time (Debarment Date).[1]

On March 17, 2014, the Commission's Enforcement Bureau sent you a Notice of Suspension and Initiation of Debarment Proceedings (*Suspension Notice*)[2] that was published in the **Federal Register** on June 17, 2014.[3] The *Suspension Notice* suspended you from participating in activities associated with or relating to the E-Rate program. It also described the basis for initiating debarment proceedings against you, the applicable debarment procedures, and the effect of debarment.

As discussed in the *Suspension Notice,* in June 2013 you were convicted of one count of fraud and theft of federal funds in connection with the E-Rate program.[4] This fraud and theft occurred while you were employed as the Director of the Information Technology Department (IT Department) for the City of Lawrence, Massachusetts, and as a city subcontractor through your company, Networks@Home, LLC (Networks@Home).[5] As Director of the IT Department, you defrauded the E-Rate program by, among other things, circumventing the state's procurement requirements to provide bidding information and instructions, and award contracts, to your friends and business associates.[6] You also hired friends and associates to perform work for the City of Lawrence as interns.[7] Then, as a city subcontractor through Networks@Home, you billed the City of Lawrence for the same work at inflated rates.[8] As a result, the City of Lawrence was double-billed.[9] At least a portion of the funds that you obtained as a result of your fraudulent schemes were E-Rate funds that the City of Lawrence had received to improve its schools' and libraries' network and technological infrastructure.[10] Pursuant to Section 54.8(c) of the Commission's rules, your conviction of criminal conduct in connection with the E-Rate program is the basis for this debarment.[11]

In accordance with the Commission's debarment rules, you were required to file with the Commission any opposition to your suspension or its scope, or to your proposed debarment or its scope, no later than 30 calendar days from either the date of your receipt of the *Suspension Notice* or of its publication in the **Federal Register**, whichever date occurred first.[12] The Commission did not receive any such opposition from you.

For the foregoing reasons, you are debarred from participating in activities associated with or related to the E-Rate program for three years from the Debarment Date.[13] During this debarment period, you are excluded from participating in any activities associated with or related to the E-Rate program, including the receipt of funds or discounted services through the E-Rate program, or consulting with, assisting, or advising applicants or service providers regarding the E-Rate program.[14]

Sincerely,

Theresa Z. Cavanaugh,

Chief Investigations and Hearings Division Enforcement Bureau

cc: Johnnay Schrieber, Universal Service Administrative Company (via e-mail)

Rashann Duvall, Universal Service Administrative Company (via e-mail)

William F. Bloomer, United States Attorney's Office, District of Massachusetts (via e-mail)

[FR Doc. 2014–19073 Filed 8–11–14; 8:45 am]

BILLING CODE 6712–01–P

[1] 47 CFR 54.8(e), (g); *see also id.* 0.111 (delegating authority to the Enforcement Bureau to resolve universal service suspension and debarment proceedings).

[2] Letter from Theresa Z. Cavanaugh, Chief, Investigations and Hearings Division, FCC Enforcement Bureau, to Bryan J. Cahoon, Notice of Suspension and Initiation of Debarment Proceedings, 29 FCC Rcd 1924 (Enf. Bur. 2014) (*Suspension Notice*); *Bryan J. Cahoon,* Erratum, FCC Case No. EB–IHD–13–00010969 (Mar. 11, 2014) (correcting the address in the caption of the *Suspension Notice*) (Attachment 1).

[3] 79 Fed. Reg. 34527 (June 17, 2014).

[4] *Suspension Notice,* 29 FCC Rcd at 1925.

[5] *Id.*

[6] *Id.* at 1925–26.

[7] *Id.* at 1926.

[8] *Id.*

[9] *Id.*

[10] *See id.* at 1925–26.

[11] 47 CFR 54.8(c).

[12] *Id.* 54.8 (e)(3)–(4). Any opposition had to be filed no later than April 16, 2014.

[13] *Id.* 54.8(e)(5), (g).

[14] *Id.* 54.8(a)(1), (5), (d).

FEDERAL ELECTION COMMISSION

Sunshine Act Meeting

AGENCY: Federal Election Commission

DATE AND TIME: Tuesday July 22, 2014 at 10:00 a.m.

PLACE: 999 E Street NW., Washington, DC

STATUS: This meeting will be closed to the public.

Federal Register Notice of Previous Announcement—79 FR 42009

CHANGE IN THE MEETING: This meeting will be continued at the conclusion of the open meeting on August 14, 2014.

* * * * *

PERSON TO CONTACT FOR INFORMATION: Judith Ingram, Press Officer, Telephone: (202) 694–1220.

Shelley E. Garr,

Deputy Secretary of the Commission.

[FR Doc. 2014–19187 Filed 8–8–14; 4:15 pm]

BILLING CODE 6715–01–P

FEDERAL TRADE COMMISSION

Granting of Request for Early Termination of the Waiting Period Under the Premerger Notification Rules

Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, requires persons contemplating certain mergers or acquisitions to give the Federal Trade Commission and the Assistant Attorney General advance notice and to wait designated periods before consummation of such plans. Section 7A(b)(2) of the Act permits the agencies, in individual cases, to terminate this waiting period prior to its expiration and requires that notice of this action be published in the **Federal Register**.

The following transactions were granted early termination—on the dates indicated—of the waiting period provided by law and the premerger notification rules. The listing for each transaction includes the transaction number and the parties to the transaction. The grants were made by the Federal Trade Commission and the Assistant Attorney General for the Antitrust Division of the Department of Justice. Neither agency intends to take any action with respect to these proposed acquisitions during the applicable waiting period.

EARLY TERMINATIONS GRANTED

[July 1, 2014 thru July 31, 2014]

07/01/2014		
20141057	G	United Natural Foods, Inc.; Tony's Fine Foods; United Natural Foods, Inc.
20141083	G	LifePoint Hospitals, Inc. Conemaugh Health System, Inc.; LifePoint Hospitals, Inc.
20141097	G	Wind Point Partners VII–A, L.P.; Charles L. Shor; Wind Point Partners VII–A, L.P.
20141149	G	Trilantic Capital Partners V (North America) AIV L.P.; Traeger Pellet Grills Holdings LLC; Trilantic Capital Partners V (North America) AIV L.P.
07/03/2014		
20140555	G	Valeant Pharmaceuticals International, Inc.; Precision Dermatology, Inc.; Valeant Pharmaceuticals International, Inc.
20141053	G	Nestle, S.A.; Valeant Pharmaceuticals International, Inc.; Nestle, S.A.
20141123	G	Temasek Holdings (Private) Limited; Adconion Media Group Limited Temasek Holdings (Private) Limited.
07/07/2014		
20141061	G	Palladian Holdings, Inc.; iParadigms Holdings LLC; Palladian Holdings, Inc.
20141136	G	The Priceline Group Inc.; OpenTable, Inc.; The Priceline Group Inc.
20141148	G	Aon plc; StoneRiver Group, L.P.; Aon plc.
20141152	G	ICV Partners III, L.P.; CPM Holdco, Inc.; ICV Partners III, L.P.
20141160	G	John C. Malone; Liberty TripAdvisor Holdings, Inc.; John C. Malone.
20141161	G	Liberty TripAdvisor Holdings, Inc.; TripAdvisor, Inc.; Liberty TripAdvisor Holdings, Inc.
20141163	G	Pamlico Capital III, L.P.; Racecar Holdings, LLC; Pamlico Capital III, L.P.
20141167	G	Sequential Brands Group, Inc.; Carlyle U.S. Equity Opportunity Fund, L.P.; Sequential Brands Group, Inc.
20141175	G	Carlyle U.S. Equity Opportunity Fund, L.P.; Sequential Brands Group, Inc.; Carlyle U.S. Equity Opportunity Fund, L.P.
07/08/2014		
20141164	G	Phillips 66; Dominus Capital Partners LP; Phillips 66.
20141181	G	Merz Holding GmbH & Co. KG; Ulthera, Inc.; Merz Holding GmbH & Co. KG.
07/09/2014		
20141119	G	BVO Holdings, LLC; Ronald I. Dozoretz, M.D. and Beth Dozoretz; BVO Holdings, LLC.
07/10/2014		
20140842	G	GTCR Fund IX/A, L.P.; Nordion (Canada) Inc.; GTCR Fund IX/A, L.P.
20141171	G	Google. Inc.; Dropcam, Inc.; Google, Inc.
20141184	G	Motherson Sumi Systems Limited; Stoneridge, Inc.; Motherson Sumi Systems Limited.
20141192	G	Calera Capital Partners IV, L.P.; USS Parent Holding Corp.; Calera Capital Partners IV, L.P.
20141195	G	TA XI L.P.; SkinnyPop Popcorn LLC; TA XI L.P.
07/11/2014		
20141103	G	AmSurg Corp.; Hellman & Friedman Capital Partners VI, L.P.; AmSurg Corp.
20141104	G	Hellman & Friedman Capital Partners VI, L.P.; AmSurg Corp.; Hellman & Friedman Capital Partners VI, L.P.
20141106	G	Hellman and Friedman Capital Partners VI (Parallel), LP.; AmSurg Corp. Hellman and Friedman Capital Partners VI (Parallel), L.P.
20141153	G	WEX Inc.; Genstar Capital Partners V, L.P.; WEX Inc.
20141178	G	John C. Malone; Liberty Interactive Corporation; John C. Malone.
20141186	G	Oleum S.a.r.l.; Deoleo S.A.; Oleum S.a.r.l.

EARLY TERMINATIONS GRANTED—Continued

[July 1, 2014 thru July 31, 2014]

07/14/2014		
20141165	G	Blackstone Capital Partners VI L.P.; Marlin Equity II, L.P.; Blackstone Capital Partners VI L.P.
20141182	G	Opera Software ASA; Insight Venture Partners VI, L.P.; Opera Software ASA.
20141185	G	Lagardere SCA; Perseus Capital, L.L.C.; Lagardere SCA.
20141198	G	Falcon Strategic Partners IV, LP; Laney Directional Holdings, LLC; Falcon Strategic Partners IV, LP.
20141203	G	Catholic Health Initiatives; St. Alexius Medical Center; Catholic Health Initiatives.
20141206	G	Cox Family Voting Trust u/a/d 7/26/13; Twenty-First Century Fox, Inc.; Cox Family Voting Trust u/a/d 7/26/13.
20141207	G	Twenty-First Century Fox, Inc.; Cox Family Voting Trust u/a/d 7/26/13; Twenty-First Century Fox, Inc.
07/15/2014		
20141157	G	Samsonite International S.A.; Black Diamond Inc.; Samsonite International S.A.
20141227	G	Group 1 Automotive, Inc.; William F. Munday; Group 1 Automotive, Inc.
07/16/2014		
20141194	G	Stryker Corporation; Small Bone Innovations, Inc; Stryker Corporation.
07/17/2014		
20141143	G	China Huaxin Post and Telecommunication Economy Dev. Center; Alcatel-Lucent; China Huaxin Post and Telecommunication Economy Dev. Center.
20141172	G	Starboard Value and Opportunity Fund LP; Darden Restaurants, Inc.; Starboard Value and Opportunity Fund LP.
20141191	G	Levine Leichtman Capital Partners V. L.P.; Roark-FASTSIGNS LLC; Levine Leichtman Capital Partners V, L.P.
20141193	G	Genstar Capital Partners VI, L.P.; Case Interactive Media, Inc.; Genstar Capital Partners VI, L.P.
20141209	G	Texas Pipe & Supply Company, Ltd. Netz Group Ltd; Texas Pipe & Supply Company, Ltd.
07/18/2014		
20141159	G	Geisinger Health System Foundation; Sisters of Christian Charity Healthcare Corp Geisinger Health System Foundation.
07/21/2014		
20131165	G	Sinclair Broadcast Group, Inc.; Perpetual Corporation; Sinclair Broadcast Group, Inc.
20141202	G	Nokia Corporation; HCP Wireless, LLC; Nokia Corporation.
20141208	G	Vista Foundation Fund II, L.P.; SFW Capital Partners Fund L.P.; Vista Foundation Fund II, L.P.
20141231	G	Atmel Corporation; Newport Media, Inc.; Atmel Corporation.
20141238	G	Validus Holdings, Ltd.; Ebelphie Private Foundation; Validus Holdings, Ltd.
20141242	G	Consolidated Communications Holdings, Inc.; Enventis Corporation; Consolidated Communications Holdings, Inc.
20141248	G	Wingate Partners V, L.P.; Monomoy Capital Partners II, L.P.; Wingate Partners V, L.P.
20141261	G	Randal J. Kirk; Pro-Edge, LP; Randal J. Kirk.
07/22/2014		
20141132	G	Kindred Healthcare, Inc.; Gentiva Health Services, Inc.; Kindred Healthcare, Inc.
20141215	G	JANA Nirvana Offshore Fund, Ltd.; PetSmart, Inc.; JANA Nirvana Offshore Fund, Ltd.
20141216	G	JANA Offshore Partners, Ltd.; PetSmart, Inc.; JANA Offshore Partners, Ltd.
20141245	G	Teleperfonnance S.A.; The Virgo Trust; Teleperformance S.A.
20141253	G	Hormel Foods Corporation; Gregory Pickett; Hormel Foods Corporation.
07/23/2014		
20140978	G	Bel Fuse Inc.; Emerson Electric Co.; Bel Fuse Inc.
20141158	G	Mr. Pierre Paul Lassonde Secom Co., Ltd.; Mr. Pierre Paul Lassonde.
20141190	G	Marlin Equity IV, L.P.; CA. Inc.; Marlin Equity IV, L.P.
20141211	G	Providence Equity Partners VI, L.P.; VitalSmans, LC; Providence Equity Partners VI, L.P.
20141213	G	TreeHouse Foods, Inc.; Snacks Parent Corporation; TreeHouse Foods, Inc.
20141221	G	Sensata Technologies Holding N.V.; Littlejohn Fund III, L.P.; Sensata Technologies Holding N.V.
20141234	G	Alcoa Inc.; Oak.Hill Capital Partners III. L.P.; Alcoa Inc.
20141244	G	Thoma Bravo Fund XI, L.P.; Sparta Holding Corporation; Thoma Bravo Fund XI, L.P.
20141258	G	PGP Investors, LLC; Voting Trust c/o Raymond Johnson; PGP Investors, LLC.

EARLY TERMINATIONS GRANTED—Continued

[July 1, 2014 thru July 31, 2014]

20141266	G	Roche Holding Ltd.; Seragon Pharmaceuticals Inc.; Roche Holding Ltd.
07/24/2014		
20141199	G	Trian Partners, L.P.; The Bank of New York Mellon Corporation; Trian Partners, L.P.
20141200	G	Trian Partners Strategic Investment Fund II, L.P.; The Bank of New York Mellon Corporation; Trian Partners Strategic Investment Fund II, L.P.
20141201	G	Trian Star Trust Intertrust Fund Services (Cayman) Limited; The Bank of New York Mellon Corporation; Trian Star Trust Intertrust Fund Services (Cayman) Limited.
20141243	G	Golden Gate Capital Opportunity Fund, L.P.; Green Street Holdings, Inc.; Golden Gate Capital Opportunity Fund, L.P.
07/25/2014		
20141170	G	Siemens Aktiengesellschaft; Rolls-Royce Holdings plc; Siemens Aktiengesellschaft.
20141250	G	salesforce.com, inc.; RelateIQ, Inc.; salesforce.com, inc.
20141259	G	Edward S. Lampert; AutoNation, Inc.; Edward S. Lampert.
20141260	G	Linn Energy, LLC; Devon Energy Corporation; Linn Energy, LLC.
20141263	G	Berkshire Hathaway, Inc.; RoundTable Healthcare Partners II, L.P.; Berkshire Hathaway, Inc.
20141264	G	Owens & Minor, Inc.; Medical Action Industries Inc.; Owens & Minor, Inc.
20141268	G	Realogy Holdings Corp.; ZipRealty, Inc.; Realogy Holdings Corp.
20141269	G	The Kroger Co.; Vitacost.com, Inc.; The Kroger Co.
20141270	G	Ingenico S.A.; WCAS XI–GC, L.P. Ingenico S.A.
20141272	G	Consonance Private Equity, L.P.; Omnicare, Inc.; Consonance Private Equity, L.P.
20141274	G	London Stock Exchange Group plc; The Northwestern Mutual Life Insurance Company; London Stock Exchange Group plc.
20141284	G	Green Equity Investors VI, L.P.; Mister Car Wash Holdings Inc.; Green Equity Investors VI, L.P.
20141286	G	The Dai-ichi Life Insurance Company, Limited; Protective Life Corporation; The Dai-ichi Life Insurance Company, Limited.
20141290	G	Timothy D. Cook; Apple Inc.; Timothy D. Cook.
07/28/2014		
20141254	G	Nabors Industries Ltd. C&J Energy Services, Inc.; Nabors Industries Ltd.
20141273	G	Keats Atlanta Infrastructure L.P.; Acciona, S.A.; Keats Atlanta Infrastructure L.P.
20141279	G	Danaher Corporation; Siemens Aktiengesellschaft; Danaher Corporation.
07/29/2014		
20141217	G	Jazz Pharmaceuticals Public Limited Company; Sigma-Tau Finanziaria, S.p.A.; Jazz Pharmaceuticals Public Limited Company.
20141230	G	Berkshire Fund VIII, L.P.; Richard and Sharon Portillo; Berkshire Fund VIII, L.P.
20141265	G	St. Jude Medical, Inc.; Linsalata Capital Partners Fund V, L.P.; St. Jude Medical, Inc.
20141275	G	Mark Zuckerberg; Pond Ventures Nominee III Limited; Mark Zuckerberg.
20141276	G	Chow Tai Fook Capital Limited; Glenn Rothman; Chow Tai Fook Capital Limited.
20141297	G	Discovery Communications, Inc.; All3Media Holdings Limited; Discovery Communications, Inc.
07/30/2014		
20141073	G	Gebr. Knauf Verwaltungsgesellschaft KG; Guardian Industries Corp.; Gebr. Knauf Verwaltungsgesellschaft KG.
20141237	G	Silver Lake Partners IV, L.P.; QBS Holding Company, Inc.; Silver Lake Partners IV, L.P.
20141249	G	Ullink S.a.r.l.; Intercontinental Exchange, Inc.; Ullink S.a.r.l.
20141283	G	QLT Inc.; Auxilium Pharmaceuticals, Inc.; QLT Inc.
20141287	G	Ares Corporate Opportunities Fund IV, L.P.; Summit Partners Private Equity Fund VII–A, L.P. Ares Corporate Opportunities Fund IV, L.P.
07/31/2014		
20141187	G	Hapag-Lloyd AG; Compania Sud Americana de Vapores S.A.; Hapag-Lloyd AG.

FOR FURTHER INFORMATION CONTACT: Renee Chapman, Contact Representative, or Theresa Kingsberry, Legal Assistant, Federal Trade Commission, Premerger Notification Office, Bureau of Competition, Room H–303, Washington, DC 20580, (202) 326–3100.

By Direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2014–18958 Filed 8–11–14; 8:45 am]

BILLING CODE 6750–01–M

FEDERAL TRADE COMMISSION

[File No. 141 0162]

Akorn, Inc.; Analysis To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent orders—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before September 3, 2014.

ADDRESSES: Interested parties may file a comment at *https://ftcpublic.commentworks.com/ftc/akorninccconsent* online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''Akorn, Inc.—Consent Agreement; File No. 141 0162'' on your comment and file your comment online at *https://ftcpublic.commentworks.com/ftc/akorninccconsent* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW., Suite CC–5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW., 5th Floor, Suite 5610 (Annex D), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Jasmine Y. Rosner, Bureau of Competition, (202–326–2232), 600 Pennsylvania Avenue NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing consent orders to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for August 4, 2014), on the World Wide Web, at *http://www.ftc.gov/os/actions.shtm.*

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before September 3, 2014. Write ''Akorn, Inc.—Consent Agreement; File No. 141 0162'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at *http://www.ftc.gov/os/publiccomments.shtm.* As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Web site.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, like anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any ''[t]rade secret or any commercial or financial information which . . . is privileged or confidential,'' as discussed in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).[1] Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/akorninccconsent* by following the instructions on the web-based form. If this Notice appears at *http://www.regulations.gov/#!home,* you also may file a comment through that Web site.

If you file your comment on paper, write ''Akorn, Inc.—Consent Agreement; File No. 141 0162'' on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW., Suite CC–5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW., 5th Floor, Suite 5610 (Annex D), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Web site at *http://www.ftc.gov* to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before September 3, 2014. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm.*

Analysis of Agreement Containing Consent Orders To Aid Public Comment

The Federal Trade Commission (''Commission'') has accepted, subject to final approval, an Agreement Containing Consent Orders (''Consent Agreement'') from Akorn, Inc. (''Akorn'') that is designed to remedy the anticompetitive effects in the market for generic injectable rifampin (''generic rifampin'') resulting from Akorn's acquisition of VersaPharm Inc. (''VersaPharm''). Under the terms of the proposed Consent Agreement, Akorn is required to divest its Abbreviated New Drug Application (''ANDA'') for generic rifampin to Watson Laboratories, Inc. (''Watson''), a wholly-owned subsidiary of Actavis plc.

The proposed Consent Agreement has been placed on the public record for thirty days for receipt of comments from interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again evaluate the proposed Consent Agreement, along with the comments received, to make a

[1] In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

final decision as to whether it should withdraw from the proposed Consent Agreement or make final the Decision and Order (''Order'').

Pursuant to an Agreement and Plan of Merger dated May 9, 2014, Akorn plans to acquire all of VPI Holdings Corp., the parent company of VersaPharm, for approximately $324 million (the ''Proposed Acquisition''). The Commission alleges in its Complaint that the Proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, by lessening future competition in the sale of generic rifampin. The proposed Consent Agreement will remedy the alleged violations by preserving the future competition that would otherwise be eliminated by the Proposed Acquisition.

The Product and Structure of the Market

The Proposed Acquisition would reduce the number of future suppliers in the market for generic rifampin. Generic rifampin is an antibacterial medication used as a first-line treatment to kill or prevent the growth of tuberculosis. There are currently three generic drug companies with approved ANDAs for rifampin: VersaPharm, Mylan/Agila, and Bedford. Akorn is one of a limited number of firms that have a generic rifampin product in development and an ANDA under review by the U.S. Food and Drug Administration (''FDA''). As a result, the Proposed Acquisition would significantly reduce the number of future suppliers for generic rifampin.

Entry

Entry into the market for generic rifampin would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Proposed Acquisition. The combination of drug development times and regulatory requirements, including FDA approval, is costly and lengthy. In addition, the expertise and facilities required to manufacture injectable products is sufficiently specialized that only a limited number of firms are capable of participating in such markets. The stability and sterility requirements specific to manufacturing injectable pharmaceuticals present a number of problems and costs that discourage new entry or expansion in the market for generic rifampin.

Effects

The Proposed Acquisition would likely cause significant anticompetitive harm to consumers by eliminating the future competition that would otherwise have occurred when Akorn's generic rifampin product entered the market. Market participants consistently characterize generic drug markets as commodity markets in which the number of generic suppliers has a direct impact on pricing. Customers and competitors alike have confirmed that the price of generic pharmaceutical products decreases with new entry even after a number of suppliers has entered the market. Further, customers have confirmed that, in pharmaceutical markets that can experience significant manufacturing problems and shortages, such as the market for generic rifampin, the entry of a fourth, fifth, sixth, or even subsequent generic competitor produces more competitive prices than if fewer suppliers are available to them. The Proposed Acquisition would eliminate significant future competition between Akorn and VersaPharm. The evidence shows that anticompetitive effects are likely to result from the Proposed Acquisition due to a decrease in the number of independent competitors in the market for generic rifampin. Absent the Proposed Acquisition, the presence of Akorn as an additional competitor likely would have allowed customers to negotiate lower prices, as well as secure supply in times of product shortages. Thus, the Proposed Acquisition will likely cause U.S. consumers to pay significantly higher prices for generic rifampin, absent a remedy.

The Consent Agreement

The proposed Consent Agreement effectively remedies the Proposed Acquisition's anticompetitive effects in the relevant product market. Pursuant to the Consent Agreement, Akorn is required to divest its rights related to generic rifampin to Watson. Akorn must accomplish this divestiture no later than ten days after the Proposed Acquisition is consummated.

The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the Proposed Acquisition. If the Commission determines that Watson is not an acceptable acquirer of the divested asset, or that the manner of the divestiture is not acceptable, the parties must unwind the sale of rights to Watson and divest the asset to a Commission-approved acquirer within six months of the date the Order becomes final. In that circumstance, the Commission may appoint a trustee to divest the asset if the parties fail to divest it as required.

The proposed Consent Agreement contains several provisions to help ensure that the divestiture is successful. The Order requires Akorn to take all action necessary to maintain the economic viability, marketability, and competitiveness of the asset to be divested. Akorn must assist Watson in securing FDA approval for the pending ANDA. Akorn must also provide transitional services to assist Watson in setting up its generic rifampin manufacturing process, which includes conveying all know-how, data, and other information necessary to transfer its manufacturing capabilities. To allow Watson to enter the market while it validates its manufacturing process, the Order requires Akorn to provide Watson with a supply of product.

The Commission has agreed to appoint F. William Rahe from Quantic Regulatory Services, LLC to act as an interim monitor to assure that Akorn expeditiously complies with all of its obligations and perform all of its responsibilities pursuant to the Consent Agreement. To ensure that the Commission remains informed about the status of the transfer of rights and assets, the Consent Agreement requires Akorn to file reports with the interim monitor who will report in writing to the Commission concerning performance by the parties of their obligations under the Consent Agreement.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Order or to modify its terms in any way.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2014–18982 Filed 8–11–14; 8:45 am]

BILLING CODE 6750–01–P

FINANCIAL STABILITY OVERSIGHT COUNCIL

Submission for OMB Review; Comment Requests

ACTION: Notice and request for comments.

SUMMARY: The Financial Stability Oversight Council will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, Public Law 104–13, on or after the date of publication of this notice.

DATES: Written comments must be received on or before September 11, 2014 to be assured of consideration.

ADDRESSES: Send comments regarding the burden estimate, or any other aspect of the information collection, including suggestion for reducing the burden, to (1) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Treasury, New Executive Office Building, Room 10235, Washington, DC 20503, or email at *OIRA_Submission@OMB.EOP.GOV* and (2) Treasury PRA Clearance Officer, 1750 Pennsylvania Ave. NW., Suite 11020, Washington, DC 20220, or on-line at *http://www.PRAComment.gov.*

FOR FURTHER INFORMATION CONTACT: Copies of the submission(s) may be obtained by calling (202) 927–5331 or emailing at *PRA@treasury.gov,* or the entire information collection request may be found at *http://www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

Title: Designation of Financial Market Utilities.

OMB Control Number: 1505–0239.

Abstract: The information collected under 12 CFR 1320.20 from FMUs will be used generally by the Council to determine whether to designate or rescind the designation of an FMU under Title VIII of the Dodd-Frank Act. The collection of information under § 1320.11 provides an opportunity for an FMU to submit written materials to the Council before the Council decides whether to (1) make a proposed designation of the FMU as systemically important; or (2) make a proposed determination to rescind the designation of the FMU as systemically important. Similarly, the collection of information under § 1320.12 provides an opportunity for an FMU to request a hearing before, or submit written materials to, the Council before the Council makes a final designation of the FMU as systemically important or makes a final determination to rescind the designation of the FMU. The collection of information under § 1320.14 provides an opportunity for an FMU to request a hearing before, or submit written materials to, the Council to contest the Council's waiver or modification of any of the notice, hearing, or other requirements in §§ 1320.11 and 1320.12.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profit and not-for-profit organization.

Estimated Total Annual Burden Hours for all Collections: 500 hours.

David G. Clunie,

Executive Secretary.

[FR Doc. 2014–19010 Filed 8–11–14; 8:45 am]

BILLING CODE 4810–25–P–P

GENERAL SERVICES ADMINISTRATION

[Notice–CECANF–2014–04; Docket No. 2014–0005; Sequence No. 4]

Commission To Eliminate Child Abuse and Neglect Fatalities; Announcement of Meeting

AGENCY: Commission to Eliminate Child Abuse and Neglect Fatalities.

ACTION: Meeting Notice.

SUMMARY: The Commission to Eliminate Child Abuse and Neglect Fatalities (CECANF), a Federal Advisory Committee established by the Protect Our Kids Act of 2012, Public Law 112–275, will hold a meeting open to the public on Thursday, August 28, 2014 in Plymouth, Michigan.

DATES: The meeting will be held on Thursday, August 28, 2014, from 8:00 a.m. to 4:30 p.m. Eastern Standard Time.

ADDRESSES: CECANF will convene its meeting at The Inn at St. John's, Grande Ballroom, 44045 Five Mile Road, Plymouth, Michigan 48170. This site is accessible to individuals with disabilities. The meeting will also be made available via teleconference.

Submit comments identified by ''Notice–CECANF–2014–04'', by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching for ''Notice–CECANF–2014–04''. Select the link ''Comment Now'' that corresponds with ''Notice–CECANF–2014–04''. Follow the instructions provided at screen. Please include your name, company name (if any), and ''Notice–CECANF–2014–04'' on your attached document.
- *Mail:* Commission to Eliminate Child Abuse and Neglect Fatalities, c/o General Services Administration, Agency Liaison Division, 1800 F St. NW., Room 7003D, Washington DC 20006.

Instructions: Please submit comments only and cite ''Notice–CECANF–2014–04'' in all correspondence related to this notice. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Visit the CECANF Web site at *https://eliminatechildabusefatalities.sites.usa.gov/* or contact Ms. Patricia Brincefield, Communications Director, at 202–818–9596, 1800 F St. NW., Room 7003D, Washington, DC 20006.

SUPPLEMENTARY INFORMATION:

Background: CECANF was established to develop a national strategy and recommendations for reducing fatalities resulting from child abuse and neglect.

Agenda: The purpose of the meeting is for Commission members to gather national and state-specific information regarding child abuse and neglect fatalities. The Commission will hear from researchers and issue experts regarding the scope of the problem, strategies for improving national data collection, policy barriers and opportunities to reduce maltreatment fatalities, confidentiality issues, and potential solutions. Experts from such disciplines as child welfare, law enforcement, health, and public health will present strategies for addressing the issue of child abuse and neglect fatalities.

Attendance at the Meeting: Individuals interested in attending the meeting in person must register in advance because of limited space. To register to attend in person or by phone, please go to *https://www.surveymonkey.com/s/PFYVWR3* and follow the prompts. Detailed meeting minutes will be posted within 90 days of the meeting. Interested members of the public may listen to the CECANF discussion by calling 1–866–928–2008, and entering pass code 569839. Members of the public will not have the opportunity to ask questions or otherwise participate in the meeting.

However, members of the public wishing to comment should follow the steps detailed under the heading addresses in this publication or contact us via the CECANF Web site at *https://eliminatechildabusefatalities.sites.usa.gov/contact-us/.*

Dated: August 5, 2014.

Karen White,

Executive Assistant.

[FR Doc. 2014–19084 Filed 8–11–14; 8:45 am]

BILLING CODE 6820–34–P

GENERAL SERVICES ADMINISTRATION

[Notice–CIB–2014–03; Docket No. 2014–0002; Sequence No. 23]

Privacy Act of 1974; Notice of an Updated System of Records

AGENCY: General Services Administration (GSA).

ACTION: Notice.

SUMMARY: GSA proposes to update a system of records subject to the Privacy Act of 1974, as amended, 5 U.S.C. 552a.

DATES: September 11, 2014.

ADDRESSES: GSA Privacy Act Officer (ISP), General Services Administration, 1800 F Street NW., Washington, DC 20405.

FOR FURTHER INFORMATION CONTACT: Call or email the GSA Privacy Act Officer: telephone 202–208–1317; email *gsa.privacyact@gsa.gov.*

SUPPLEMENTARY INFORMATION: GSA proposes to update a system of records subject to the Privacy Act of 1974, 5 U.S.C. 552a.

The updated system will allow the public and GSA Users to utilize the SalesForce application environment and the Google Apps platform used by the GSA.

Dated: August 7, 2014.

James L. Atwater,

Director, Policy and Compliance Division, Office of the Chief Information Officer.

GSA/CIO–3

SYSTEM NAME:

GSA's Enterprise Organization of Google Applications, Moderate Impact Software as a Service Cloud (SaaS) Minor Applications & GSA's EEO Org of Salesforce.com. This system is a compilation of GSA's Cloud based minor applications implemented across various vendors as well as GSA applications, all of which are part of the Enterprise Cloud Services (ECS) system.

SYSTEM LOCATION:

Enterprise Cloud Services (ECS) is a singular component system managed by the Applied Solutions Division, a division of Office of the Chief Information Officer. The ECS system is housed in secure datacenters hosted by GSA in Kansas City (Region 6) and Fort Worth (Region 7) and the Stennis DataCenter in Hancock County, MS as well as Cloud components as part of GSA's implementation of Google Apps, Moderate Impact SaaS minor applications and GSA's EEO Org of Salesforce.com implemented by GSA with varying Cloud based Software as a Service (SaaS) vendors. In addition, some employees and contractors may download and store information from this system. Those copies are located within the employees' or contractors' offices or on encrypted workstations issued by GSA for individuals when they are out of the office.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The categories of individuals covered by this system are the public who access, or are granted access to, specific minor applications in either the Google Apps or Salesforce.com environment in GSA and individuals collectively referred to as ''GSA Users'', which are GSA employed individuals who require routine access to agency information technology systems, including federal employees, contractors, child care workers and other temporary workers with similar access requirements. The system does not apply to or contain occasional visitors or short-term guests not cleared for use under HSPD–12.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system contains information needed for the functionality of specific minor applications that are developed for either GSA's implementation of Google Apps or Salesforce.com. This system contains the following information:

Public individuals defined under Categories of Individuals above/employee/contractor/other worker's full name.

Organization/office of assignment.
Company/agency name.
Work address.
Work telephone number.
Social Security Number.
Personal physical home address.
Personal home or mobile phone.
Personal email addresses.
Individual work related records.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, 40 U.S.C. 11315, 44 U.S.C. 3506, E.O. 9397, as amended, and Homeland Security Presidential Directive 12 (HSPD–12).

PURPOSES:

For the functionality and use of specific minor applications within GSA's implementation of Google Apps & Salesforce.com. Information may be collected to meet the business requirements of the application, site, group or instance. The new system will allow users to utilize the SalesForce application environment and the Google Apps platform used by the GSA.

A listing of applications covered by this SORN can be found at: *http://www.gsa.gov/portal/content/102236.*

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

a. To a Member of Congress or to a Congressional staff member in response to an inquiry of the Congressional office, made at the written request of the constituent about whom the record is maintained.

b. To the National Archives and Records Administration (NARA) for records management purposes.

c. To Agency contractors, grantees, consultants, or experts who have been engaged to assist the agency in the performance of a Federal duty to which the information is relevant.

d. To a Federal, State, local, foreign, or tribal or other public authority, on request, in connection with the hiring or retention of an employee, the issuance or retention of a security clearance, the letting of a contract, or the issuance or retention of a license, grant, or other benefit, to the extent that the information is relevant and necessary to the requesting agency's decision.

e. To the Office of Management and Budget (OMB) when necessary to the review of private relief legislation pursuant to OMB circular No. A–19.

f. To designated Agency personnel for the purpose of performing an authorized audit or oversight evaluation.

g. To the Office of Personnel Management (OPM), the Office of Management and Budget (OMB), the Government Accountability Office (GAO), or other Federal agencies when the information is required for program evaluation purposes.

h. To appropriate agencies, entities, and persons when (1) the Agency suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (2) the Agency has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by GSA or another agency or entity) that rely upon the compromised information; (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with GSA's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

i. In any criminal, civil or administrative legal proceeding, where pertinent, to which GSA, a GSA employee, or the United States or other entity of the United States Government

is a party before a court or administrative body.

j. To an appeal, grievance, hearing, or complaints examiner; an equal employment opportunity investigator, arbitrator, or mediator; and/or an exclusive representative or other person authorized to investigate or settle a grievance, complaint, or appeal filed by an individual who is the subject of the record.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Computer records are stored on a secure server and accessed over the Web via encryption software. Paper records, when created, are kept in file folders and cabinets in secure rooms. When individuals download information it is kept on encrypted computers that are accessed using PIV credentials. It is their responsibility to protect the data, including compliance with HCO 2180.1, GSA Rules of Behavior for Handling Personally Identifiable Information (PII).

RETRIEVABILITY:

Records are retrievable by a combination of first name and last name. Group records are retrieved by organizational code or other listed identifiers as configured in the application by the program office for their program requirements.

SAFEGUARDS:

Cloud systems are authorized to operate separately by the GSA CIO at the moderate level. All GSA Users utilize two-factor authentication to access Google Apps and Salesforce.com. Access is limited to authorized individuals with passwords or keys. Computer records are protected by a password system that is compliant with National Institute of Standards and Technology standards. Paper records are stored in locked metal containers or in secured rooms when not in use. Information is released to authorized officials based on their need to know.

RETENTION AND DISPOSAL:

Records are retained and disposed of according to GSA records maintenance and disposition schedules, GSA Records Maintenance and Disposition System (CIO P 1820.1), GSA 1820.2A, and requirements of the National Archives and Records Administration.

SYSTEM MANAGER AND ADDRESS:

Director, Office of Enterprise Solutions, General Services Administration, 1800 F Street NW., Washington, DC 20405.

NOTIFICATION PROCEDURE:

An individual can determine if this system contains a record pertaining to him/her by sending a request in writing, signed, to the System Manager at the above address. When requesting notification of or access to records covered by this notice, an individual should provide his/her full name, date of birth, region/office, and work location. An individual requesting notification of records in person must provide identity documents sufficient to satisfy the custodian of the records that the requester is entitled to access.

RECORD ACCESS PROCEDURES:

Individuals wishing to access their own records should contact the system manager at the address above.

CONTESTING RECORD PROCEDURES:

Rules for contesting the content of a record and appealing a decision are contained in 41 CFR 105–64.

RECORD SOURCE CATEGORIES:

The sources for information in the system are the individuals about whom the records are maintained, the supervisors of those individuals, existing GSA systems, a sponsoring agency, a former sponsoring agency, other Federal agencies, contract employers, or former employers.

[FR Doc. 2014–19071 Filed 8–11–14; 8:45 am]

BILLING CODE 6820–14–P

GENERAL SERVICES ADMINISTRATION

[Notice–CIB–2014–02; Docket No. 2014–0002; Sequence No. 22]

Privacy Act of 1974; Notice of Updated Systems of Records

AGENCY: General Services Administration.

ACTION: Notice.

SUMMARY: GSA reviewed its Privacy Act systems to ensure that they are relevant, necessary, accurate, up-to-date and covered by the appropriate legal or regulatory authority. This notice is an updated Privacy Act system of records notice.

DATES: September 11, 2014.

ADDRESSES: GSA Privacy Act Officer (ISP), General Services Administration, 1800 F Street NW., Washington, DC 20405.

FOR FURTHER INFORMATION CONTACT: Call or email the GSA Privacy Act Officer telephone 202–208–1317; email *gsa.privacyact@gsa.gov.*

SUPPLEMENTARY INFORMATION: GSA undertook and completed an agency-wide review of its Privacy Act systems of records. As a result of the review, GSA is publishing an updated Privacy Act system of records notice.

The revised system notice reflects additional data that is collected and stored within the system. This update does not change individuals' rights to access or amend their records in the system of records.

Dated: August 7, 2014.

James L. Atwater,

Director, Policy and Compliance Division, Office of the Chief Information Officer.

GSA/CIO–1

SYSTEM NAME:

GSA Credential and Identity Management System (GCIMS).

SYSTEM LOCATION:

GCIMS comprises a web-based application and data is maintained in a secure server facility in Fort Worth, TX and Kansas City, MO. Additionally, some fingerprint data may be stored in other GSA facilities to handle adjudications for employees and contractors located in GSA facilities where staffed fingerprint collection stations have been established to handle the contractor and employee Personal Identity Verification (PIV) process. Contact the System Manager for additional information.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who require routine access to agency facilities and information technology systems, including:

a. Federal employees.

b. Contractors.

c. Child care workers and other temporary workers with similar access requirements.

The system does not apply to occasional visitors or short-term guests, to whom GSA facilities may issue local Facility Access Cards (FAC).

CATEGORIES OF RECORDS IN THE SYSTEM:

The system contains information needed for issuing and maintaining HSPD–12 credentials and also access privilege information. Records may include:

- Employee/contractor/other worker full name
- Social Security Number (SSN)
- Date of birth
- Place of birth
- Height
- Weight
- Hair color
- Eye color
- Sex
- Citizenship

- Non-US citizens only:
  - Port of entry city and state
  - Date of entry
  - Less than 3-year US resident (yes or no)
- Occupation
- Summary report of investigation
- Investigation results and date
- File attachments containing PII
- Security Specialist Notes
- Investigation History Data
- Level of security clearance
- Date of issuance of security clearance
- Facial Image
- Fingerprints
- Organization/office of assignment
- Region
- Company name
- Telephone number
- ID card issuance and expiration dates
- ID card number
- Emergency responder designation
- Home address and work location
- Emergency contact information
- Physical and logical access
- Contractors only:
  - Contract company (also referred as vendor)
  - Vendor Point of Contact (POC)
  - Whether contract company is the prime or a subcontractor
  - Name of prime if company is subcontractor
  - Task order number, delivery order, or contract base number
  - Contract start and end date
  - Contract option years (yes or no)
  - Names of previous companies on GSA contracts

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, 40 U.S.C. 121, 40 U.S.C. 582, 40 U.S.C. 3101, 40 U.S.C. 11315, 44 U.S.C. 3602, E.O. 9397, as amended, and Homeland Security Presidential Directive 12 (HSPD–12).

PURPOSE:

The primary purposes of the system are: To act as an authoritative source for GSA identities including employees and contractors to verify that all persons requiring routine access to GSA facilities or using GSA information resources have sufficient background investigations and are permitted access, to track and manage PIV smart cards issued to persons who have routine access to GSA facilities and information systems, to provide reports of identity data for administrative and staff offices to efficiently track and manage personnel, and to track and process background investigations for GSA personnel. (GSA branded the PIV card that it issues to its personnel as the GSA Access Card.)

ROUTINE USES OF THE SYSTEM RECORDS, INCLUDING CATEGORIES OF USERS AND THEIR PURPOSE FOR USING THE SYSTEM:

System information may be accessed and used by:

a. *GSA Personnel and GSA investigation service provider Department of Homeland Security, Federal Protective Service (DHS FPS) Personnel when needed for official use only, including, but not limited to: managing identity information of GSA personnel; managing the issuance and maintenance of Access Cards; managing the completion of background investigation requirements.*

Additional users who do not have access to privacy data are:

- *IT Helpdesk Personnel.*
- *Building Managers controlling physical access.*
- *System Administrators providing logical access.*
- *Record Holders updating their personal information (Employment Information, Emergency Contacts, Work and Home Address) in the self-service module.*
- *Google Mail Team.*

b. To verify suitability of an employee or contractor before granting access to specific resources;

c. To disclose information to agency staff and administrative offices who may restructure the data for management purposes;

d. An authoritative source of identities for Active Directory, Google mail, and other GSA systems;

e. In any legal proceeding, where pertinent, to which GSA is a party before a court or administrative body;

f. To authorized officials engaged in investigating or settling a grievance, complaint, or appeal filed by an individual who is the subject of the record.

g. To a Federal, state, local, foreign, or tribal agency in connection with the hiring or retention of an employee; the issuance of a security clearance; the reporting of an investigation; the letting of a contract; or the issuance of a grant, license, or other benefit to the extent that the information is relevant and necessary to a decision;

h. To the Office of Personnel Management (OPM), the Office of Management and Budget (OMB), or the Government Accountability Office (GAO) when the information is required for program evaluation purposes;

i. To a Member of Congress or staff on behalf of and at the request of the individual who is the subject of the record;

j. To an expert, consultant, or contractor of GSA in the performance of a Federal duty to which the information is relevant;

k. To the National Archives and Records Administration (NARA) for records management purposes;

l. To appropriate agencies, entities, and persons when (1) the Agency suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (2) the Agency has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by GSA 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 GSA's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING RECORDS IN THE SYSTEM:

STORAGE:

Computer records are stored on a secure server and accessed over the web using encryption software. Paper records, when created, are kept in file folders and cabinets in secure locked rooms where only authorized personnel have access. The enrollment workstations are kept in secure locations with limited access to authorized personnel only.

RETRIEVABILITY:

Records are retrievable by a combination of first name, last name, and/or Social Security Number. Group records are retrieved by organizational code.

SAFEGUARDS:

Computer records within GCIMS are protected utilizing certificate based smart card login. Paper records are stored in locked metal containers or in secured rooms when not in use. Information is released to authorized officials based on their need to know.

RETENTION AND DISPOSAL:

Records are disposed of as specified in the handbook, GSA Records Maintenance and Disposition System (CIO P 1820.1).

SYSTEM MANAGER AND ADDRESS:

Program Manager, Identity, Credential and Access Management Division, General Services Administration, 1800 F St. NW., Room 2340, Washington, DC 20405.

NOTIFICATION PROCEDURE:

Individuals wishing to inquire if the system contains information about them should contact the system manager at the above address.

CONTESTING RECORD PROCEDURES:

Rules for contesting the content of a record and appealing a decision are contained in 41 CFR 105–64.

RECORD SOURCES CATEGORIES:

The sources for information in the system are the individuals about whom the records are maintained, the supervisors of those individuals, existing GSA systems, sponsoring agency, former sponsoring agency, other Federal agencies, contract employer, former employer, and the U.S. Office of Personnel Management (OPM).

[FR Doc. 2014–19079 Filed 8–11–14; 8:45 am]

BILLING CODE 6820–20–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Declaration Regarding Emergency Use of In Vitro Diagnostics for Detection of Ebola Virus

AGENCY: Office of the Secretary, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: The Secretary of Health and Human Services (HHS) is issuing this notice pursuant to section 564 of the Federal Food, Drug, and Cosmetic (FD&C) Act, 21 U.S.C. 360bbb–3. On September 22, 2006, then Secretary of Homeland Security, Michael Chertoff, determined pursuant to section 319F–2 of the Public Health Service Act, 42 U.S.C. 247d–6b, that the Ebola virus presents a material threat against the United States population sufficient to affect national security.

On the basis of this determination, on August 4, 2014 the Secretary declared that circumstances exist justifying the authorization of emergency use of *in vitro* diagnostics for detection of Ebola virus pursuant to section 564 of the FD&C Act, subject to the terms of any authorization issued under that section.

DATES: The determination and declaration are effective August 4, 2014.

FOR FURTHER INFORMATION CONTACT: Nicole Lurie, M.D., MSPH, Assistant Secretary for Preparedness and Response, Office of the Secretary, Department of Health and Human Services, 200 Independence Avenue SW., Washington, DC 20201, Telephone (202) 205–2882 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

Under Section 564 of the FD&C Act, the Commissioner of the Food and Drug Administration (FDA), acting under delegated authority from the Secretary of HHS, may issue an Emergency Use Authorization (EUA) authorizing (1) the emergency use of an unapproved drug, an unapproved or uncleared device, or an unlicensed biological product; or (2) an unapproved use of an approved drug, approved or cleared device, or licensed biological product. Before an EUA may be issued, the Secretary of HHS must declare that circumstances exist justifying the authorization based on one of four determinations: (1) A determination by the Secretary of Homeland Security that there is a domestic emergency, or a significant potential for a domestic emergency, involving a heightened risk of attack with a biological, chemical, radiological, or nuclear (''CBRN'') agent or agents; (2) the identification of a material threat by the Secretary of Homeland Security pursuant to section 319F–2 of the Public Health Service (PHS) Act [1] sufficient to affect national security or the health and security of United States citizens living abroad; (3) a determination by the Secretary of Defense that there is a military emergency, or a significant potential for a military emergency, involving a heightened risk to United States military forces of attack with a CBRN agent or agents; or (4) a determination by the Secretary that there is a public health emergency, or a significant potential for a public health emergency, that affects, or has a significant potential to affect, national security or the health and security of United States citizens living abroad, and that involves a CBRN agent or agents, or a disease or condition that may be attributable to such agent or agents.

Based on any of these four determinations, the Secretary of HHS may then declare that circumstances exist that justify the EUA, at which point the FDA Commissioner may issue an EUA if the criteria for issuance of an authorization under section 564 of the FD&C Act are met.

The Department of Defense requested that the FDA issue an EUA for *in vitro* diagnostics for detection of Ebola virus to allow the Defense Department to take preparedness and response measures based on information currently available about the Ebola virus in Western Africa. The material threat determination by the Secretary of Homeland Security, and the declaration that circumstances exist justifying emergency use of *in vitro* diagnostics for detection of Ebola virus by the Secretary of HHS, as described below, enable the FDA Commissioner to issue an EUA for certain *in vitro* diagnostics for emergency use under section 564 of the FD&C Act.

II. Material Threat Determination by the Secretary of Homeland Security

On September 22, 2006, then Secretary of Homeland Security, Michael Chertoff, determined pursuant to section 319F–2 of the Public Health Service Act, 42 U.S.C. 247d–6b, that the Ebola virus presents a material threat against the United States population sufficient to affect national security.

III. Declaration of the Secretary of Health and Human Services

On August 4, 2014, on the basis of the Secretary of Homeland Security's determination that the Ebola virus presents a material threat against the United States population sufficient to affect national security, I declared that circumstances exist justifying the authorization of emergency use of *in vitro* diagnostics for detection of Ebola virus pursuant to section 564 of the FD&C Act, subject to the terms of any authorization issued under that section.

Notice of the EUAs issued by the FDA Commissioner pursuant to this determination and declaration will be provided promptly in the **Federal Register** as required under section 564 of the FD&C Act.

Dated: August 5, 2014.

Sylvia M. Burwell,

Secretary.

[FR Doc. 2014–19026 Filed 8–11–14; 8:45 am]

BILLING CODE 4150–37–P

[1] 42 U.S.C. 247d–6b, which states: ''[t]he Homeland Security Secretary, in consultation with the Secretary and the heads of other agencies as appropriate, shall on an ongoing basis—(i) assess current and emerging threats of chemical, biological, radiological, and nuclear agents; and (ii) determine which of such agents present a material threat against the United States population sufficient to affect national security.''

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Meeting of the National Vaccine Advisory Committee

AGENCY: National Vaccine Program Office, Office of the Assistant Secretary for Health, Office of the Secretary, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: As stipulated by the Federal Advisory Committee Act, the Department of Health and Human

Services (HHS) is hereby giving notice that the National Vaccine Advisory Committee (NVAC) will hold a meeting September 9–10, 2014. The meeting is open to the public. However, pre-registration is required for both public attendance and public comment. Individuals who wish to attend the meeting and/or participate in the public comment session should register at *http://www.hhs.gov/nvpo/nvac.* Participants may also register by emailing *nvpo@hhs.gov* or by calling 202–690–5566 to provide your name, organization, and email address.

DATES: The meeting will be held on September 9–10, 2014. The meeting times and agenda will be posted on the NVAC Web site at *http://www.hhs.gov/nvpo/nvac* as soon they become available.

ADDRESSES: U.S. Department of Health and Human Services, Hubert H. Humphrey Building, Room 800, 200 Independence Avenue SW., Washington, DC 20201.

The meeting can also be accessed through a live webcast the day of the meeting. For more information, visit *http://www.hhs.gov/nvpo/nvac/meetings/upcomingmeetings/index.html.*

FOR FURTHER INFORMATION CONTACT: National Vaccine Program Office, U.S. Department of Health and Human Services, Room 715–H, Hubert H. Humphrey Building, 200 Independence Avenue SW., Washington, DC 20201. Phone: (202) 690–5566; email: *nvpo@hhs.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to Section 2101 of the Public Health Service Act (42 U.S.C. 300aa–1), the Secretary of Health and Human Services was mandated to establish the National Vaccine Program to achieve optimal prevention of human infectious diseases through immunization and to achieve optimal prevention against adverse reactions to vaccines. The NVAC was established to provide advice and make recommendations to the Director of the National Vaccine Program on matters related to the Program's responsibilities. The Assistant Secretary for Health serves as Director of the National Vaccine Program.

The topics planned for NVAC discussion will include a presentation on the progress of the development of a National Adult Immunization Plan; plans by the NVPO to conduct a mid-course review of the 2010 National Vaccine Plan; the recent findings of a comprehensive review of vaccine safety; and an overview of vaccine research and development efforts for developing vaccines for use in pregnant women. In addition, the NVAC working group on Vaccine Confidence will present their findings and recommendations for NVAC consideration and discussion. The NVAC also will hear an overview of Canada's efforts to strengthen the Canadian immunization system and an update on our national progress towards the Healthy People 2020 immunization goals. Finally, the NVAC HPV Working Group will provide an update on its progress. The meeting agenda will be posted on the NVAC Web site: *http://www.hhs.gov/nvpo/nvac* prior to the meeting.

Public attendance at the meeting is limited to the available space. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the National Vaccine Program Office at the address/phone listed above at least one week prior to the meeting. For those unable to attend in person, a live webcast will be available. More information on registration and accessing the webcast can be found at *http://www.hhs.gov/nvpo/nvac/meetings/upcomingmeetings/index.html.*

Members of the public will have the opportunity to provide comments at the NVAC meeting during the public comment periods designated on the agenda. Individuals who would like to submit written statements should email their comments to the National Vaccine Program Office (*nvpo@hhs.gov*) at least five business days prior to the meeting.

Dated: July 29, 2014.

Bruce Gellin,

Executive Secretary, National Vaccine Advisory Committee, Deputy Assistant Secretary for Health, Director, National Vaccine Program Office.

[FR Doc. 2014–19046 Filed 8–11–14; 8:45 am]

BILLING CODE 4150–44–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Agency for Healthcare Research and Quality, HHS.

ACTION: Notice.

SUMMARY: This notice announces the intention of the Agency for Healthcare Research and Quality (AHRQ) to request that the Office of Management and Budget (OMB) approve the proposed information collection project: ''Evaluation of the AHRQ Healthcare Horizon Scanning System.'' In accordance with the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)), AHRQ invites the public to comment on this proposed information collection.

DATES: Comments on this notice must be received by October 14, 2014.

ADDRESSES: Written comments should be submitted to: Doris Lefkowitz, Reports Clearance Officer, AHRQ, by email at *doris.lefkowitz@ahrq.hhs.gov.*

Copies of the proposed collection plans, data collection instruments, and specific details on the estimated burden can be obtained from the AHRQ Reports Clearance Officer.

FOR FURTHER INFORMATION CONTACT: Doris Lefkowitz, AHRQ Reports Clearance Officer, (301) 427–1477, or by email at *doris.lefkowitz@ahrq.hhs.gov.*

SUPPLEMENTARY INFORMATION:

Proposed Project

''Evaluation of the AHRQ Healthcare Horizon Scanning System''

The American Recovery and Reinvestment Act (ARRA) appropriated $1.1 billion for comparative effectiveness research (CER), of which $300 million was made available to the Agency for Healthcare Research and Quality (AHRQ). The goal of CER is to improve patient outcomes by providing clinicians and patients the information they need to choose between preventive and diagnostic treatments, and other health care options to identify the options that best fit an individual patient's needs and preferences. The EHC Program was created in response to Section 1013 of the Medicare Prescription Drug, Improvement, and Modernization Act (MMA) of 2003.

To better inform comparative effectiveness research investments at the EHC Program, AHRQ used some of the ARRA funds to develop a horizon scanning system to identify and monitor emerging health care technologies and innovations. While horizon scanning systems exist in other countries, these systems do not take into account the unique political, regulatory, cultural, and economic context of the U.S. health care system. To meet this need, the AHRQ Healthcare Horizon Scanning System was implemented in November 2010. The AHRQ Healthcare Horizon Scanning System provides a systematic process to identify and monitor target technologies and innovations in health care and to create an inventory of target technologies that have the highest

potential for impact on clinical care, the health care system, patient outcomes, and costs. It is also a tool for the public to identify and find information on new health care technologies and interventions. Additionally, the AHRQ Healthcare Horizon Scanning System serves as a resource for those involved in decision making about adoption, implementation, and coverage of new health care interventions.

To fulfill its purpose, the AHRQ Healthcare Horizon Scanning System performs three functions: (1) Identification and prioritization of interventions in late phase development for tracking and monitoring; (2) monitoring of target interventions through the development of detailed information on interventions in late phase development; and (3) assessment of potential impact of target interventions through the gathering and synthesizing the perspectives of experts from various areas of the health care community about the potential impact those target interventions may have on the health care system, clinical care, patient outcomes, and health care costs.

As the first and only U.S. horizon scanning system, it is important to understand whether the AHRQ Healthcare Horizon Scanning System is implementing its functions effectively. This evaluation is also essential to determining whether the AHRQ Healthcare Horizon Scanning System is meeting the needs of patients, clinicians, private industry, and policymakers and how it can be improved to better meet those needs. The evaluation will address the following research questions:

1. How successfully did the AHRQ Healthcare Horizon Scanning System identify and prioritize interventions for monitoring?

2. How successfully did the AHRQ Healthcare Horizon Scanning System monitor the selected target interventions?

3. How accurately did the AHRQ Healthcare Horizon Scanning System assess the potential impact of the interventions?

4. How can the processes for identification, prioritization, monitoring, and assessment of potential impact of the interventions be improved?

This research has the following goals:

1. To assess the performance of the AHRQ Healthcare Horizon Scanning System in the identification and prioritization of interventions which are important topics for further assessment.

2. To assess the performance of the AHRQ Healthcare Horizon Scanning System in terms of the quality of information provided on the topics selected, and the accuracy of the assessment of potential impact.

3. To identify which, if any, of these areas of performance may require improvement so as to strengthen the effectiveness of the AHRQ Healthcare Horizon Scanning System.

This evaluation is being conducted by AHRQ through its contractor, ECRI Institute, and ECRI's subcontractor, Mathematica Policy Research, pursuant to AHRQ's statutory authority to conduct and support research on health care and on systems for the delivery of such care, including activities with respect to the quality, effectiveness, efficiency, appropriateness and value of health care services and with respect to quality measurement and improvement. 42 U.S.C. 299a(a)(1) and (2).

Method of Collection

To achieve the goals of this project the following data collections will be implemented:

1. Expert Survey—The purpose of this survey, completed by domain experts, is to measure the accuracy and completeness of the AHRQ Healthcare Horizon Scanning System Potential High Impact reports and to collect their assessment of the potential for high impact for the included Potential High Impact interventions.

2. Expert Consultation—The purpose of this consultation with experts is to confirm the cases of inaccurate or missing information identified by a sole expert in the Expert Survey.

3. Stakeholder Survey—The purpose of this survey, completed by stakeholders and likely users of the reports issued by the AHRQ Healthcare Horizon Scanning System, is to rate the relevance, clarity, and usefulness of the Potential High Impact reports.

4. Key Informant Interview—The purpose of these interviews of the AHRQ Healthcare Horizon Scanning System staff is to learn about areas and suggestions for improvement in the identification, monitoring, and impact assessment processes.

The data collected by the Expert Survey will be used to measure the accuracy and completeness of the Potential High Impact reports and the accuracy of the potential for high impact assessments. If the expert survey identifies cases of inaccurate or missing information that are not reported by multiple experts, we will conduct an Expert Consultation with another expert to confirm these cases. Accuracy of the potential for high impact assessments will be measured by the level of sensitivity (if experts agree that the Potential High Impact interventions identified by the AHRQ Healthcare Horizon Scanning System are high impact interventions) and specificity (if experts agree that the No Potential High Impact interventions identified by the AHRQ Healthcare Horizon Scanning System should be excluded from the group of Potential High Impact interventions).

The Stakeholder Survey will collect data to measure the usability of the Potential High Impact reports and the specific report sections that include the potential high impact assessment, summary, and synthesis of expert comments. These data will be used to inform the improvement of the format and content of the report. The survey will also collect information on the sources and media these stakeholders use to find CER information to help AHRQ better target distribution of these reports to stakeholders.

A series of semi-structured Key Informant Interviews will be conducted with staff and domain experts at ECRI Institute and other organizations that participate in the AIIRQ Healthcare Horizon Scanning System in order to identify opportunities for improvements to the AHRQ Healthcare Horizon Scanning System process. Qualitative interviews are the main vehicle for gathering data to (1) learn which elements of the AHRQ Healthcare Horizon Scanning System Protocol are working well and the reasons why they are working well; and (2) understand which elements of the AHRQ Healthcare Horizon Scanning System Protocol can be improved, how they might be improved, and the relative importance of suggested improvements.

All of these information collection activities will allow for an evaluation of the AHRQ Healthcare Horizon Scanning System, thereby creating the opportunity to both maintain and improve this important national resource. The findings will be presented in a report to ECRI Institute and AHRQ.

Estimated Annual Respondent Burden

Mathematica expects a response rate of 80 percent from the sample of 67 experts for the Expert Survey − 54 completed surveys. The Expert Survey is expected to require about 20 minutes, on average, to complete. Mathematica expects that Expert Consultation with 15 experts will be needed to confirm cases of inaccurate or missing information identified in the Expert Survey. The follow-ups should be about 10 minutes.

For the Stakeholder Survey, Mathematica expects that 30 percent of the sample of 700 stakeholders will be ineligible (i.e. will not find any of the

presented reports relevant and therefore unable to rate a report) and that 65 percent of the eligible sample will complete, resulting in 319 completes. It should take about 30 minutes to complete the Stakeholder Survey. Mathematica will conduct senii-structured Key Informant Interviews, on average lasting 50 minutes, with 23 respondents.

EXHIBIT 1—ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Number of responses per respondent	Hours per response	Total burden hours
Expert Survey	54	1	.33	18
Expert Consultation	15	1	.17	3
Stakeholder Survey	319	1	.50	160
Key Informant Interviews	23	1	.83	19
Total	411			200

EXHIBIT 2—ESTIMATED ANNUALIZED COST BURDEN

Form name	Number of respondents	Total burden hours	Average hourly wage rate *	Total cost burden
Expert Survey	54	17.8	$92.25	$1,642
Expert Consultation	15	2.5	** 92.25	231
Stakeholder Survey	319	59.5	*** 48.72	7,771
Key Informant Interviews	23	19.1	38.68	739
Total	411			10,383

* May 2013 National Occupational Employment and Wage Estimates, U.S. Department of Labor, Bureau of Labor Statistics.
** Based on average wage for physicians and surgeons.
*** Based on average wage for medical and health services managers.
**** Based on average wage for social scientists and related workers.

Request for Comments

In accordance with the above-cited Paperwork Reduction Act legislation, comments on AHRQ's information collection are requested with regard to any of the following: (a) Whether the proposed collection of information is necessary for the proper performance of AHRQ health care research and health care information dissemination functions, including whether the information will have practical utility; (b) the accuracy of AHRQ's estimate of burden (including hours and costs) of the proposed collection(s) 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 upon the respondents, including the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the Agency's subsequent request for OMB approval of the proposed information collection. All comments will become a matter of public record.

Dated: July 30 2014.

Richard Kronick,

AHRQ Director.

[FR Doc. 2014–18972 Filed 8–11–14; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10305]

Agency Information Collection Activities: Proposed Collection; Extension of Comment Period

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

ACTION: Agency information collection activities: Proposed collection; comment request; extension of comment period.

SUMMARY: This notice extends the comment period for a 60-day notice request for proposed information collection request associated with the notice [Document Identifier: CMS–10305] entitled ''Medicare Part C and Part D Data Validation'' that was published in the June 13, 2014 (79 FR 33927) **Federal Register**. The comment period for the information collection request, which would have ended on August 12, 2014, is extended to August 26, 2014.

DATES: The comment period for the information collection request published in the June 13, 2014, **Federal Register** (79 FR 33927) is extended to August 26, 2014.

ADDRESSES: When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number _____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' Web site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995.*

2. Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov.*

3. Call the Reports Clearance Office at (410) 786–1326.

FOR FURTHER INFORMATION CONTACT: Reports Clearance Office at (410) 786–1326.

SUPPLEMENTARY INFORMATION:

In the FR Doc. 2014–13863 of June 13, 2014 (79 FR 33927), we published a Paperwork Reduction Act notice requesting a 60-day public comment period for the document entitled ''Medicare Part C and Part D Data Validation.'' There were technical delays with making the information collection request publicly available; therefore, in this notice we are extending the comment period from the date originally listed in the June 13, 2014, notice.

Dated: August 7, 2014.

Martique Jones,

Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2014–19027 Filed 8–11–14; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–N–1030]

Agency Information Collection Activities; Proposed Collection; Comment Request; Food Allergen Labeling and Reporting

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 our proposed collection of certain information. 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 and to allow 60 days for public comment in response to the notice. This notice invites comments on the information collection provisions of the labeling requirements for major food allergens in the Federal Food, Drug, and Cosmetic Act (the FD&C Act) and the information collection provisions of the draft guidance entitled, ''Draft Guidance for Industry: Food Allergen Labeling Exemption Petitions and Notifications.''

DATES: Submit either electronic or written comments on the collection of information by October 14, 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, 8455 Colesville Rd., COLE–14526, Silver Spring, MD 20993–0002, *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 before submitting the collection to OMB for approval. To comply with this requirement, we are publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, we invite comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of our functions, including whether the information will have practical utility; (2) the accuracy of our 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.

Food Allergen Labeling and Reporting—(OMB Control Number 0910–NEW)

I. Background

The Food Allergen Labeling and Consumer Protection Act of 2004 (FALCPA) (Title II, Pub. L. 108–282) amended the FD&C Act by defining the term ''major food allergen'' and stating that foods regulated under the FD&C Act are misbranded unless they declare the presence of each major food allergen on the product label using the name of the food source from which the major food allergen is derived. Section 403(w)(1) of the FD&C Act (21 U.S.C. 343(w)(1)) sets forth the requirements for declaring the presence of each major food allergen on the product label. Section 201(qq) of the FD&C Act (21 U.S.C. 321(qq)) defines a major food allergen as ''[m]ilk, egg, fish (e.g., bass, flounder, or cod), Crustacean shellfish (e.g., crab, lobster, or shrimp), tree nuts (e.g., almonds, pecans, or walnuts), wheat, peanuts, and soybeans'' and also as a food ingredient that contains protein derived from such foods. The definition excludes any highly refined oil derived from a major food allergen and any ingredient derived from such highly refined oil.

In some cases, the production of an ingredient derived from a major food allergen may alter or eliminate the allergenic proteins in that derived ingredient to such an extent that it does not contain allergenic protein. In addition, a major food allergen may be used as an ingredient or as a component of an ingredient such that the level of allergenic protein in finished food products does not cause an allergic response that poses a risk to human health. Therefore, FALCPA provides two mechanisms through which such ingredients may become exempt from the labeling requirement of section 403(w)(1) of the FD&C Act. An ingredient may obtain an exemption through submission and approval of a petition containing scientific evidence that demonstrates that the ingredient ''does not cause an allergic response that poses a risk to human health'' (section 403(w)(6) of the FD&C Act (21 U.S.C. 343(w)(6)). Alternately, an ingredient may become exempt through submission of a notification containing scientific evidence showing that the ingredient ''does not contain allergenic protein'' or that there has been a previous determination through a premarket approval process under section 409 of the FD&C Act (21 U.S.C. 348) that the ingredient ''does not cause an allergic response that poses a risk to human health'' (section 403(w)(7) of the FD&C Act (21 U.S.C. 343(w)(7)).

In the **Federal Register** of May 8, 2014 (79 FR 26435), we published a notice of availability for the draft guidance document entitled, ''Draft Guidance for Industry: Food Allergen Labeling Exemption Petitions and Notifications.'' This draft guidance is intended to help industry prepare petitions and notifications seeking exemptions from the labeling requirements for ingredients derived from major food allergens. Persons with access to the Internet may obtain the guidance at *http://www.fda.gov/FoodGuidances.*

II. Analysis of the Proposed Information Collection

The proposed information collection seeks OMB approval of the third party disclosure requirements of food allergen labeling under section 403(w)(1) of the FD&C Act, as well as OMB approval of the reporting associated with the submission of petitions and notifications seeking exemptions from the labeling requirements for ingredients derived from major food allergens under section 403(w)(6) and (7) of the FD&C Act.

A. Third Party Disclosure

The labeling requirements of section 403(w)(1) of the FD&C Act apply to all packaged foods sold in the United States that are regulated under the FD&C Act, including both domestically manufactured and imported foods. As noted, section 403(w)(1) of the FD&C Act requires that the label of a food product declare the presence of each major food allergen. We estimate the information collection burden of the third party disclosure associated with food allergen labeling under section 403(w)(1) of the FD&C Act as the time needed for a manufacturer to review the labels of new or reformulated products for compliance with the requirements of section 403(w)(1) of the FD&C Act and the time needed to make any needed modifications to the labels of those products.

The primary user of the allergen information disclosed on the label or labeling of food products is the consumer that purchases the food product. Consumers will use the information to help them make choices concerning their purchase of a food product, including choices related to substances that the consumer wishes to avoid due to their potential to cause adverse reactions. Additionally, we intend to use the information to determine whether a manufacturer or other supplier of food products is meeting its statutory obligations. Failure of a manufacturer or other supplier of food products to label its products in compliance with section 403(w)(1) of the FD&C Act may result in a product being misbranded under the FD&C Act and the manufacturer or packer and the product subject to regulatory action.

Description of respondents: The respondents to this collection of information are manufacturers and packers of packaged foods sold in the United States.

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL THIRD PARTY DISCLOSURE BURDEN [1]

FD&C Act section	Number of respondents	Number of disclosures per respondent	Total annual disclosures	Avg. burden per disclosure	Total hours	Total capital costs
403(w)(1); review labels for compliance with food allergen labeling requirements	77,500	1	77,500	1	77,500	0
403(w)(1); redesign labels to comply with food allergen labeling requirements	3,875	1	3,875	16	62,000	$7,071,875
Total					139,500	$7,071,875

[1] There are no operating and maintenance costs associated with this collection of information.

We used our labeling cost model (Ref. 1) to estimate the number of new or reformulated products sold in the United States, annually, that are affected by the requirements of section 403(w)(1) of the FD&C Act. We estimate that there are approximately 690,000 Universal Product Codes (UPCs) of FDA-regulated foods and approximately 85,000 UPCs of FDA-regulated dietary supplements for a total of 775,000 UPCs (Ref. 1). Using our labeling cost model, we estimate the entry rate of new UPCs to be approximately 8 percent per year. Based on the approximate entry rate of new UPCs, we estimate the rate of new or reformulated UPCs to be approximately 10 percent per year, or 77,500 products (775,000 × 10 percent). Thus, we estimate that, annually, 77,500 new or reformulated products are sold in the United States. Assuming an association of one respondent to each of the 77,500 new or reformulated products, we estimate that 77,500 respondents will each review the label of one of the 77,500 new or reformulated products, as reported in table 1, row 1. We have no data on how many label reviews would identify the need to redesign the label. Therefore, we further estimate, for the purposes of this analysis, that 5 percent of the reviewed labels of new or reformulated products, or 3,875 labels (77,500 × 5 percent) would need to be redesigned to comply with the requirements of section 403(w)(1) of the FD&C Act. Assuming an association of one respondent to each of the 3,875 labels, we estimate that 3,875 respondents will each redesign one label, as reported in table 1, row 2.

Our estimate of the average burdens per disclosure reported in table 1 is based on our experience with food labeling and our labeling cost model. We estimate the average burden for the review of labels for compliance with the food allergen labeling requirements under section 403(w)(1) of the FD&C Act to be 1 hour. Consequently, the burden of reviewing the labels of new or reformulated products is 77,500 hours, as reported in table 1. Using our labeling cost model, we estimate that it takes an average of 16 hours to complete the administration and internal design work for the redesign of a label to comply with the food allergen labeling requirements under section 403(w)(1) of the FD&C Act. Consequently, the burden of redesigning the 3,875 labels of new or reformulated products is 62,000 hours, as reported in table 1.

Using our labeling cost model, we estimate the capital cost to be $1,825 per label for external design services for the redesign of a label. Consequently for 3,875 labels, the total capital costs are $7,071,875 (3,875 labels × $1,825 per label), as reported in table 1.

B. Reporting

Under sections 403(w)(6) and (7) of the FD&C Act, interested parties may

request from us a determination that an ingredient is exempt from the labeling requirement of section 403(w)(1) of the FD&C Act. An ingredient may obtain an exemption through submission and approval of a petition containing scientific evidence that demonstrates that the ingredient ''does not cause an allergic response that poses a risk to human health'' (section 403(w)(6) of the FD&C Act). This section also states that ''the burden shall be on the petitioner to provide scientific evidence (including the analytical method used to produce the evidence) that demonstrates that such food ingredient, as derived by the method specified in the petition, does not cause an allergic response that poses a risk to human health.'' Alternately, an ingredient may become exempt through submission of a notification containing scientific evidence showing that the ingredient ''does not contain allergenic protein'' or that there has been a previous determination through a premarket approval process under section 409 of the FD&C Act that the ingredient ''does not cause an allergic response that poses a risk to human health'' (section 403(w)(7) of the FD&C Act).

Our draft guidance document entitled, ''Draft Guidance for Industry: Food Allergen Labeling Exemption Petitions and Notifications,'' sets forth our recommendations with regard to the information that an interested party should submit in such a petition or notification. The draft guidance states that to evaluate these petitions and notifications, we will consider scientific evidence that describes:

1. The identity or composition of the ingredient;

2. The methods used to produce the ingredient;

3. The methods used to characterize the ingredient;

4. The intended use of the ingredient in food; and either

5. a. For a petition, data and information, including the expected level of consumer exposure to the ingredient, that demonstrate that the ingredient when manufactured and used as described does not cause an allergic response that poses a risk to human health; or

5. b. For a notification, data and information that demonstrate that the ingredient when manufactured as described does not contain allergenic protein, or documentation of a previous determination under a process under section 409 of the FD&C Act that the ingredient does not cause an allergic response that poses a risk to human health.

We will use the information submitted in the petition or notification to determine whether the ingredient satisfies the criteria of sections 403(w)(6) and (7) of the FD&C Act for granting the exemption.

Description of respondents: The respondents to this collection of information are manufacturers and packers of packaged foods sold in the United States that seek an exemption from the labeling requirement of section 403(w)(1) of the FD&C Act.

We estimate the burden of this collection of information as follows:

TABLE 2—ESTIMATED ANNUAL REPORTING BURDEN [1]

FD&C Act section	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
403(w)(6); petition for exemption	5	1	5	100	500
403(w)(7); notification	5	1	5	68	340
Total					840

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Based on the number of petitions and notifications received in recent years, we estimate that we will receive an average of five petitions and five notifications annually, over the next 3 years. Assuming an association of one respondent to each petition or notification, we estimate that five respondents will each submit one petition and five respondents will each submit one notification, as reported in table 2, rows 1 and 2.

We base our estimate of the average burdens per response reported in table 2 on our experience with other petition processes. We estimate that a petition would take, on average, 100 hours to develop and submit (Ref. 2). Therefore, we estimate that the burden associated with petitions will be 500 hours annually (5 petitions × 100 hours per petition).

The burden of a notification involves collecting documentation that a food ingredient does not pose an allergen risk. Either we can make a determination that the ingredient does not cause an allergic response that poses a risk to human health under a premarket approval or notification program under section 409 of the FD&C Act, or the respondent would submit scientific evidence demonstrating that the ingredient when manufactured as described does not contain allergenic protein. We estimate that it would take a respondent 20 hours to prepare and submit a notification based on our determination under a process under section 409 of the FD&C Act that the ingredient does not cause an allergic response. We estimate that it would take a respondent approximately 100 hours to prepare a notification submitting scientific evidence (including the analytical method used) that demonstrates that the food ingredient (as derived by the method specified in the notification, where applicable) does not contain allergenic protein. We have no data on how many notifications would be based on our determination that the ingredient does not cause an allergic response or based on scientific evidence that demonstrates that the food ingredient does not contain allergenic protein. Therefore, we estimate that three of the five notifications would be based on scientific evidence, and two of the five notifications would be based on our determination. The average time per notification is then estimated to be 68 hours (2 × 20 hours + 3 × 100 hours)/5). Therefore, we estimate that the burden associated with notifications will be 340 hours annually (5 notifications × 68 hours per notification), as reported in table 2.

III. References

The following references have been placed on display in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. RTI International. ''Model to Estimate Costs of Using Labeling as a Risk Reduction Strategy for Consumer Products Regulated by the Food and Drug Administration, Final

Report.'' Prepared for Andrew Stivers, FDA/CFSAN. Prepared by Muth, M., M. Ball, M. Coglaiti, and S. Karns. RTI Project Number 0211460.005. March, 2011.

2. Gendel, Steven M. ''Food Allergen Petitions and Notifications,'' Memorandum to File. August 8, 2011.

Dated: August 6, 2014.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2014–19004 Filed 8–11–14; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel NIAID Peer Review Meeting.

Date: September 4, 2014.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, Room 3130, 6700B Rockledge Drive, Bethesda, MD 20817 (Telephone Conference Call).

Contact Person: Roberta Binder, Ph.D., Scientific Review Officer, Scientific, Review Program, Division of Extramural Activities, National Institutes of Health/NIAID, 6700B Rockledge Drive, Room 3130, Bethesda, MD 20892–7616, 301–496–7966, *rbinder@niaid.nih.gov.*

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel ''NIAID Investigator Initiated Program Project Applications (P01).''

Date: September 17, 2014.

Time: 9:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Room 3120, 6700B Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Lynn Rust, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, NIAID/NIH/DHHS, 6700B Rockledge Drive, MSC 7616, Bethesda, MD 20892, 301–402–3938, *lr228v@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: August 6, 2014.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2014–18991 Filed 8–11–14; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel; Retroviral Pathogenesis, Treatment and Prevention.

Date: September 11, 2014.

Time: 11:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 5W030, Rockville, MD 20850, (Telephone Conference Call).

Contact Person: Thomas M. Vollberg, Ph.D., Scientific Review Officer, Research Technology and Contract Review, Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W102, Bethesda, MD 20892–8329, 240–276–6341, *vollbergt@mail.nih.gov.*

Information is also available on the Institute's/Center's home page: *http://deainfo.nci.nih.gov/advisory/sep/sep.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: August 6, 2014.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2014–18997 Filed 8–11–14; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Advisory Mental Health Council.

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 Advisory Mental Health Council.

Date: September 18, 2014.

Open: 8:30 a.m. to 12:30 p.m.

Agenda: Presentation of NIMH Director's Report and discussion of NIMH program and policy issues.

Place: National Institutes of Health (NIH), Neuroscience Center, Conference Rooms C/D/E, 6001 Executive Boulevard, Rockville, MD 20852.

Closed: 1:30 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, Conference Rooms C/D/E, 6001 Executive Boulevard, Rockville, MD 20852.

Contact Person: Jane A. Steinberg, Ph.D., Director, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6154, MSC 9609, Bethesda, MD 20892–9609, 301–443–5047.

Any member of the public interested in presenting oral comments to the committee may notify the Contact Person listed on this notice at least 10 days in advance of the meeting. Interested individuals and representatives of organizations may submit a letter of intent, a brief description of the organization represented, and a short description of the oral presentation. Only one representative of an organization may be allowed to present oral comments and if accepted by the committee, presentations may be limited to five minutes. Both printed and electronic copies are requested for the record. In addition, any interested person may file written comments with the committee by forwarding their statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://www.nimh.nih.gov/about/advisory-boards-and-groups/namhc/index.shtml,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program No. 93.242, Mental Health Research Grants, National Institutes of Health, HHS)

Dated: August 6, 2014.

Carolyn Baum,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2014–18990 Filed 8–11–14; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel; Omnibus R03 & R21 SEP–2.

Date: September 15–16, 2014.

Time: 8:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW., Washington, DC 20015.

Contact Person: Eun Ah Cho, Ph.D., Scientific Review Officer and Acting Chief, Special Review Branch, Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W106, Bethesda, MD 20892–9750, 240–276–6342, *choe@mail.nih.gov.*

Name of Committee: National Cancer Institute Initial Review Group; Subcommittee I—Transition to Independence.

Date: November 4–5, 2014.

Time: 8:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda One Bethesda Metro Center Bethesda, MD 20814.

Contact Person: Sergei Radaev, Ph.D., Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W634, Bethesda, MD 20892–9750, 240–276–6466, *sradaev@mail.nih.gov.*

Information is also available on the Institute's/Center's home page: *http://deainfo.nci.nih.gov/advisory/sep/sep.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: August 6, 2014.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2014–18996 Filed 8–11–14; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Advancing Translational Sciences; Notice of Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of meetings of the National Center for Advancing Translational Sciences.

The meetings 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 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: Cures Acceleration Network Review Board.

Date: September 19, 2014.

Time: 8:30 a.m. to 3:00 p.m.

Agenda: Report from the Institute Director and CAN Review Board presentation from focus groups.

Place: National Institutes of Health, Building 31, Conference Room 6, 31 Center Drive, Bethesda, MD 20892.

Contact Person: Danilo A Tagle, Ph.D. Executive Secretary, National Center for Advancing Translational Sciences, 1 Democracy Plaza, Room 992, Bethesda, MD 20892, 301–594–8064, *Danilo.Tagle@nih.gov.*

Name of Committee: National Center for Advancing Translational Sciences Advisory Council.

Date: September 19, 2014.

Open: 8:30 a.m. to 3:00 p.m.

Agenda: Report from the Institute Director and other staff, and a presentation by the Council Subcommittees.

Place: National Institutes of Health, Building 31, Conference Room 6, 31 Center Drive, Bethesda, MD 20892.

Close: 3:15 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Building 31, Conference Room 6, 31 Center Drive, Bethesda, MD 20892.

Contact Person: Danilo A Tagle, Ph.D., Executive Secretary, National Center for Advancing Translational Sciences, 1 Democracy Plaza, Room 992, Bethesda, MD 20892, 301–594–8064, *Danilo.Tagle@nih.gov.*

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

(Catalogue of Federal Domestic Assistance Program Nos. 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.350, B—Cooperative Agreements; 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: August 6, 2014.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2014–18987 Filed 8–11–14; 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 PAR Panel: Causal Variants for Autoimmune and Musculoskeletal Diseases.

Date: August 22, 2014.

Time: 10:30 a.m. to 11:30 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Elaine Sierra-Rivera, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6184, MSC 7804, Bethesda, MD 20892, 301–435–1779, *riverase@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel Member Conflict: Pain and Chemosensory Neuroscience.

Date: September 10–11, 2014.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: John Bishop, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5182, MSC 7844, Bethesda, MD 20892, (301) 408–9664, *bishopj@csr.nih.gov.*

(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: August 6, 2014.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2014–18985 Filed 8–11–14; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel Life Course Disability and Employment.

Date: September 19, 2014.

Time: 2:30 p.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, Suite 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Kimberly Firth, Ph.D., National Institutes of Health, National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, 301–402–7702, *firthkm@mail.nih.gov.*

Name of Committee: National Institute on Aging Special Emphasis Panel Training Grants.

Date: October 22, 2014.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Garden Inn, 7301 Waverly Street, Bethesda, MD 20814.

Contact Person: Jeannette L. Johnson, Ph.D., National Institutes on Aging, National Institutes of Health, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, 301–402–7705, *JOHNSONJ9@NIA.NIH.GOV.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS).

Dated: August 6, 2014.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2014–18984 Filed 8–11–14; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Cancer Advisory Board.

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.

A portion of the meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Advisory Board; *Ad hoc* Subcommittee on Global Cancer Research.

Open: September 8, 2014, 6:00 p.m. to 7:30 p.m.

Agenda: Discussion on Global Cancer Research.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, Bethesda, Maryland 20814.

Contact Person: Dr. Edward Trimble, MD, MPH, Executive Secretary, National Cancer Institute, National Institutes of Health, 9609 Medical Center Drive, Room 3W562, Bethesda, MD 20892, (240) 276–5796, *trimblet@dct.nci.nih.gov.*

Name of Committee: National Cancer Advisory Board.

Open: September 9, 2014, 9:00 a.m. to 5:00 p.m.

Agenda: Program reports and presentations; business of the Board.

Place: National Institutes of Health, 9000 Rockville Pike, Building 31, C Wing, 6th Floor, Conference Room 10, Bethesda, MD 20892.

Contact Person: Paulette S. Gray, Ph.D., Executive Secretary, National Cancer Institute, National Institutes of Health, 9609

Medical Center Drive, Room 7W–444, Bethesda, MD 20892, (240) 276–6340, *grayp@dea.nci.nih.gov.*

Name of Committee: National Cancer Advisory Board.

Open: September 10, 2014, 9:00 a.m. to 10:00 a.m.

Agenda: Program reports and presentations; business of the Board.

Place: National Institutes of Health, 9000 Rockville Pike, Building 31, C Wing, 6th Floor, Conference Room 10, Bethesda, MD 20892.

Closed: September 10, 2014, 10:15 a.m. to 12:00 p.m.

Agenda: Grant application review.

Place: National Institutes of Health, 9000 Rockville Pike, Building 31, C Wing, 6th Floor, Conference Room 10, Bethesda, MD 20892.

Contact Person: Paulette S. Gray, Ph.D., Executive Secretary, National Cancer Institute, National Institutes of Health, 9609 Medical Center Drive, Room 7W–444, Bethesda, MD 20892, (240) 276–6340, *grayp@dea.nci.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://deainfo.nci.nih.gov/* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: August 6, 2014.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2014–18995 Filed 8–11–14; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; 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 a meeting of the National Advisory General Medical Sciences Council.

The meeting will be open to the public as indicated below, with a short public comment period at the end. Attendance is limited by the 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 open session will also be videocast and can be accessed from the NIH Videocasting and Podcasting Web site (*http://videocast.nih.gov/*).

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 Advisory General Medical Sciences Council.

Date: September 18–19, 2014.

Closed: September 18, 2014, 8:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, Conference Rooms E1 & E2, 45 Center Drive, Bethesda, MD 20892.

Open: September 19, 2014, 8:30 a.m. to ADJOURNMENT.

Agenda: For the discussion of program policies and issues, opening remarks, report of the Director, NIGMS, and other business of the Council.

Place: National Institutes of Health, Natcher Building, Conference Rooms E1 & E2, 45 Center Drive, Bethesda, MD 20892.

Contact Person: Ann A. Hagan, Ph.D., Associate Director for Extramural Activities, NIGMS, NIH, DHHS, 45 Center Drive, Room 2AN24H, MSC 6200, Bethesda, MD 20892, (301) 594–4499, *hagana@nigms.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and, when applicable, the business or professional affiliation of the interested person. In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus.

All visitor vehicles, including taxis, hotel, and airport shuttles, will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit. Information is also available on the Institute's home page (*http://www.nigms.nih.gov/About/Council//*) where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: August 6, 2014.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2014–18988 Filed 8–11–14; 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 Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Neurodevelopment.

Date: August 13, 2014.

Time: 12:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Peter B Guthrie, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4142, MSC 7850, Bethesda, MD 20892, (301) 435–1239, *guthriep@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: August 6, 2014.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2014–18992 Filed 8–11–14; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; 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 a meeting of the Board of Scientific Counselors, NIA.

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 as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the National Institute on Aging, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, NIA.

Date: October 7, 2014.

Closed: 8:00 a.m. to 8:30 a.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Institute on Aging, Biomedical Research Center, 3rd Floor Conference Room, 251 Bayview Boulevard, Baltimore, MD 21224.

Open: 8:30 a.m. to 12:00 p.m.

Agenda: Committee discussion, individual presentations, laboratory overview.

Place: National Institute on Aging, Biomedical Research Center, 3rd Floor Conference Room, 251 Bayview Boulevard, Baltimore, MD 21224.

Closed: 12:00 p.m. to 1:00 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Institute on Aging, Biomedical Research Center, 3rd Floor Conference Room, 251 Bayview Boulevard, Baltimore, MD 21224.

Open: 1:00 p.m. to 2:30 p.m.

Agenda: Committee discussion, individual presentations, laboratory overview.

Place: National Institute on Aging, Biomedical Research Center, 3rd Floor Conference Room, 251 Bayview Boulevard, Baltimore, MD 21224.

Closed: 2:30 p.m. to 3:30 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Institute on Aging, Biomedical Research Center, 3rd Floor Conference Room, 251 Bayview Boulevard, Baltimore, MD 21224.

Contact Person: Luigi Ferrucci, Ph.D., MD, Scientific Director, National Institute on Aging, 251 Bayview Boulevard, Suite 100, Room 4C225, Baltimore, MD 21224, 410–558–8110, *LF27Z@NIH.GOV*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: August 6, 2014.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2014–18986 Filed 8–11–14; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Minority Health and Health Disparities; 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 a meeting of the National Advisory Council on Minority Health and Health Disparities.

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/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Council on Minority Health and Health Disparities.

Date: September 9, 2014.

Open: 8:30 a.m. to 12:30 p.m.

Agenda: The agenda will include opening remarks, administrative matters, Director's Report, NIH Health Disparities update, and other business of the Council.

Place: National Institutes of Health, 31 Center Drive, Building 31, Conference Room 6, Bethesda, MD 20892.

Closed: 01:30 p.m. to Adjournment.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 31 Center Drive, Building 31, Conference Room 6, Bethesda, MD 20892.

Contact Person: Donna Brooks, Executive Officer, National Institutes of Health, National Institute on Minority Health and Heath Disparities, 6707 Democracy Blvd., Suite 800, Bethesda, MD 20892, (301) 435–2135, *brooksd@mail.nih.gov*.

Any member of the public interested in presenting oral comments to the committee may notify the Contact Person listed on this notice at least 10 days in advance of the meeting. Interested individuals and representatives of organizations may submit a letter of intent, a brief description of the organization represented, and a short description of the oral presentation. Only one representative of an organization may be allowed to present oral comments and if accepted by the committee, presentations may be limited to five minutes. Both printed and electronic copies are requested for the record. In addition, any interested person may file written comments with the committee by forwarding their statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxis, hotel, and airport shuttles, will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Dated: August 6, 2014.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2014–18993 Filed 8–11–14; 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; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Board of Scientific Counselors, NIDDK, September 18, 2014, 08:00 a.m. to September 19, 2014, 04:20 p.m., National Institutes of Health, Building 5, Room 127, 5 Memorial Drive, Bethesda, MD, 20892 which was published in the **Federal Register** on August 4, 2014, 79 FR 45202.

This meeting will be open to the public on September 18, 2014, from 8:00 a.m. until 8:20 a.m. The rest of the meeting is closed to the public.

Dated: August 6, 2014.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2014–18989 Filed 8–11–14; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2011–1156]

Draft Change to Navigation and Inspection Circular 01–13, Inspection and Certification of Vessels Under the Maritime Security Program

AGENCY: Coast Guard, DHS.

ACTION: Notice of availability extending comment period.

SUMMARY: The Coast Guard is extending the public comment period on its draft change to Navigation and Inspection Circular (NVIC) 01–13.

DATES: Submit comments and related material by September 17, 2014. Documents discussed in this notice should be available in the online docket by August 15, 2014.

ADDRESSES: Submit comments using one of the listed methods, and see **SUPPLEMENTAL INFORMATION** for more information on public comments.

- *Online—http://www.regulations.gov* following Web site instructions.
- *Fax*—202–493–2251.
- *Mail* or *hand deliver*—Docket Management Facility (M–30, U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001. Hours for hand delivery are 9 a.m. to 5 p.m., Monday through Friday, except Federal holidays (telephone 202–366–9329).

FOR FURTHER INFORMATION CONTACT: For information about this document, call or email Lieutenant Corydon Heard, Office of Commercial Vessel Compliance (CG–CVC), U.S. Coast Guard; telephone 202–372–1208, email *Corydon.F.Heard@uscg.mil.* For information about viewing or submitting material to the docket, call Cheryl Collins, Program Manager, Docket Operations, telephone 202–366–9826, toll free 1–800–647–5527.

SUPPLEMENTARY INFORMATION: On June 19, 2014, we published a **Federal Register** notice [1] announcing the public availability of our draft change to NVIC 01–13 and inviting public comments, by August 18, on the draft. Today, we are extending that deadline to September 17, 2014. The NVIC provides uniform Maritime Security Program process guidance to assist vessel owners and operators, authorized classification societies, and Coast Guard personnel. Please see our June notice for further information about our proposed revisions to better facilitate the transition of vessels to U.S. registry under the MSP.

We encourage you to submit comments or related material on the draft change to NVIC 01–13. We will consider all submissions and may adjust our final action based on your comments. Comments should be marked with docket number USCG–2011–1156 and should provide a reason for each suggestion or recommendation. You should provide personal contact information so that we can contact you if we have questions regarding your comments; but please note that all comments will be posted to the online docket without change and that any personal information you include can be searchable online.[2] Mailed or hand-delivered comments should be in an unbound 8½ x 11 inch format suitable for reproduction. The Docket Management Facility will acknowledge receipt of mailed comments if you enclose a stamped, self-addressed postcard or envelope with your submission.

Documents mentioned in this notice, and all public comments, are in our online docket at *http://www.regulations.gov* and can be viewed by following the Web site's instructions. You can also view the docket at the Docket Management Facility (see the mailing address under **ADDRESSES**) between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

[1] 79 FR 35177.

[2] See the Privacy Act notice regarding DHS public dockets, 73 FR 3316 (Jan. 17, 2008).

This notice is issued under authority of 5 U.S.C. 552(a).

Dated: August 5, 2014.

Jonathan C. Burton,

Captain, U.S. Coast Guard, Director, Inspections and Compliance.

[FR Doc. 2014–19052 Filed 8–11–14; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNMP01200 L10200000.DN0000 14X]

Notice of Public Meeting, Pecos District Resource Advisory Council (RAC) Lesser Prairie-Chicken Habitat Preservation Area of Critical Environmental Concern (LPC ACEC) Livestock Grazing Subcommittee Meeting

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Public Meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act and the Federal Advisory Committee Act, the Bureau of Land Management (BLM) Pecos District Resource Advisory Council's (RAC) Lesser Prairie-Chicken (LPC) Habitat Preservation Area of Critical Environmental Concerns (ACEC) Livestock Grazing Subcommittee will meet as indicated below.

DATES: The LPC ACEC Subcommittee will meet on September 17, 2014, at the Roswell Field Office, 2909 West 2nd Street, Roswell, New Mexico 88201, from 9 a.m.–12 p.m. The public may send written comments to the Subcommittee at the BLM Pecos District Office, 2909 West 2nd Street, Roswell, New Mexico 88201.

FOR FURTHER INFORMATION CONTACT: Adam Ortega, Range Management Specialist, Roswell Field Office, Bureau of Land Management, 2909 West 2nd Street, Roswell, New Mexico 88201, 575–627–0204. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8229 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The 10-member Pecos District RAC elected to create a subcommittee to advise the Secretary of the Interior, through the BLM, on a grazing plan and management issues associated with the

LPC ACEC. Planned agenda items include: An overview of the LPC ACEC and the management objectives as stated in the Pecos District Resource Management Plan Amendment (RMPA); and a discussion on grazing in the LPC ACEC.

For any interested members of the public who wish to address the Subcommittee, there will be a half-hour public comment period beginning at 11 a.m. Depending on the number of persons wishing to speak and time available, the time for individual comments may be limited.

Jim Stovall,

District Manager.

[FR Doc. 2014–19044 Filed 8–11–14; 8:45 am]

BILLING CODE 4310–FB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLMT926000–L14200000.BJ0000]

Notice of Filing of Plats of Survey; Montana

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of filing of plats of survey.

SUMMARY: The Bureau of Land Management (BLM) will file the plat of survey of the lands described below in the BLM Montana State Office, Billings, Montana, on September 11, 2014.

DATES: Protests of the survey must be filed before September 11, 2014 to be considered.

ADDRESSES: Protests of the survey should be sent to the Branch of Cadastral Survey, Bureau of Land Management, 5001 Southgate Drive, Billings, Montana 59101–4669.

FOR FURTHER INFORMATION CONTACT: Marvin Montoya, Cadastral Surveyor, Branch of Cadastral Survey, Bureau of Land Management, 5001 Southgate Drive, Billings, Montana 59101–4669, telephone (406) 896–5124 or (406) 896–5007, *hmontoya@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: This survey was executed at the request of the Field Manager, Billings Field Office, and was necessary to determine to delineate the Federal lands.

The lands we surveyed are:

Principal Meridian, Montana

T. 8 S., R. 22 E.

The plat, in two sheets, representing the dependent resurvey of a portion of the subdivisional lines and the adjusted original meanders of the former left bank of the Clarks Fork River, through section 10, the subdivision of section 10, and the survey of the meanders of the present left bank of the Clarks Fork River, through section 10, Township 8 South, Range 22 East, Principal Meridian, Montana, was accepted July 7, 2014.

We will place a copy of the plat, in two sheets in the open files. They will be available to the public as a matter of information. If the BLM receives a protest against this survey, as shown on this plat, in two sheets, prior to the date of the official filing, we will stay the filing pending our consideration of the protest. We will not officially file this plat, in two sheets, until the day after we have accepted or dismissed all protests and they have become final, including decisions or appeals.

Authority: 43 U.S.C. Chap. 3.

Joshua F. Alexander,

Chief, Branch of Cadastral Survey, Division of Energy, Minerals and Realty.

[FR Doc. 2014–19019 Filed 8–11–14; 8:45 am]

BILLING CODE 4310–DN–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

[RR83550000, 145R5065C6, RX.59389832.1009676]

Quarterly Status Report of Water Service, Repayment, and Other Water-Related Contract Actions

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice.

SUMMARY: Notice is hereby given of contractual actions that have been proposed to the Bureau of Reclamation (Reclamation) and are new, discontinued, or completed since the last publication of this notice. This notice is one of a variety of means used to inform the public about proposed contractual actions for capital recovery and management of project resources and facilities consistent with section 9(f) of the Reclamation Project Act of 1939. Additional announcements of individual contract actions may be published in the **Federal Register** and in newspapers of general circulation in the areas determined by Reclamation to be affected by the proposed action.

ADDRESSES: The identity of the approving officer and other information pertaining to a specific contract proposal may be obtained by calling or writing the appropriate regional office at the address and telephone number given for each region in the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Michelle Kelly, Reclamation Law Administration Division, Bureau of Reclamation, P.O. Box 25007, Denver, Colorado 80225–0007; telephone 303–445–2888.

SUPPLEMENTARY INFORMATION: Consistent with section 9(f) of the Reclamation Project Act of *1939,* and the rules and regulations published in 52 FR 11954, April 13, 1987 (43 CFR 426.22), Reclamation will publish notice of proposed or amendatory contract actions for any contract for the delivery of project water for authorized uses in newspapers of general circulation in the affected area at least 60 days prior to contract execution. Announcements may be in the form of news releases, legal notices, official letters, memorandums, or other forms of written material. Meetings, workshops, and/or hearings may also be used, as appropriate, to provide local publicity. The public participation procedures do not apply to proposed contracts for the sale of surplus or interim irrigation water for a term of 1 year or less. Either of the contracting parties may invite the public to observe contract proceedings. All public participation procedures will be coordinated with those involved in complying with the National Environmental Policy Act. Pursuant to the ''Final Revised Public Participation Procedures'' for water resource-related contract negotiations, published in 47 FR 7763, February 22, 1982, a tabulation is provided of all proposed contractual actions in each of the five Reclamation regions. When contract negotiations are completed, and prior to execution, each proposed contract form must be approved by the Secretary of the Interior, or pursuant to delegated or redelegated authority, the Commissioner of Reclamation or one of the regional directors. In some instances, congressional review and approval of a report, water rate, or other terms and conditions of the contract may be involved.

Public participation in and receipt of comments on contract proposals will be facilitated by adherence to the following procedures:

1. Only persons authorized to act on behalf of the contracting entities may negotiate the terms and conditions of a specific contract proposal.

2. Advance notice of meetings or hearings will be furnished to those parties that have made a timely written request for such notice to the appropriate regional or project office of Reclamation.

3. Written correspondence regarding proposed contracts may be made available to the general public pursuant to the terms and procedures of the Freedom of Information Act, as amended.

4. Written comments on a proposed contract or contract action must be submitted to the appropriate regional officials at the locations and within the time limits set forth in the advance public notices.

5. All written comments received and testimony presented at any public hearings will be reviewed and summarized by the appropriate regional office for use by the contract approving authority.

6. Copies of specific proposed contracts may be obtained from the appropriate regional director or his or her designated public contact as they become available for review and comment.

7. In the event modifications are made in the form of a proposed contract, the appropriate regional director shall determine whether republication of the notice and/or extension of the comment period is necessary.

Factors considered in making such a determination shall include, but are not limited to, (i) the significance of the modification, and (ii) the degree of public interest which has been expressed over the course of the negotiations. At a minimum, the regional director will furnish revised contracts to all parties who requested the contract in response to the initial public notice.

Definitions of Abbreviations Used in the Reports

ARRA American Recovery and Reinvestment Act of 2009
BCP Boulder Canyon Project
Reclamation Bureau of Reclamation
CAP Central Arizona Project
CUP Central Utah Project
CVP Central Valley Project
C–BT Colorado-Big Thompson Project
CRSP Colorado River Storage Project
FR Federal Register
IDD Irrigation and Drainage District
ID Irrigation District
LCWSP Lower Colorado Water Supply Project
M&I Municipal and Industrial
NMISC New Mexico Interstate Stream Commission
O&M Operation and Maintenance
OM&R Operation, maintenance, and replacement
P–SMBP Pick-Sloan Missouri Basin Program
PPR Present Perfected Right
RRA Reclamation Reform Act of 1982
SOD Safety of Dams
SRPA Small Reclamation Projects Act of 1956
USACE U.S. Army Corps of Engineers
WD Water District

Pacific Northwest Region: Bureau of Reclamation, 1150 North Curtis Road, Suite 100, Boise, Idaho 83706–1234, telephone 208–378–5344.

Completed contract actions:

5. Queener Irrigation Improvement District, Willamette Basin Project, Oregon: Renewal of long-term water service contract to provide up to 2,150 acre-feet of stored water from the Willamette Basin Project (a USACE project) for the purpose of irrigation within the District's service area. Contract executed May 14, 2014.

8. Cowiche Creek Water Users Association and Yakima-Tieton ID, Yakima Project, Washington: Warren Act contract to allow the use of excess capacity in Yakima Project facilities to convey up to 1,583.4 acre-feet of nonproject water for the irrigation of approximately 396 acres of nonproject land. Contract executed April 2, 2014.

Mid-Pacific Region: Bureau of Reclamation, 2800 Cottage Way, Sacramento, California 95825–1898, telephone 916–978–5250.

New contract actions:

53. Del Puerto WD, CVP, California: Long-term Warren Act contract, not to exceed 40 years, for storage and conveyance of up to 60,000 acre-feet of recycled water from the cities of Turlock and Modesto. This nonproject water will be stored in the San Luis Reservoir and conveyed through the Delta-Mendota Canal to agricultural lands and wildlife refuges.

Modified contract actions:

10. Warren Act Contracts, CVP, California: Execution of long-term Warren Act contracts (up to 40 years) with various entities for conveyance of nonproject water in the CVP.

38. Irrigation water districts, individual irrigators, M&I and miscellaneous water users; California, Nevada, and Oregon: Temporary Warren Act contracts for terms up to 5 years providing for use of excess capacity in CVP facilities for annual quantities exceeding 10,000 acre-feet.

Completed contract action:

13. Byron-Bethany ID, CVP, California: Long-term operational contract for conveyance of nonproject water and exchange of project water using Delta Division facilities of the CVP. Contract executed April 24, 2014.

Lower Colorado Region: Bureau of Reclamation, P.O. Box 61470 (Nevada Highway and Park Street), Boulder City, Nevada 89006–1470, telephone 702–293–8192.

New contract actions:

24. Cibola Valley Irrigation and Drainage District, BCP, Arizona: Approve a partial assignment of 240 acre-feet per year from the District's Colorado River fourth-priority entitlement to GSC Farm, LLC, and execute the necessary amendments to the District's and GSC's contracts.

25. H2O Water Company, Inc. and the Town of Queen Creek, CAP, Arizona: Execute a proposed assignment to the Town of Queen Creek of the H2O Water Company's 147 acre-foot annual CAP water entitlement.

Completed contract actions:

12. Fort McDowell Yavapai Nation and the Town of Gilbert, CAP, Arizona: Execute Amendment No. 3 to a CAP water lease to extend the term of the lease from January 1, 2014 to December 31, 2014, and increase the quantity leased from 13,683 acre-feet to 13,933 acre-feet. The lease is for Fort McDowell Yavapai Nation's CAP water to be leased to the Town of Gilbert. Contract executed December 31, 2013.

14. Arizona Recreational Facilities, LLC, BCP, Arizona: Execute a proposed assignment of a Colorado River water delivery contract and transfer of the entitlement in the amount of 2,673.3 acre-feet per year from Arizona Recreation Facilities to GSC Farm, LLC. Contract executed December 23, 2013.

16. San Carlos Apache Tribe and Pascua Yaqui Tribe, CAP, Arizona: Execute a CAP water lease among the United States, the San Carlos Apache Tribe, and the Pascua Yaqui Tribe in order for the San Carlos Apache Tribe to lease 2,000 acre-feet of its CAP water to the Pacua Yaqui Tribe during calendar year 2014 under the terms and conditions of the lease. Contract executed December 26, 2013.

22. Maurice L. McAlister, BCP, Arizona: Approve an assignment of the contract for 40 acre-feet of Colorado River water per year from Mr. McAlister to McAlister Family Trust. Contract executed May 7, 2014.

Upper Colorado Region: Bureau of Reclamation, 125 South State Street, Room 6107, Salt Lake City, Utah 84138–1102, telephone 801–524–3864.

The Upper Colorado Region has no updates to report for this quarter.

Great Plains Region: Bureau of Reclamation, P.O. Box 36900, Federal Building, 316 North 26th Street,

Billings, Montana 59101, telephone 406–247–7752.

Discontinued contract actions:

28. Oil and Gas Industry Contractors; P–SMBP; North Dakota, South Dakota, Montana and Wyoming: Consideration of a form of contract for water service from P–SMBP reservoirs for industrial purposes.

39. Ruedi Reservoir, Fryingpan-Arkansas Project, Colorado: Amend existing contract place of use for some Round II contracts.

53. John Vandenacre; Canyon Ferry Unit, P–SMBP; Montana: Renewal of a long-term water service contract.

Completed contract action:

42. Republican River Basin, P–SMBP, Kansas/Nebraska: Consideration of a short-term contract(s) with the Kansas Bostwick ID for use of Reclamation facilities. Contract executed May 8, 2014.

45. Town of Dillon; C–BT, Colorado: Consideration of a new long-term water service contract for municipal/domestic use out of Green Mountain Reservoir. Contract executed May 8, 2014.

47. Summit County, C–BT, Colorado: Consideration of an amendment to Contract No. 139E6C0121 to change the source of water associated with the Alternative Source Contract, Green Mountain Reservoir. Contract executed April 25, 2014.

50. Frenchman Valley, H&RW, and Kansas Bostwick IDs; Frenchman-Cambridge and Bostwick Divisions, P–SMBP; Nebraska: Consideration of a temporary assignment of water from Frenchman Valley ID and H&RW ID to Kansas-Bostwick ID. Contract executed May 7, 2014.

Dated: June 27, 2014.

Roseann Gonzales,

Director, Policy and Administration.

[FR Doc. 2014–19001 Filed 8–11–14; 8:45 am]

BILLING CODE 4310–MN–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–924]

Certain Light Reflectors and Components, Packaging, and Related Advertising Thereof; Institution of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on June 20, 2014, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Sunlight Supply, Inc. of Vancouver, Washington and IP Holdings, LLC of Vancouver, Washington. An amended complaint was filed on July 11, 2014. A supplement to the amended complaint was filed on July 18, 2014. The amended complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain light reflectors and components, packaging, and related advertising thereof by reason of infringement of certain claims of U.S. Patent No. 7,641,367 (''the '367 patent''); U.S. Design Patent No. D634,469 (''the '469 patent''); U.S. Design Patent No. D644,185 (''the '185 patent''); and U.S. Design Patent No. D545,485 (''the '485 patent''), and by reason of infringement of U.S. Trademark Registration No. 3,871,765 (''the '765 trademark'') and U.S. Trademark Registration No. 3,262,059 (''the '059 trademark''), and that an industry in the United States exists as required by subsection (a)(2) of section 337. The amended complaint further alleges violations of section 337 based upon the importation into the United States, or in the sale of, certain light reflectors and components, packaging, and related advertising thereof by reason of false advertising, the threat or effect of which is to destroy or substantially injure an industry in the United States.

The complainants request that the Commission institute an investigation and, after the investigation, issue a general exclusion order, or in the alternative a limited exclusion order exclusion order, and cease and desist orders.

ADDRESSES: The amended complaint, except for any confidential information contained therein, is available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Room 112, Washington, DC 20436, telephone (202) 205–2000. Hearing impaired individuals are advised that information on this matter can be obtained 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 at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: The Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2560.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2014).

Scope of Investigation: Having considered the amended complaint, the U.S. International Trade Commission, on August 6, 2014, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine:

(a) Whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain light reflectors and components, packaging, and related advertising thereof by reason of infringement of one or more of claims 1–4 of the '367 patent; the claim of the '469 patent; the claim of the '185 patent; and the claim of the '485 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(b) whether there is a violation of subsection (a)(1)(C) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain light reflectors and components, packaging, and related advertising thereof by reason of infringement of one or more of the '765 trademark and the '059 trademark, and whether an industry in the United States exists as required by subsection (a)(2) of section 337; and

(c) whether there is a violation of subsection (a)(1)(A) of section 337 in the importation into the United States, or in the sale of, certain light reflectors and components, packaging, and related advertising thereof by reason of false advertising, the threat or effect of which is to destroy or substantially injure an industry in the United States;

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainants are:

Sunlight Supply, Inc., 5408 NE 88th Street, Vancouver, WA 98665.

IP Holdings, LLC, 5408 NE 88th Street, Vancouver, WA 98665.

(b) The respondents are the following entities alleged to be in violation of

section 337, and are the parties upon which the amended complaint is to be served:

Sinowell (Shanghai) Co., Ltd., Rm. 802, Bld. 2, No. 335, Guoding Road, Shanghai, 200433 China
Sinohydro Ltd., Unit D 16F, Cheuk Nang Plaza, 250 Hennessy Road, Wanchai, Hong Kong, China
Groco Enterprises, LLC, 1454 127th Place NE., Bellevue, WA 98005
Good Nature Garden Supply, 6290 Folsom Boulevard, Sacramento, CA 95819
Aqua Serene, Inc., 2836 W. 11th Avenue, Eugene, OR 97402
Aurora Innovations, Inc., 29862 E. Enid, Eugene, OR 97402
Big Daddy Garden Supply, Inc., 310 Mason Street, Ukiah, CA 95482
Bizright, LLC, 15320 Valley Boulevard, City of Industry, CA 91746
The Hydro Source II, Inc., 11760 E. Slauson Avenue, Santa Fe Springs, CA 90670
Insun, LLC, 1407 116th Avenue NE., Suite 102, Bellevue, WA 98004
Lumz'N Blooms, Ltd. Corp., 174B Semoran Commerce Place #116, Apopka, FL 32703
Parlux LP, 7522 187th Drive SE., Snohomish, WA 98290
Silversun, Inc., 11718 Hunter Lane NW., Gig Harbor, WA 98332
Zimbali Group, Inc., 2913 129th Avenue SE., Bellevue, WA 98005

(c) The Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street SW., Suite 401, Washington, DC 20436; and

(3) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the amended complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the amended complaint and the notice of investigation. Extensions of time for submitting responses to the amended complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the amended complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the amended complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the amended complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: August 7, 2014.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2014–19045 Filed 8–11–14; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

[OMB Number 1125–0005]

Agency Information Collection Activities; Proposed eCollection; eComments Requested; Notice of Entry of Appearance as Attorney or Representative Before the Board of Immigration Appeals

AGENCY: Executive Office for Immigration Review, Department of Justice.

ACTION: 30-day notice.

SUMMARY: The Department of Justice (DOJ), Executive Office for Immigration Review (EOIR), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection was previously published in the **Federal Register** Volume 79, Number 107, page 32314, on June 4, 2014, allowing for a 60 day comment period.

DATES: Comments are encouraged and will be accepted for an additional 30 days until September 11, 2014.

FOR FURTHER INFORMATION CONTACT: If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Jeff Rosenblum, General Counsel, USDOJ–EOIR–OGC, Suite 2600, 5107 Leesburg Pike, Falls Church, Virginia, 20530; telephone: (703) 305–0470. Written comments and/or suggestions can also be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20530 or sent to *OIRA_submissions@omb.eop.gov*

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
—Enhance the quality, utility, and clarity of the information to be collected; and
—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision and extension of a currently approved collection.

(2) Title *of the Form/Collection:* Notice of Entry of Appearance as Attorney or Representative before the Board of Immigration Appeals.

(3) *Agency form number:* EOIR–27 (OMB #1125–0005).

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Attorneys or representatives notifying the Board of Immigration Appeals (Board) that they are representing a party in proceedings before the Board. Other: None. Abstract: This information collection is necessary to allow an attorney or representative to notify the Board that he or she is representing a party before the Board.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 26,544 respondents will complete each form within approximately 6 minutes.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 2,654 total annual burden hours associated with this collection.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and

Planning Staff, Two Constitution Square, 145 N Street NE., Room 3E.405B, Washington, DC 20530.

Dated: August 7, 2014.

Jerri Murray,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2014–19021 Filed 8–11–14; 8:45 am]

BILLING CODE 4410–30–P

DEPARTMENT OF JUSTICE

[OMB Number 1125–0006]

Agency Information Collection Activities; Proposed eCollection; eComments Requested; Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court

AGENCY: Executive Office for Immigration Review, Department of Justice.

ACTION: 30-day notice.

SUMMARY: The Department of Justice (DOJ), Executive Office for Immigration Review (EOIR), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection was previously published in the **Federal Register** Volume 79, Number 107, page 32315, on June 4, 2014, allowing for a 60 day comment period.

DATES: Comments are encouraged and will be accepted for an additional 30 days until September 11, 2014.

FOR FURTHER INFORMATION CONTACT: If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Jeff Rosenblum, General Counsel, USDOJ–EOIR–OGC, Suite 2600, 5107 Leesburg Pike, Falls Church, Virginia, 20530; telephone: (703) 305–0470. Written comments and/or suggestions can also be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20530 or sent to *OIRA_submissions@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision and extension of a currently approved collection.

(2) *Title of the Form/Collection:* Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court.

(3) *Agency form number:* EOIR–28 (OMB #1125–0006)

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Attorneys or representatives notifying the Immigration Court that they are representing an alien in immigration proceedings. Other: None. Abstract: This information collection is necessary to allow an attorney or representative to notify the Immigration Court that he or she is representing an alien before the Immigration Court.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 179,856 respondents will complete each form within approximately 6 minutes.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 17,985 total annual burden hours associated with this collection.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., Room 3E.405B, Washington, DC 20530.

Dated: August 7, 2014.

Jerri Murray,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2014–19007 Filed 8–11–14; 8:45 am]

BILLING CODE 4410–30–P

NATIONAL SCIENCE FOUNDATION

Advisory Committee for Environmental Research and Education Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Advisory Committee for Environmental Research and Education (9487).

Dates: September 23, 2014, 8:00 a.m.–5:00 p.m., September 24, 2014, 8:00 a.m.–2:00 p.m.

Place: National Science Foundation, 4201 Wilson Blvd., Stafford I, Rm. 1235, Arlington, Virginia 22230.

Type of Meeting: Open.

Contact Person: Linda A. Deegan, National Science Foundation, 4201 Wilson Blvd., Arlington, Virginia 22230. Phone 703–292–7870.

Minutes: May be obtained from the contact person listed above.

Purpose of Meeting: To provide advice, recommendations, and oversight concerning support for environmental research and education.

Agenda

Tuesday, September 23, 2014 8:00 a.m.–5:00 p.m.

- Update on recent NSF environmental activities
- Update on NSF's efforts on Broader Impacts
- Report to AC from Food Systems Working Group—Next Steps
- Report to AC from Diversity Working Group—Next Steps

Wednesday, September 24, 2014 8:00 a.m.–2:00 p.m.

- Meeting with the NSF Director
- Discussion of Future Directions for NSF Research Portfolio for Environmental Science

Dated: August 6, 2014.

Suzanne Plimpton,

Acting, Committee Management Officer.

[FR Doc. 2014–18960 Filed 8–11–14; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. NRC–2014–0026]

Agency Information Collection Activities: Submission for the Office of Management and Budget (OMB) Review; Comment Request

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of the OMB review of information collection and solicitation of public comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has recently submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The NRC published a **Federal Register** notice with a 60-day comment period on this information collection on April 21, 2014.

1. *Type of submission, new, revision, or extension:* Extension.

2. *The title of the information collection:* 10 CFR Part 75, ''Safeguards on Nuclear Material—Implementation of US/IAEA Agreement.''

3. *Current OMB approval number:* 3150–0055.

4. *The form number if applicable:* Not Applicable.

5. *How often the collection is required:* Reporting is done when specified events occur. Recordkeeping for nuclear material accounting and control information is done in accordance with specific instructions.

6. *Who will be required or asked to report:* Licensees of facilities on the U.S. eligible list who have been selected by the International Atomic Energy Agency (IAEA) for reporting or recordkeeping activities.

7. *An estimate of the number of annual responses:* 7 (2 reporting responses + 5 recordkeepers).

8. *The estimated number of annual respondents:* 5.

9. *An estimate of the total number of hours needed annually to complete the requirement or request:* 3,960.4.

10. *Abstract:* Part 75 of Title 10 of the *Code of Federal Regulations,* requires selected licensees to provide reports of nuclear material inventory and flow for selected facilities under the US/IAEA Safeguards Agreement, permit inspections by IAEA inspectors, complementary access of IAEA inspectors under the Additional Protocol, give immediate notice to the NRC in specified situations involving the possibility of loss of nuclear material, and give notice for imports and exports of specified amounts of nuclear material. These licensees will also follow written material accounting and control procedures, although actual reporting of transfer and material balance records to the IAEA will be done through the U. S. State system (Nuclear Materials Management and Safeguards System, collected under OMB clearance numbers 3150–0003, 3150–0004, 3150–0057, and 3150–0058.) The NRC needs this information to implement its responsibilities under the US/IAEA agreement.

The public may examine and have copied for a fee publicly-available documents, including the final supporting statement, at the NRC's Public Document Room, Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. The OMB clearance requests are available at the NRC's Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/.* The document will be available on the NRC's home page site for 60 days after the signature date of this notice.

Comments and questions should be directed to the OMB reviewer listed below by September 11, 2014. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date.

Danielle Y. Jones, Desk Officer, Office of Information and Regulatory Affairs (3150–0055), NEOB–10202, Office of Management and Budget, Washington, DC 20503.

Comments can also be emailed to *Danielle_Y_Jones@omb.eop.gov* or submitted by telephone at 202–395–1741.

The Acting NRC Clearance Officer is Kristen Benney, telephone: 301–415–6355.

Dated at Rockville, Maryland, this 7th day of August, 2014.

For the Nuclear Regulatory Commission.

Kristen Benney,

Acting NRC Clearance Officer, Office of Information Services.

[FR Doc. 2014–19015 Filed 8–11–14; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. NRC–2014–0188]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of pending NRC action to submit a generic information collection request to the Office of Management and Budget (OMB) and solicitation of public comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) invites public comment about our intention to request the OMB's approval for a generic information collection that is summarized below. We are required to publish this notice in the **Federal Register** under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

Information pertaining to the requirement to be submitted:

1. *The title of the information collection:* Reports Concerning Possible Non-Routine Emergency Generic Problems.

2. *Current OMB approval number:* 3150–0012.

3. *How often the collection is required:* On occasion.

4. *Who is required or asked to report:* Nuclear power reactor licensees, nonpower reactors, and materials applicants and licensees.

5. *The number of annual respondents:* 231.

6. *The number of hours needed annually to complete the requirement or request:* 83,100.

7. *Abstract:* The NRC is requesting approval authority to collect information concerning possible nonroutine generic problems which would require prompt action from the NRC to preclude potential threats to public health and safety. During the conduct of normal program activities, the NRC becomes aware of an emergent event or issue that may be identified in its licensing, inspection, and enforcement programs. In addition, reportable occurrences, or unusual events, equipment failures, construction problems, and issues discovered or raised during safety reviews are brought to the attention of the NRC through licensee reporting procedures and the safety review process. The emergent event or issue may present a situation in which the NRC does not have enough information to support regulatory decision making regarding an

appropriate course of action to address the event or issue.

If the NRC determines that an event or issue may have or has the potential for an immediate impact upon public health, safety, common defense, and/or the environment, the agency will prepare a bulletin or other form of generic communication that requires licensees and/or permit holders to respond within a specified period with information that would support agency evaluation and regulatory decision making. The bulletin may request licensees and permit holders to conduct evaluations, perform tests, and provide specified information within a prescribed time frame.

Submit, by October 14, 2014, comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?
2. Is the burden estimate accurate?
3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?
4. How can the burden of the information collection be minimized, including the use of automated collection techniques or other forms of information technology?

The public may examine and have copied for a fee publicly-available documents, including the draft supporting statement, at the NRC's Public Document Room, Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. The OMB clearance requests are available at the NRC's Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/.* The document will be available on the NRC's home page site for 60 days after the signature date of this notice.

Comments submitted in writing or in electronic form will be made available for public inspection. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly-disclosed. Comments submitted should reference Docket No. NRC–2014–0188. You may submit your comments by any of the following methods: Electronic comments go to: *http://www.regulations.gov* and search for Docket No. NRC–2014–0188. Mail comments to the Acting NRC Clearance Officer, Kristen Benney (T–5 F50), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Questions about the information collection requirements may be directed to the Acting NRC Clearance Officer, Kristen Benney (T–5 F50), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, by telephone at 301–415–6355, or by email to *INFOCOLLECTS.Resource@NRC.GOV.*

Dated at Rockville, Maryland, this 7th day of August, 2014.

For the Nuclear Regulatory Commission.

Kristen Benney,

Acting NRC Clearance Officer, Office of Information Services.

[FR Doc. 2014–19016 Filed 8–11–14; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–31199; File No. 812–13970]

Citigroup Global Markets Inc., et al.; Notice of Application and Temporary Order

August 6, 2014.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Temporary order and notice of application for a permanent order under section 9(c) of the Investment Company Act of 1940 (''Act'').

SUMMARY OF APPLICATION: Applicants have received a temporary order exempting them from section 9(a) of the Act, with respect to an injunction entered against Citigroup Global Markets Inc. (''CGMI'') on August 5, 2014 by the United States District Court for the Southern District of New York (''Injunction''), until the Commission takes final action on an application for a permanent order. Applicants also have applied for a permanent order.

APPLICANTS: CGMI, CEFOF GP I Corp. (''CEFOF''), CELFOF GP Corp. (''CELFOF''), Citibank, N.A. (''Citibank''), Citigroup Alternative Investments LLC (''Citigroup Alternative''), Citigroup Capital Partners I GP I Corp. (''CCP I''), Citigroup Capital Partners I GP II Corp. (''CCP II''), Citigroup Private Equity (Offshore) LLC (''CPE (Offshore)''), Citigroup First Investment Management Americas LLC (''CFIMA,'' and along with CGMI, CEFOF, CELFOF, Citibank, Citigroup Alternative, CCP I, CCP II, and CPE (Offshore), the ''Applicants'').[1]

DATES: *Filing Date:* The application was filed on October 20, 2011 and amended on August 5, 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 September 2, 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: Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090; Applicants: CGMI, CEFOF, CELFOF, CCP I, CCP II, CPE (Offshore), CFIMA, 388 Greenwich Street, New York, NY 10013; Citibank, Citigroup Alternative, 399 Park Avenue, New York, NY 10043.

FOR FURTHER INFORMATION CONTACT: Jill Ehrlich, Senior Counsel, at (202) 551–6819, or Mary Kay Frech, Branch Chief, at (202) 551–6821 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a temporary order and 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. Each of the Applicants is an indirect wholly-owned subsidiary of Citigroup Inc. (''Citigroup''), a diversified financial services company. CGMI is a full service investment banking firm that engages in securities underwriting, sales and trading, investment banking, financial advisory and investment research services. CGMI is registered as a broker-dealer under the Securities Exchange Act of 1934 and as an investment adviser under the Investment Advisers Act of 1940 (''Advisers Act''). It currently does not serve as principal underwriter or investment adviser of any Funds, but it may seek to do so in the future.[2] CFIMA

[1] Applicants request that any relief granted pursuant to the application also apply to any other company of which CGMI is or may become an affiliated person within the meaning of section 2(a)(3) of the Act (together with the Applicants, the ''Covered Persons'').

[2] ''Funds'' refers to any registered investment company, business development company, or ESC (as defined herein) for which a Covered Person serves as an investment adviser, sub-adviser, general partner or depositor, or any registered open-

is registered as an investment adviser under the Advisers Act and serves as investment adviser for one or more Funds. CEFOF, CELFOF, Citibank, Citigroup Alternative, CCP I, CCP II, and CPE (Offshore) (''ESC Advisers'') serve as investment advisers to certain employees' securities companies within the meaning of section 2(a)(13) of the Act, which provide investment opportunities for certain eligible employees, officers, directors and persons on retainer of Citigroup and its affiliates (''ESCs'' and included in the term ''Funds'').[3]

2. On August 5, 2014, the United States District Court for the Southern District of New York entered a judgment, which included the Injunction, against CGMI (''Final Judgment'') in a matter brought by the Commission.[4] The conduct of CGMI, along with certain of its affiliates, (together, ''Citi'') alleged in the complaint (''Complaint'') involved Citi's role in the structuring and marketing of a largely synthetic collateralized debt obligation (''CDO'') whose investment portfolio consisted primarily of credit default swaps referencing other CDO securities with collateral consisting primarily of residential mortgage-backed securities. The Complaint alleged that the marketing materials for the CDO were materially misleading because they suggested that Citi was acting in the traditional role of an arranging bank, when in fact Citi had allegedly exercised influence over the selection of the assets and had retained a proprietary short position of the assets it had helped select, which gave Citi allegedly undisclosed economic interests adverse to those of the investors in the CDO. The Final Judgment would restrain and enjoin CGMI from violating sections 17(a)(2) and (3) of the Securities Act of 1933. Without admitting or denying any of the allegations in the Complaint, except as to personal and subject matter jurisdiction, CGMI consented to the entry of the Final Judgment and other equitable relief, including certain undertakings and the payment of a civil penalty.

Applicants' Legal Analysis

1. Section 9(a)(2) of the Act, in relevant part, prohibits a person who has been enjoined from engaging in or continuing any conduct or practice in connection with the purchase or sale of a security, or in connection with activities as an underwriter, broker or dealer, from acting, among other things, as an investment adviser or depositor of any registered investment company or a principal underwriter for any registered open-end company, registered unit investment trust or registered face-amount certificate company. Section 9(a)(3) of the Act makes the prohibition in section 9(a)(2) applicable to a company, any affiliated person of which has been disqualified under the provisions of section 9(a)(2). Section 2(a)(3) of the Act defines ''affiliated person'' to include, among others, any person directly or indirectly controlling, controlled by, or under common control with, the other person. Applicants state that CGMI is an affiliated person of each of the other Applicants within the meaning of section 2(a)(3) of the Act. Applicants state that the entry of the Injunction results in Applicants being subject to the disqualification provisions of section 9(a) of the Act.

2. Section 9(c) of the Act provides that the Commission shall grant an application for exemption from the disqualification provisions of section 9(a) if it is established that these provisions, as applied to the applicants, are unduly or disproportionately severe or that the applicants' conduct has been such as not to make it against the public interest or the protection of investors to grant the exemption. Applicants have filed an application pursuant to section 9(c) seeking a temporary and permanent order exempting them and other Covered Persons from the disqualification provisions of section 9(a) of the Act.

3. Applicants believe they meet the standard for exemption specified in section 9(c). Applicants state that the prohibitions of section 9(a) as applied to them would be unduly and disproportionately severe and that the conduct of the Applicants has been such as not to make it against the public interest or the protection of investors to grant the exemption from section 9(a).

4. Applicants state that the alleged conduct giving rise to the Injunction did not involve any of the Applicants acting in the capacity of investment adviser, sub-adviser or depositor for any Fund (including as general partner providing investment advisory services to ESCs) or as principal underwriter for any registered open-end company, registered unit investment trust or registered face-amount certificate company. Applicants also state that, to the best of their knowledge, none of the current directors, officers, or employees of the Applicants that are involved in providing services as investment adviser or sub-adviser of the Funds (including as general partner providing investment advisory services to ESCs) or principal underwriter for any registered open-end company (or any other persons in such roles during the time period covered by the Complaint) participated in the conduct alleged in the Complaint to have constituted the violations that provide a basis for the Injunction. Applicants further represent that the personnel at CGMI who participated in the conduct alleged in the Complaint to have constituted the violations that provided a basis for the Injunction have had no, and will not have any, involvement in providing advisory or depositary services (including as general partner providing investment advisory services to ESCs) to the Funds or principal underwriting services to any registered open-end company, registered unit investment trust, or registered face-amount certificate company on the behalf of the Applicants or other Covered Persons. Applicants also represent that because the personnel of the Applicants (other than those at CGMI) did not participate in the conduct alleged in the Complaint to have constituted the violations that provide a basis for the Injunction, the shareholders of those Funds were not affected any differently than if those Funds had received services from any other non-affiliated investment adviser or principal underwriter. Applicants state that the alleged conduct did not involve any Fund or the assets of any Fund.

5. Applicants state that their inability to continue to provide investment advisory and subadvisory services to the Funds (including as general partner providing investment advisory services to ESCs) and principal underwriting services to any registered open-end company would result in potential hardship for some of the Funds and their shareholders. Applicants state that they will, as soon as reasonably practicable, distribute written materials, including an offer to meet in person to discuss the materials, to the boards of directors of the Funds (''Boards'') (excluding, for this purpose, the ESCs) for which the Applicants serve as investment adviser, investment sub-adviser or principal underwriter, including the directors who are not ''interested persons,'' as defined in section 2(a)(19) of the Act, of such Funds, and their independent legal counsel, if any, describing the circumstances that led to the Injunction

end investment company, registered unit investment trust or registered face amount certificate company for which a Covered Person serves as principal underwriter.

[3] Greenwich Street Employees Fund, L.P., et al., Investment Company Act Release Nos. 25324 (Dec. 21, 2001) (notice) and 25367 (Jan. 16, 2002) (order) (''ESC Order'').

[4] Securities and Exchange Commission v. Citigroup Global Markets Inc., 11–CV–7387 (S.D.N.Y. Aug. 5, 2014).

and any impact on the Funds, and the application. Applicants state they will provide the Boards with the information concerning the Injunction and the application that is necessary for the Funds to fulfill their disclosure and other obligations under the federal securities laws.

6. Applicants also state that, if they were barred from providing services to the Funds, the effect on their businesses and employees would be severe. Applicants state that they have committed substantial resources to establishing an expertise in providing advisory and distribution services to Funds. Applicants further state that prohibiting them from providing such services would not only adversely affect their businesses, but would also adversely affect numerous employees who are involved in those activities. Applicants also state that disqualifying the ESC Advisers from continuing to provide investment advisory services to the ESCs is not in the public interest or in the furtherance of the protection of investors. Because the ESCs have been formed for certain key employees, officers and directors of Citigroup and its affiliates, it would not be consistent with the purposes of the ESC provisions of the Act or the terms and conditions of the ESC Order to require another entity not affiliated with Citigroup to manage the ESCs. In addition, participating employees of Citigroup and its affiliates likely subscribed for interests in the ESCs with the expectation that the ESCs would be managed by an affiliate of Citigroup.

7. Certain of the Applicants previously have applied for and received exemptions under section 9(c) as the result of conduct that triggered section 9(a) of the Act, as described in greater detail in the application.

Applicants' Condition

Applicants agree that any order granting the requested relief will be subject to the following condition:

Any temporary exemption granted pursuant to the application shall be without prejudice to, and shall not limit the Commission's rights in any manner with respect to, any Commission investigation of, or administrative proceedings involving or against, Covered Persons, including, without limitation, the consideration by the Commission of a permanent exemption from section 9(a) of the Act requested pursuant to the application or the revocation or removal of any temporary exemptions granted under the Act in connection with the application.

Temporary Order

The Commission has considered the matter and finds that Applicants have made the necessary showing to justify granting a temporary exemption.

Accordingly,

It is hereby ordered, pursuant to section 9(c) of the Act, that Applicants and any other Covered Persons are granted a temporary exemption from the provisions of section 9(a), solely with respect to the Injunction, subject to the condition in the application, from August 5, 2014, until the Commission takes final action on their application for a permanent order.

By the Commission.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–18983 Filed 8–11–14; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Federal Register Citation of Previous Announcement: [to be published]

STATUS: Closed Meeting.

PLACE: 100 F Street NE., Washington, DC.

DATE AND TIME OF PREVIOUSLY ANNOUNCED MEETING: Thursday, August 14, 2014.

CHANGE IN THE MEETING: Cancellation of Meeting.

The Closed Meeting scheduled for Thursday, August 14, 2014 at 2:00 p.m. has been cancelled.

For further information please contact the Office of the Secretary at (202) 551–5400.

Dated: August 7, 2014.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–19100 Filed 8–8–14; 11:15 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–72779; File No. SR–NASDAQ–2014–065]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change To Adopt New Rule 5713 and List Paired Class Shares Issued by AccuShares® Commodities Trust I

August 6, 2014.

On June 11, 2014, The NASDAQ Stock Market LLC filed with the Securities and Exchange Commission (''Commission'') a proposed rule change to: (1) Adopt new Rule 5713 governing the listing of Paired Class Shares; and (2) list and trade Paired Class Shares issued by AccuShares® Commodities Trust I relating to the following funds pursuant to new Rule 5713: (a) AccuShares S&P GSCI® Spot Fund; (b) AccuShares S&P GSCI® Agriculture and Livestock Spot Fund; (c) AccuShares S&P GSCI® Industrial Metals Spot Fund; (d) AccuShares S&P GSCI® Crude Oil Spot Fund; (e) AccuShares S&P GSCI® Brent Oil Spot Fund; (f) AccuShares S&P GSCI® Natural Gas Spot Fund; and (g) AccuShares Spot CBOE® VIX® Fund. The proposed rule change was published for comment in the **Federal Register** on June 23, 2014.[1] The Commission has not received any comments on the proposed rule change.

Section 19(b)(2) of the Act[2] provides that, within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The Commission is extending this 45-day time period.

The Commission finds that it is appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[3] designates September 19, 2014, as the date by which the Commission shall either approve or disapprove or institute proceedings to determine whether to disapprove the proposed rule change (File Number SR–NASDAQ–2014–065).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[4]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–18980 Filed 8–11–14; 8:45 am]

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[1] *See* Securities Exchange Act Release No. 72412 (June 17, 2014), 79 FR 35610.

[2] 15 U.S.C. 78s(b)(2).

[3] *Id.*

[4] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–72778; File No. SR–NYSE–2014–41]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Its Price List Relating to Certain Transactions Involving Floor Brokers

August 6, 2014.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on July 23, 2014, New York Stock Exchange LLC (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Price List related to certain transactions involving Floor brokers. The Exchange proposes to implement the fee change effective July 23, 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

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 related to certain transactions involving Floor brokers. The Exchange proposes to implement the fee change effective July 23, 2014.

Cross Trades

The Price List currently provides that an agency cross trade (i.e., where a member organization has customer orders to buy and sell an equivalent amount of the same security) receives a $0.0006 credit per share, per transaction, which is credited to both sides of the transaction. The rate applies to cross trades effected on the Exchange, which are effected only by Floor brokers. The Exchange proposes a non-substantive change to the description to (i) eliminate the existing reference to ''agency,'' which is intended to refer to the agency capacity in which the Floor broker represents the crossed trade (i.e., not as principal), and (ii) replace the term ''member organization'' with the term ''Floor broker,'' as only Floor brokers are able to execute a cross trade. The resulting transaction description would be a Floor broker cross trade (i.e., a trade where a Floor broker executes customer orders to buy and sell an equivalent amount of the same security).[4] The existing credit of $0.0006 would not change. This proposed change is designed to avoid potential confusion with an ''agency cross,'' which, under NYSE Rule 72(d), has a specific meaning and may be entitled to priority at the cross price, irrespective of pre-existing displayed bids or offers on the Exchange at that price. Replacing ''member organization'' with ''Floor broker'' would also add greater precision to the Price List, as only Floor brokers are able to execute cross trades on the Exchange.

Non-Electronic Agency Transactions Between Floor Brokers

The Price List currently provides that non-electronic agency transactions between Floor brokers in the crowd are not charged. The Exchange proposes to provide a $0.0006 credit for these transactions, which would be identical to the rate described above for Floor broker cross trades. The Exchange also proposes a non-substantive change to this transaction description to specify that the pricing is a per share credit, per transaction, and applies to both sides of the transaction.[5]

Non-Electronic Agency Transactions Against the Book

The Price List currently provides that non-electronic agency transactions of Floor brokers that execute against the Book are not charged. The Exchange proposes that this no charge rate would only apply to non-electronic agency transactions of Floor brokers that execute at the close.[6] Non-electronic agency transactions of Floor brokers at the close could be against other trading interest in the crowd or against the Book, which is why ''against the Book'' would be removed from the description. The Price List already includes a separate transaction description for Floor broker executions swept into the close (i.e., electronic Floor broker transactions), which are similarly not charged.[7] In conjunction with this aspect of the proposed change, and to fill the gap created by the change described above, the Exchange also proposes to introduce a credit of $0.0006 per share, per transaction applicable to non-electronic agency transactions of Floor brokers that execute against the Book intraday (i.e., other than at the open or close).[8]

At the Opening or at the Opening Only Orders

The Price List currently provides that at the opening or at the opening only orders are charged $0.0010 per share. The Exchange proposes a non-substantive change to this transaction description to specify that the pricing is

[4] The Exchange proposes the same non-substantive changes to the corresponding description for transactions in securities priced below $1.00. The existing rate for such transactions in securities priced below $1.00 would remain unchanged.

[5] The corresponding description for transactions in securities priced below $1.00 would remain unchanged, as would the existing rate for such transactions.

[6] The Exchange proposes the same change to the corresponding description for transactions in securities priced below $1.00. The existing rate for such transactions in securities priced below $1.00 would remain unchanged.

[7] The Price List also provides a charge of $0.0002 per share for executions at the close (except market at-the-close (''MOC'') and limit at-the-close (''LOC'') orders) and Floor broker executions swept into the close for a member organization that executes an average daily trading volume (''ADV'') of at least 1,000,000 shares in such transactions on the Exchange during the billing month. This existing $0.0002 charge would not apply to non-electronic agency transactions of Floor brokers that execute at the close, because they cannot be ''swept into the close.''

[8] The Exchange proposes to introduce a corresponding description for transactions in securities priced below $1.00, at the ''no charge'' rate that currently applies to several other transactions in securities priced below $1.00.

a per share charge, per transaction, and applies to both sides of the transaction.[9]

The proposed change is not otherwise intended to address any other issues, and the Exchange is not aware of any problems that members and 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,[10] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[11] 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 non-substantive change to the description of the Floor broker cross trade in the Price List is reasonable because it would add greater specificity regarding the type of transaction to which the corresponding rate applies. This is equitable and not unfairly discriminatory because it would avoid confusion with an ''agency cross,'' which, under NYSE Rule 72(d), may be entitled to priority at the cross price, irrespective of pre-existing displayed bids or offers on the Exchange at that price, and is a subset of Floor broker cross trades eligible for the credit. The reference to the term ''agency'' in the current description merely refers to the capacity in which a Floor broker is serving (i.e., not as principal), but it is not intended to refer to an ''agency cross'' for purposes of NYSE Rule 72(d). Additionally, only Floor brokers are able to execute cross trades.

The Exchange believes it is reasonable to provide a $0.0006 credit for non-electronic agency transactions between Floor brokers in the crowd and non-electronic agency transactions of Floor brokers that execute against the Book intraday because, like Floor broker cross trades for which the same $0.0006 credit currently applies, these non-electronic agency transactions of Floor brokers are typically large block orders. This is equitable and not unfairly discriminatory because providing the same credit would encourage the execution of such transactions on a public exchange, thereby promoting price discovery and transparency. The Exchange also believes that the proposed credit is equitable and not unfairly discriminatory because all non-electronic agency transactions between Floor brokers in the crowd and non-electronic agency transactions of Floor brokers that execute against the Book intraday would be eligible to receive the credit and all market participants would benefit from the price discovery and transparency provided by such large block orders. The proposed non-substantive change to the description of non-electronic agency transactions between Floor brokers in the crowd would have no effect on the applicable pricing, but would instead conform this description to the descriptions in the Price List for other transactions.

The Exchange believes that maintaining no charge as the applicable rate for non-electronic agency transactions of Floor brokers that execute at the close is reasonable because this would be the same rate that currently applies to these transactions, and is also the same rate that applies to Floor broker executions swept into the close. This is equitable and not unfairly discriminatory because it would encourage Floor brokers to continue to send orders to the Exchange for the closing auction, thereby contributing to robust levels of liquidity during such period, which benefits all market participants.

The Exchange believes that the proposed non-substantive change to the description of at the opening or at the opening only orders is reasonable because it would have no effect on the applicable pricing, but would instead conform this description to the descriptions in the Price List for other transactions. In this regard, the proposed change would have no effect on the $20,000 cap per month per member organization that currently applies to this pricing, as described in footnote 2 in the Price List.

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,[12] 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. Instead, the Exchange believes that the substantive aspects of the proposed change would encourage the submission of additional liquidity to a public exchange, thereby promoting price discovery and transparency and increasing competition among execution venues. The rates proposed herein would apply only to Floor broker transactions and are consistent with existing rates in the Price List for similar types of Floor broker-only transactions. The Exchange therefore believes that the proposed change would further contribute to competition among member organizations, generally, and Floor brokers, specifically, by encouraging additional orders to be sent to the Exchange for execution.

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) [13] of the Act and subparagraph (f)(2) of Rule 19b–4 [14]

[9] The Exchange proposes the same non-substantive change to the corresponding description for transactions in securities priced below $1.00. The existing rate for such transactions in securities priced below $1.00 would remain unchanged.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(4) and (5).

[12] 15 U.S.C. 78f(b)(8).

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(2).

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) [15] 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–2014–41 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2014–41. 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. 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–2014–41 and should be submitted on or before September 2, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Kevin M. O'Neill,

Deputy Secretary.

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[15] 15 U.S.C. 78s(b)(2)(B).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–72777; File No. SR–MIAX–2014–39]

Self-Regulatory Organizations: Miami International Securities Exchange LLC; Notice of Filing of a Proposed Rule Change To List and Trade Options on Shares of the Market Vectors ETFs

August 6, 2014.

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 28, 2014, Miami International Securities Exchange LLC (''MIAX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to list and trade on the Exchange options on shares of the Market Vectors Brazil Small-Cap ETF (''BRF''), Market Vectors Indonesia Index ETF (''IDX''), Market Vectors Poland ETF (''PLND''), and Market Vectors Russia ETF (''RSX'').

The text of the proposed rule change is available on the Exchange's Web site at *http://www.miaxoptions.com/filter/wotitle/rule_filing,* at MIAX's principal office, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list for trading on the Exchange options on the shares of the Market Vectors Brazil Small-Cap ETF,[3] Market Vectors Indonesia Index ETF, Market Vectors Poland ETF, and Market Vectors Russia ETF [4] (collectively the ''Market Vector ETFs''). MIAX Rule 402 establishes the Exchange's initial listing standards for equity options (the ''Listing Standards''). The Listing Standards permit the Exchange to list options on the shares of open-end investment companies, such as the Market Vectors ETFs, without having to file for approval with the Commission.[5] The Exchange submits that each of the Market Vectors ETFs substantially meet all of the initial listing requirements. In particular, all of the requirements set forth in Rule 402(i) for each of the Market Vectors ETFs are met except for the requirement concerning the existence of a comprehensive surveillance sharing agreement (''CSSA''). However, as explained below, the Exchange submits that sufficient mechanisms exist in order to provide adequate surveillance and regulatory information with respect to the portfolio securities of each of the Market Vectors ETFs.

[3] Options on Market Vectors Brazil Small-Cap ETF are currently listed on Chicago Board Options Exchange, Inc. (''CBOE''), International Securities Exchange (''ISE''), and NASDAQ OMX PHLX (''PHLX'').

[4] Options on Market Vectors Russia ETF are currently listed on BATS Options Exchange (''BATS''), BOX Options Exchange (''BOX''), CBOE, PHLX, NYSE AMEX Options (''AMEX''), NYSE ARCA Options (''ARCA''), ISE, and ISE Gemini.

[5] MIAX Rule 402(i) provides the Listing Standards for shares or other securities (''Exchange-Traded Fund Shares'') that are traded on a national securities exchange and are defined as an ''NMS stock'' under Rule 600 of Regulation NMS.

Market Vectors Brazil Small-Cap ETF (''BRF'')

BRF is registered pursuant to the Investment Company Act of 1940 as a management investment company designed to hold a portfolio of securities which track the Market Vectors Brazil Small-Cap Index (''Brazil Index'').[6] The Brazil Index consists of stocks traded primarily on BM&FBOVESPA. BRF employs a ''passive'' or indexing approach to track the Brazil Index by investing in a portfolio of securities that generally replicates the Brazil Index.[7] Van Eck Associates Corporation (the ''Adviser'') expects BRF to closely track the Brazil Index so that, over time, a tracking error of 5%, or less, is exhibited. BRF will normally invest at least eighty percent (80%) of its assets in the securities comprising the Brazil Index. The Exchange believes that these policies prevent BRF from being excessively weighted in any single security or small group of securities and significantly reduce concerns that trading in BRF could become a surrogate for trading in unregistered securities.

Shares of the BRF (''BRF Shares'') are issued and redeemed, on a continuous basis, at net asset value (''NAV'') in aggregation size of 50,000 shares, or multiples thereof (a ''Creation Unit''). Following issuance, BRF Shares are traded on an exchange like other equity securities. BRF Shares trade in the secondary markets in amounts less than a Creation Unit and the price per BRF Share may differ from its NAV which is calculated once daily as of the regularly scheduled close of business of NYSE Arca.[8]

Bank of New York Mellon is the custodian, and transfer agent for BRF. Detailed information on BRF can be found at *www.vaneck.com*.

The Exchange has reviewed BRF and determined that the BRF Shares satisfy the initial listing standards, except for the requirement set forth in MIAX Rule 402(i)(5)(ii)(B) which requires BRF to meet the following condition:

• Component securities of an index or portfolio of securities on which the Exchange-Traded Fund Shares are based for which the primary market is in any one country that is not subject to a comprehensive surveillance agreement do not represent 20% or more of the weight of the index.

The Exchange currently does not have in place a surveillance agreement with BOVESPA.

The Exchange submits that the Commission, in the past, has been willing to allow a national securities exchange to rely on a memorandum of understanding entered into between regulators in the event that the exchanges themselves cannot enter into a CSSA. The Exchange notes that BM&FBOVESPA is under the regulatory oversight of the Comissao de Valores Mobiliarios (''CMV''), which has the responsibility for both Brazilian exchanges and over-the-counter markets. The Exchange further notes that the Commission executed a memorandum of understanding with the CMV dated as of July 24, 2012 (''Brazil-US MOU''), which provides a framework for mutual assistance in investigatory and regulatory issues. Based on the relationship between the SEC and CMV and the terms of the Brazil-US MOU, the Exchange submits that both the Commission and the CMV could acquire information from and provide information to the other similar to that which would be required in a CSSA between exchanges. Moreover, the Commission could make a request for information under the Brazil-US MOU on behalf of an SRO that needed the information for regulatory purposes. Thus, should MIAX need information on Brazilian trading in the Brazil Index component securities to investigate incidents involving trading of BRF options, the SEC could request such information from the CMV under the Brazil-US MOU. While this arrangement certainly would be enhanced by the existence of direct exchange to exchange surveillance sharing agreements, it is nonetheless consistent with other instances where the Commission has explored alternatives when the relevant foreign exchange was unwilling or unable to enter into a CSSA.[9]

The practice of relying on surveillance agreements or MOUs between regulators when a foreign exchange was unable, or unwilling, to provide an information sharing agreement was affirmed by the Commission in the Commission's New Product Release (''New Product Release'').[10] The Commission noted in the New Product Release that if securing a CSSA is not possible, an exchange should contact the Commission prior to listing a new derivative securities product. The Commission also noted that the Commission may determine instead that it is appropriate to rely on a memorandum of understanding between the Commission and the foreign regulator.

The Exchange has recently contacted BM&FBOVESPA with a request to enter into a CSSA. Until the Exchange is able to secure a CSSA with BM&FBOVESPA, the Exchange requests that the Commission allow the listing and trading of options on BRF without a CSSA, upon reliance of the Brazil-US MOU entered into between the Commission and the CMV. The Exchange believes this request is reasonable and notes that the Commission has provided similar relief in the past. For example, the Commission approved the Philadelphia Stock Exchange, Inc. (''PHLX'') to rely on an MOU between the Commission and the CMV instead of a direct CSSA with BM&FBOVESPA in order to list and trade options on Telebras Portoflio Certicate American Depository Receipts.[11] Additionally, the Commission approved, on a pilot basis, proposals of competing exchanges to list and trade options on the iShares MSCI Emerging Markets Fund [12] and the iShares MSCI Mexico Indext Fund.[13]

The Commission's approval of this request to list and trade options on the BRF would otherwise render BRF compliant with all of the applicable Listing Standards.

The Exchange shall continue to use its best efforts to obtain a CSSA with BM&FBOVESPA, which shall reflect the following: (1) Express language addressing market trading activity, clearing activity, and customer identity; (2) BM&FBOVESPA's reasonable ability to obtain access to and produce

[6] Market Vectors Index Solutions created and maintains the Market Vectors Brazil Small-Cap Index.

[7] As of March 20, 2014, BRF was comprised of 82 securities. CIA HERING had the greatest individual weight at 3.39%. The aggregate percentage weighting of the top 5 and 10 securities in the Fund were 15.04% and 27.66%, respectively.

[8] The regularly scheduled close of trading on NYSE Arca is normally 4:00 p.m. Eastern Time (''ET'') and 4:15 p.m. for ETFs.

[9] *See, e.g.,* Securities Exchange Act Release No. 36415 (October 25, 1995), 60 FR 55620 (November 1, 1995) (SR–CBOE–95–45) (Order Approving Proposed Rule Change Relating to the Listing and Trading of Options on the CBOE Mexico 30 Index).

[10] *See* Securities Exchange Act Release No. 40761 (December 8, 1998), 63 FR 70952, 70959 at fn. 101 (December 22, 1998).

[11] *See* Securities Exchange Act Release No. 40298 (August 3, 1998), 63 FR 43435 (August 13, 1998) (SR–Phlx–1998–33).

[12] *See* Securities Exchange Act Release Nos. 53824 (May 17, 2006), 71 FR 30003 (May 24, 2006) (SR–Amex–2006–43); 54081 (June 30, 2006), 71 FR 38911 (July 10, 2006) (SR–Amex–2006–60); 54553 (September 29, 2006), 71 FR 59561 (October 10, 2006) (SR–Amex–2006–91); 55040 (January 3, 2007), 72 FR 1348 (January 11, 2007) (SR–Amex–2007–01); and 55955 (June 25, 2007), 72 FR 36079 (July 2, 2007) (SR–Amex–2007–57); 56324 (August 27, 2007), 72 FR 50426 (August 31, 2007) (SR–ISE–2007–72).

[13] *See* Securities Exchange Act Release Nos. 72213 (May 21, 2014), FR 30699 (May 28, 2014) (SR–MIAX–2014–19); 56778 (November 9, 2007), 72 FR 65113 (November 19, 2007) (SR–Amex–2007–100); 57013 (December 20, 2007), 72 FR 73923 (December 28, 2007) (SR–CBOE–2007–140); 57014 (December 20, 2007), 72 FR 73934 (December 28, 2007) (SR–ISE–2007–111).

requested information; and (3) based on the CSSA and other information provided by the BM&FBOVESPA, the absence of existing rules, law or practices that would impede the Exchange from obtaining foreign information relating to market activity, clearing activity, or customer identity, or in the event such rules, laws, or practices exist, they would not materially impede the production of customer or other information.

Market Vectors Indonesia Index ETF (''IDX'')

IDX is registered pursuant to the Investment Company Act of 1940 as a management investment company designed to hold a portfolio of securities which track the Market Vectors Indonesia Index (''Indonesia Index'').[14] The Indonesia Index consists of stocks traded primarily on the Indonesia Stock Exchange. IDX employs a ''passive'' or indexing approach to track the Indonesia Index by investing in a portfolio of securities that generally replicates the Indonesia Index.[15] The Adviser expects IDX to closely track the Indonesia Index so that, over time, a tracking error of 5%, or less, is exhibited. IDX will normally invest at least eighty percent (80%) of its assets in the securities comprising the Indonesia Index. IDX may concentrate its investments in a particular industry or group of industries to the extent that the Indonesia Index concentrates in an industry or group of industries. The Exchange believes that these requirements and policies prevent the IDX from being excessively weighted in any single security or small group of securities and significantly reduce concerns that trading in IDX could become a surrogate for trading in unregistered securities.

Shares of the IDX (''IDX Shares'') are issued and redeemed, on a continuous basis, at NAV in aggregation size of 50,000 shares, or multiples thereof (a ''Creation Unit''). Following issuance, IDX Shares are traded on an exchange like other equity securities. IDX Shares trade in the secondary markets in amounts less than a Creation Unit and the price per IDX Share may differ from its NAV which is calculated once daily as of the regularly scheduled close of business of NYSE Arca.[16]

Bank of New York Mellon is the custodian, and transfer agent for IDX. Detailed information on IDX can be found at *www.vaneck.com*.

The Exchange has reviewed IDX and determined that the IDX Shares satisfy the initial listing standards, except for the requirement set forth in MIAX Rule 402(i)(5)(ii)(B) which requires IDX to meet the following condition:

- Component securities of an index or portfolio of securities on which the Exchange-Traded Fund Shares are based for which the primary market is in any one country that is not subject to a comprehensive surveillance agreement do not represent 20% or more of the weight of the index.

The Exchange currently does not have in place a surveillance agreement with the Indonesia Stock Exchange. The Exchange submits that the Commission, in the past, has been willing to allow a national securities exchange to rely on a memorandum of understanding entered into between regulators in the event that the exchanges themselves cannot enter into a CSSA. The Exchange notes that the Indonesia Stock Exchange is under the regulatory oversight of the Indonesia Financial Services Authority (''FSA''), which has the responsibility for Indonesian stock exchanges. The Exchange further notes that both the Commission and FSA are signatories to the International Organization of Securities Commissions (''IOSCO'') Multilateral Memorandum of Understanding (''MMOU''), which provides a framework for mutual assistance in investigatory and regulatory issues. Based on the relationship between the SEC and FSA and the terms of the MMOU, the Exchange submits that both the Commission and the FSA could acquire information from and provide information to the other similar to that which would be required in a CSSA between exchanges. Moreover, the Commission could make a request for information under the MMOU on behalf of an SRO that needed the information for regulatory purposes. Thus, should MIAX need information on Indonesian trading in the Indonesia Index component securities to investigate incidents involving trading of IDX options, the SEC could request such information from the FSA under the MMOU. While this arrangement certainly would be enhanced by the existence of direct exchange to exchange surveillance sharing agreements, it is nonetheless consistent with other instances where the Commission has explored alternatives when the relevant foreign exchange was unwilling or unable to enter into a CSSA.[17]

The practice of relying on surveillance agreements or MOUs between regulators when a foreign exchange was unable, or unwilling, to provide an information sharing agreement was affirmed by the Commission in the New Product Release.[18] The Commission noted in the New Product Release that if securing a CSSA is not possible, an exchange should contact the Commission prior to listing a new derivative securities product. The Commission also noted that the Commission may determine instead that it is appropriate to rely on a memorandum of understanding between the Commission and the foreign regulator.

The Exchange has recently contacted the Indonesia Stock Exchange with a request to enter into a CSSA. Until the Exchange is able to secure a CSSA with the Indonesia Stock Exchange, the Exchange requests that the Commission allow the listing and trading of options on IDX without a CSSA, upon reliance of the MMOU entered into between the Commission and the FSA. The Exchange believes this request is reasonable and notes that the Commission has provided similar relief in the past. Additionally, the Commission approved, on a pilot basis, proposals of competing exchanges to list and trade options on the iShares MSCI Emerging Markets Fund[19] and the iShares MSCI Mexico Index Fund.[20]

The Commission's approval of this request to list and trade options on the IDX would otherwise render IDX compliant with all of the applicable Listing Standards.

The Exchange shall continue to use its best efforts to obtain a CSSA with the Indonesia Stock Exchange, which shall reflect the following: (1) Express language addressing market trading activity, clearing activity, and customer identity; (2) the Indonesia Stock Exchange's reasonable ability to obtain access to and produce requested information; and (3) based on the CSSA and other information provided by the Indonesia Stock Exchange, the absence of existing rules, law or practices that would impede the Exchange from obtaining foreign information relating to market activity, clearing activity, or customer identity, or in the event such rules, laws, or practices exist, they would not materially impede the

[14] Market Vectors Index Solutions created and maintains the Market Vectors Indonesia Index.

[15] As of June 30, 2014, IDX was comprised of 52 securities. ASTRA INTERNATIONAL had the greatest individual weight at 8.05%. The aggregate percentage weighting of the top 5 and 10 securities in the Fund were 35.65% and 54.01%, respectively.

[16] *See supra* note 8.

[17] *See supra* note 9.

[18] *See supra* note 10.

[19] *See supra* note 12.

[20] *See supra* note 13.

production of customer or other information.

Market Vectors Poland Index ETF (''PLND'')

PLND is registered pursuant to the Investment Company Act of 1940 as a management investment company designed to hold a portfolio of securities which track the Market Vectors Poland Index (''Poland Index'').[21] The Poland Index consists of stocks traded primarily on the Warsaw Stock Exchange. PLND employs a ''passive'' or indexing approach to track the Poland Index by investing in a portfolio of securities that generally replicates the Poland Index.[22] The Adviser expects PLND to closely track the Poland Index so that, over time, a tracking error of 5%, or less, is exhibited. PLND will normally invest at least eighty percent (80%) of its assets in the securities comprising the Poland Index. PLND may concentrate its investments in a particular industry or group of industries to the extent that the Poland Index concentrates in an industry or group of industries. The Exchange believes that these requirements and policies prevent the PLND from being excessively weighted in any single security or small group of securities and significantly reduce concerns that trading in PLND could become a surrogate for trading in unregistered securities.

Shares of the PLND (''PLND Shares'') are issued and redeemed, on a continuous basis, at NAV in aggregation size of 50,000 shares, or multiples thereof (a ''Creation Unit''). Following issuance, PLND Shares are traded on an exchange like other equity securities. PLND Shares trade in the secondary markets in amounts less than a Creation Unit and the price per PLND Share may differ from its NAV which is calculated once daily as of the regularly scheduled close of business of NYSE Arca.[23]

Bank of New York Mellon is the custodian, and transfer agent for PLND. Detailed information on PLND can be found at *www.vaneck.com*.

The Exchange has reviewed PLND and determined that the PLND Shares satisfy the initial listing standards, except for the requirement set forth in MIAX Rule 402(i)(5)(ii)(B) which requires PLND to meet the following condition:

• Component securities of an index or portfolio of securities on which the Exchange-Traded Fund Shares are based for which the primary market is in any one country that is not subject to a comprehensive surveillance agreement do not represent 20% or more of the weight of the index.

The Exchange currently does not have in place a surveillance agreement with the Warsaw Stock Exchange.

The Exchange submits that the Commission, in the past, has been willing to allow a national securities exchange to rely on a memorandum of understanding entered into between regulators in the event that the exchanges themselves cannot enter into a CSSA. The Exchange notes that the Warsaw Stock Exchange is under the regulatory oversight of the Polish Financial Supervision Authority (''KNF''), which has the responsibility for Polish stock exchanges. The Exchange further notes that both the Commission and KNF are signatories to the IOSCO MMOU, which provides a framework for mutual assistance in investigatory and regulatory issues. Based on the relationship between the SEC and KNF and the terms of the MMOU, the Exchange submits that both the Commission and the KNF could acquire information from and provide information to the other similar to that which would be required in a CSSA between exchanges. Moreover, the Commission could make a request for information under the MMOU on behalf of an SRO that needed the information for regulatory purposes. Thus, should MIAX need information on Polish trading in the Poland Index component securities to investigate incidents involving trading of PLND options, the SEC could request such information from the KNF under the MMOU. While this arrangement certainly would be enhanced by the existence of direct exchange to exchange surveillance sharing agreements, it is nonetheless consistent with other instances where the Commission has explored alternatives when the relevant foreign exchange was unwilling or unable to enter into a CSSA.[24]

The practice of relying on surveillance agreements or MOUs between regulators when a foreign exchange was unable, or unwilling, to provide an information sharing agreement was affirmed by the Commission in the New Product Release.[25] The Commission noted in the New Product Release that if securing a CSSA is not possible, an exchange should contact the Commission prior to listing a new derivative securities product. The Commission also noted that the Commission may determine instead that it is appropriate to rely on a memorandum of understanding between the Commission and the foreign regulator.

The Exchange has recently contacted the Warsaw Stock Exchange with a request to enter into a CSSA. Until the Exchange is able to secure a CSSA with the Warsaw Stock Exchange, the Exchange requests that the Commission allow the listing and trading of options on PLND without a CSSA, upon reliance of the MMOU entered into between the Commission and the KNF. The Exchange believes this request is reasonable and notes that the Commission has provided similar relief in the past. Additionally, the Commission approved, on a pilot basis, proposals of competing exchanges to list and trade options on the iShares MSCI Emerging Markets Fund[26] and the iShares MSCI Mexico Index Fund.[27]

The Commission's approval of this request to list and trade options on the PLND would otherwise render PLND compliant with all of the applicable Listing Standards.

The Exchange shall continue to use its best efforts to obtain a CSSA with the Warsaw Stock Exchange, which shall reflect the following: (1) Express language addressing market trading activity, clearing activity, and customer identity; (2) the Warsaw Stock Exchange's reasonable ability to obtain access to and produce requested information; and (3) based on the CSSA and other information provided by the Warsaw Stock Exchange, the absence of existing rules, law or practices that would impede the Exchange from obtaining foreign information relating to market activity, clearing activity, or customer identity, or in the event such rules, laws, or practices exist, they would not materially impede the production of customer or other information.

Market Vectors Russia Index ETF (''RSX'')

RSX is registered pursuant to the Investment Company Act of 1940 as a management investment company designed to hold a portfolio of securities which track the Market Vectors Russia Index (''Russia Index'').[28] The Russia Index consists of stocks traded primarily on the Moscow Exchange. RSX employs

[21] Market Vectors Index Solutions created and maintains the Market Vectors Poland Index.

[22] As of June 30, 2014, PLND was comprised of 30 securities. PZU had the greatest individual weight at 8.13%. The aggregate percentage weighting of the top 5 and 10 securities in the Fund were 36.20% and 60.49%, respectively.

[23] *See supra* note 8.

[24] *See supra* note 9.

[25] *See supra* note 10.

[26] *See supra* note 12.

[27] *See supra* note 13.

[28] Market Vectors Index Solutions created and maintains the Market Vectors Russia Index.

a ''passive'' or indexing approach to track the Russia Index by investing in a portfolio of securities that generally replicates the Russia Index.[29] The Adviser expects RSX to closely track the Russia Index so that, over time, a tracking error of 5%, or less, is exhibited. RSX will normally invest at least eighty percent (80%) of its assets in the securities comprising the Russia Index. The Exchange believes that these requirements and policies prevent the RSX from being excessively weighted in any single security or small group of securities and significantly reduce concerns that trading in RSX could become a surrogate for trading in unregistered securities.

Shares of the RSX (''RSX Shares'') are issued and redeemed, on a continuous basis, at NAV in aggregation size of 50,000 shares, or multiples thereof (a ''Creation Unit''). Following issuance, RSX Shares are traded on an exchange like other equity securities. RSX Shares trade in the secondary markets in amounts less than a Creation Unit and the price per RSX Share may differ from its NAV which is calculated once daily as of the regularly scheduled close of business of NYSE Arca.[30]

Bank of New York Mellon is the custodian, and transfer agent for RSX. Detailed information on RSX can be found at *www.vaneck.com*.

The Exchange has reviewed RSX and determined that the RSX Shares satisfy the initial listing standards, except for the requirement set forth in MIAX Rule 402(i)(5)(ii)(B) which requires RSX to meet the following condition:

- Component securities of an index or portfolio of securities on which the Exchange-Traded Fund Shares are based for which the primary market is in any one country that is not subject to a comprehensive surveillance agreement do not represent 20% or more of the weight of the index.

The Exchange currently does not have in place a surveillance agreement with the Moscow Exchange. The Exchange submits that the Commission, in the past, has been willing to allow a national securities exchange to rely on a memorandum of understanding entered into between regulators in the event that the exchanges themselves cannot enter into a CSSA. The Exchange notes that the Moscow Exchange is under the regulatory oversight of the Federal Commission on Securities Market of Russia (''FCSM''), which has the responsibility for Russian stock exchanges. The Exchange further notes that Commission executed a memorandum of understanding with the Federal Commission on Securities and the Capital Market of the Government of the Russian Federation (''FCSCM''), a forerunner of the FCSM, dated as of December 6, 1995 (''Russia-US MOU''). Based on the relationship between the SEC and FCSM and the terms of the Russia-US MOU, the Exchange submits that both the Commission and the FCSM could acquire information from and provide information to the other similar to that which would be required in a CSSA between exchanges. Moreover, the Commission could make a request for information under the Russia-US MOU on behalf of an SRO that needed the information for regulatory purposes. Thus, should MIAX need information on Russian trading in the Russia Index component securities to investigate incidents involving trading of RSX options, the SEC could request such information from the FCSM under the Russia-US MOU. While this arrangement certainly would be enhanced by the existence of direct exchange to exchange surveillance sharing agreements, it is nonetheless consistent with other instances where the Commission has explored alternatives when the relevant foreign exchange was unwilling or unable to enter into a CSSA.[31]

The practice of relying on surveillance agreements or MOUs between regulators when a foreign exchange was unable, or unwilling, to provide an information sharing agreement was affirmed by the Commission in the New Product Release.[32] The Commission noted in the New Product Release that if securing a CSSA is not possible, an exchange should contact the Commission prior to listing a new derivative securities product. The Commission also noted that the Commission may determine instead that it is appropriate to rely on a memorandum of understanding between the Commission and the foreign regulator.

The Exchange has recently contacted the Moscow Exchange with a request to enter into a CSSA. Until the Exchange is able to secure a CSSA with the Moscow Exchange, the Exchange requests that the Commission allow the listing and trading of options on RSX without a CSSA, upon reliance of the Russia-US MOU entered into between the Commission and the FCSM. The Exchange believes this request is reasonable and notes that the Commission has provided similar relief in the past. Additionally, the Commission approved, on a pilot basis, proposals of competing exchanges to list and trade options on the iShares MSCI Emerging Markets Fund[33] and the iShares MSCI Mexico Index Fund.[34]

The Commission's approval of this request to list and trade options on the RSX would otherwise render RSX compliant with all of the applicable Listing Standards.

The Exchange shall continue to use its best efforts to obtain a CSSA with the Moscow Exchange, which shall reflect the following: (1) Express language addressing market trading activity, clearing activity, and customer identity; (2) the Moscow Exchange's reasonable ability to obtain access to and produce requested information; and (3) based on the CSSA and other information provided by the Moscow Exchange, the absence of existing rules, law or practices that would impede the Exchange from obtaining foreign information relating to market activity, clearing activity, or customer identity, or in the event such rules, laws, or practices exist, they would not materially impede the production of customer or other information.

2. Statutory Basis

MIAX believes that its proposed rule change is consistent with Section 6(b) of the Act[35] in general, and furthers the objectives of Section 6(b)(5) of the Act[36] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest. In particular, the Exchange believes listing and trading of options on the Market Vectors ETFs will benefit investors by providing them with valuable risk management tools.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes this proposed rule change will benefit investors by providing additional methods to trade options on the Market Vectors ETFs, and by providing them with valuable risk management tools. Specifically, the

[29] As of June 30, 2014, RSX was comprised of 51 securities. GAZPROM OAO–SPON ADR had the greatest individual weight at 8.38%. The aggregate percentage weighting of the top 5 and 10 securities in the Fund were 35.90% and 60.25%, respectively.

[30] *See supra* note 8.

[31] *See supra* note 9.

[32] *See supra* note 10.

[33] *See supra* note 12.

[34] *See supra* note 13.

[35] 15 U.S.C. 78f(b).

[36] 15 U.S.C. 78f(b)(5).

Exchange believes that market participants on MIAX would benefit from the introduction and availability of options on the Market Vectors ETFs in a manner that is similar to other exchanges and will provide investors with yet another venue on which to trade these products. The Exchange notes that the rule change is being proposed as a competitive response to other competing options exchanges that already list and trade options on the Market Vectors ETFs and believes this proposed rule change is necessary to permit fair competition among the options exchanges. For all the reasons stated above, the Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act, and believes the proposed change will enhance competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–MIAX–2014–39 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–MIAX–2014–39. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–MIAX–2014–39 and should be submitted on or before September 2, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[37]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–18978 Filed 8–11–14; 8:45 am]

BILLING CODE 8011–01–P

[37] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice: 8824]

Shipping Coordinating Committee; Notice of Committee Meeting

The Shipping Coordinating Committee (SHC) will conduct an open meeting at 9:30 a.m. on Wednesday, August 27, 2014, in Conference Room 4 of the Department of Transportation Headquarters Conference Center, West Building, 1200 New Jersey Avenue SE., Washington, DC 20590. The primary purpose of the meeting is to prepare for the first Session of the International Maritime Organization's (IMO) Sub-Committee on Carriage of Cargoes and Containers to be held at the IMO Headquarters, United Kingdom, September 8–12, 2014.

The agenda items to be considered include:

—Adoption of the agenda
—Decisions of other IMO bodies
—Amendments to CSC 1972 and associated circulars
—Development of international code of safety for ships using gases or other low flashpoint fuels (IGF Code)
—Amendments to the IMSBC Code and supplements
—Amendments to the IMDG Code and supplements
—Unified interpretation to provisions of IMO safety, security and environment related Conventions
—Consideration of reports of incidents involving dangerous goods or marine pollutants in packaged form on board shops or in port areas
—Revised guidelines for packing of cargo transport units
—Biennial agenda and provisional agenda for CCC 2
—Election of Chairman and Vice-Chairman for 2015

Members of the public may attend this meeting up to the seating capacity of the room. Upon request, members of the public may also participate via teleconference, up to the capacity of the teleconference phone line. To facilitate the building security process, and to request reasonable accommodation, those who plan to attend, or participate via the teleconference line, should contact the meeting coordinator, Ms. Amy Parker, by email at *Amy.M.Parker@uscg.mil* or by phone at (202) 372–1423, not later than August 18, 2014, 7 business days prior to the meeting. Requests made after August 18, 2014 might not be able to be accommodated. Please note that due to security considerations, a valid, government issued photo identification must be presented to gain entrance to the DOT Headquarters building. DOT Headquarters is accessible by metro via the Navy Yard Metrorail Station, taxi, and privately owned conveyance. However, parking in the vicinity of the building is extremely limited. Additional information regarding this and other IMO SHC public meetings may be found at: *www.uscg.mil/imo.*

This announcement might appear in the **Federal Register** less than 15 days prior to the meeting. The Department of State finds that there is an exceptional circumstance in that this advisory committee meeting must be held on August 27, in order to adequately

prepare for the IMO meeting to be convened on September 8th.

Dated: August 6, 2014.

Marc Zlomek,

Executive Secretary, Shipping Coordinating Committee, Department of State.

[FR Doc. 2014–19035 Filed 8–11–14; 8:45 am]

BILLING CODE 4710–09–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (Formerly Subpart Q) During the Week Ending July 26, 2014

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart B (formerly Subpart Q) of the Department of Transportation's Procedural Regulations (See 14 CFR 301.201 et. seq.). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: DOT–OST–2014–0125.

Date Filed: July 21, 2014.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: August 11, 2014.

Description: Application of Primera Air Scandinavia A/S (''Primera Air'') requesting a foreign air carrier permit and exemption authority so that it may exercise the full rights available to EU Member State air carriers pursuant to the Air Transport Agreement between the United States of America and the European Union and its Member States. Primera Air requests rights to engage in: (i) Foreign scheduled and charter air transportation of persons, property and mail from any point or points behind any Member State of the European Union, via any point or points in any Member State and via intermediate points, to any point or points in the United States and beyond; (ii) foreign scheduled and charter air transportation of persons, property and mail between any point or points in the United States and any point or points in any member of the European Common Aviation Area; (iii) foreign scheduled and charter air transportation of cargo between any point or points in the United States and any other point or points; (iv) other charters pursuant to the prior approval requirements; and (v) transportation authorized by any additional route rights made available to European Union carriers under the U.S.-EU Air Transport Agreement in the future.

Barbara J. Hairston,

Supervisory Dockets Officer, Docket Operations, Federal Register Liaison .

[FR Doc. 2014–19033 Filed 8–11–14; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Global Positioning System Adjacent Band Compatibility Assessment Workshop

AGENCY: Office of the Assistant Secretary for Research and Technology, Department of Transportation.

ACTION: Notice of meeting.

SUMMARY: The purpose of this notice is to inform the public that the U.S. Department of Transportation will host a workshop to discuss implementation of a Global Positioning System (GPS) Adjacent Band Compatibility Assessment. Discussion at this workshop will focus on the various implementation steps of the GPS Adjacent Band Compatibility Assessment, including development of GPS receiver use cases, identification of representative GPS receivers, and development of a test and analysis program. In particular, emphasis will be placed on the information needed from GPS receiver and antenna manufacturers, and the logistics of procuring and handling that information to safeguard manufacturer proprietary data. This workshop is open to the general public by registration only. For those who would like to attend the workshop in person or via WebEx, we request that you register no later than September 4, 2014. Please send the registration information to *stephen.mackey@dot.gov* providing:

- Name
- Organization
- Telephone number
- Mailing and email addresses
- Attendance method (WebEx or on site)
- Country of citizenship

DATES: Date/Time: September 18, 2014 10 a.m.–5 p.m. (Eastern Daylight Time).

Location: U.S. Department of Transportation, John A. Volpe National Transportation Systems Center, 55 Broadway, Cambridge, MA 02142.

Identification will be required at the entrance of Volpe Center facility (Passport, state ID, or Federal ID).

FOR FURTHER INFORMATION CONTACT: Stephen M. Mackey, U.S. Department of Transportation, John A. Volpe National Transportation Systems Center, RVT–75, Cambridge, MA 02142, *Stephen.Mackey@dot.gov,* Telephone: 617–494–2753.

Gregory D. Winfree,

Assistant Secretary for Research and Technology.

[FR Doc. 2014–18971 Filed 8–11–14; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Noise Exposure Map Notice; Portsmouth International Airport at Pease; Portsmouth, Newington, and Greenland, New Hampshire

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) announces its determination that the noise exposure maps for Portsmouth International Airport at Pease, as submitted by the Pease Development Authority under the provisions of Title I of the Aviation Safety and Noise Abatement Act of 1979 (Pub. L. 96–193) and 14 CFR Part 150, are in compliance with applicable requirements.

DATES: EFFECTIVE DATE: The effective date of the FAA's determination on the noise exposure maps is July 30, 2014.

FOR FURTHER INFORMATION CONTACT: Richard Doucette, Federal Aviation Administration, New England Region, Airports Division, 12 New England Executive Park, Burlington, Massachusetts 01803.

SUPPLEMENTARY INFORMATION: This notice announces that the FAA finds that the noise exposure maps submitted for Portsmouth International Airport at Pease are in compliance with applicable requirements of Part 150, effective July 30, 2014.

Under Section 103 of Title I of the Aviation Safety and Noise Abatement Act of 1979 (hereinafter referred to as ''the Act''), an airport operator may submit to the FAA noise exposure maps that meet applicable regulations and that depict non-compatible land uses as of the date of submission of such maps, a description of projected aircraft operations, and the ways in which such operations will affect such maps. The Act requires such maps to be developed in consultation with interested and affected parties in the local community,

government agencies, and persons using the airport.

An airport operator who has submitted such noise exposure maps that are found by FAA to be in compliance with the requirements of Federal Aviation Regulation (FAR) Part 150, promulgated pursuant to Title I of the Act, may submit a noise compatibility program for FAA approval that sets forth the measures the operator has taken, or proposes, for the introduction of additional non-compatible uses.

The FAA has completed its review of the noise exposure map and related descriptions submitted by the Pease Development Authority. The specific maps under consideration were Figure 4–1 ''2014 Existing Conditions Noise Exposure Map'' and Figure 4–2 ''2019 Five-Year forecast conditions Noise Exposure Map'' in the submission. The FAA has determined that these maps for Portsmouth International Airport at Pease are in compliance with applicable requirements. This determination is effective on July 30, 2014.

FAA's determination on an airport operator's noise exposure maps is limited to a finding that the maps were developed in accordance with the procedures contained in Appendix A of FAR Part 150. Such determination does not constitute approval of the applicant's data, information or plans, or a commitment to approve a noise compatibility program or to fund the implementation of that program.

If questions arise concerning the precise relationship of specific properties to noise exposure contours depicted on a noise exposure map submitted under Section 103 of the Act, it should be noted that the FAA is not involved in any way in determining the relative locations of specific properties with regard to the depicted noise contours, or in interpreting the noise exposure maps to resolve questions concerning, for example, which properties should be covered by the provisions of Section 107 of the Act. These functions are inseparable from the ultimate land use control and planning responsibilities of local government. These local responsibilities are not changed in any way under Part 150 or through FAA's review of a noise exposure map. Therefore, the responsibility for the detailed overlaying of noise exposure contours onto the map depicting properties on the surface rests exclusively with the airport operator that submitted the map or with those public agencies and planning agencies with which consultation is required under Section 103 of the Act. The FAA has relied on the certification by the airport operator, under Section 150.21 of FAR Part 150, that the statutorily required consultation has been accomplished.

Copies of the noise exposure maps and of the FAA's evaluation of the maps are available for examination at the following locations:

Pease Development Authority, 55 International Drive, Portsmouth, NH 03801.

Federal Aviation Administration, New England Region, Airports Division, 12 New England Executive Park, Burlington, Massachusetts 01803.

Questions may be directed to the individual named above under the heading: **FOR FURTHER INFORMATION CONTACT**.

Issued in Burlington, Massachusetts, on July 30, 2014.

Richard P. Doucette,

Environmental Program Manager, FAA New England Region, Airports Division.

[FR Doc. 2014–19042 Filed 8–11–14; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA–2014–0029]

Agency Information Collection Activities: Request for Comments for the Renewal of a Previously Approved Information Collection

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that FHWA will submit the collection of information described below to the Office of Management and Budget (OMB) for review and comment. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on May 19, 2014. The PRA submission describes the nature of the information collection and its expected cost and burden.

DATES: Please submit comments by September 11, 2014.

ADDRESSES: You may submit comments identified by DOT Docket ID 2014–0029 by any of the following methods:

Web site: For access to the docket to read background documents or comments received go to the *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.

Fax: 1–202–493–2251.

Mail: Docket Management Facility, U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.

Hand Delivery or Courier: U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Kevin Douglas, 202–366–2601, Office of Human Environment, Federal Highway Administration, Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Title: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.

Background: The information collection activity will garner qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the Administration's commitment to improving service delivery. By qualitative feedback we mean information that provides useful insights on perceptions and opinions, but are not statistical surveys that yield quantitative results that can be generalized to the population of study. This feedback will provide insights into customer or stakeholder perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between the Agency and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

Feedback collected under this generic clearance will provide useful information, but it will not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address: the target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering),

the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential non-response bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior to 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. Below we provide FHWA's projected average estimates for the next three years:

Respondents: State and local governments, highway industry organizations, and the general public.

Estimated Average Annual Burden: The burden hours per response will vary with each survey; however, we estimate an average burden of 15 minutes for each survey.

Estimated Total Annual Burden Hours: We estimate that FHWA will survey approximately 21,000 respondents annually during the next 3 years. Therefore, the estimated total annual burden is 5,200 hours.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1.48.

Issued On: May 5, 2014.

Michael Howell,

Information Collection Officer.

[FR Doc. 2014–19030 Filed 8–11–14; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA–2014–0027]

Agency Information Collection Activities: Request for Comments for the Renewal of a Previously Approved Information Collection

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that FHWA will submit the collection of information described below to the Office of Management and Budget (OMB) for review and comment. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on May 19, 2014. The PRA submission describes the nature of the information collection and its expected cost and burden.

DATES: Please submit comments by September 11, 2014.

ADDRESSES: You may submit comments identified by DOT Docket ID 2014–0027 by any of the following methods:

Web site: For access to the docket to read background documents or comments received go to the Federal eRulemaking Portal: Go to *http://www.regulations.gov* . Follow the online instructions for submitting comments.

Fax: 1–202–493–2251.

Mail: Docket Management Facility, U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.

Hand Delivery or Courier: U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Title: Emergency Relief Funding Applications.

OMB Control #: 2125–0525.

Background: Congress authorized in Title 23, United States Code, Section 125, a special program from the Highway Trust Fund for the repair or reconstruction of Federal-aid highways and roads on Federal lands which have suffered serious damage as a result of natural disasters or catastrophic failures from an external cause. This program, commonly referred to as the Emergency Relief or ER program, supplements the commitment of resources by States, their political subdivisions, or other Federal agencies to help pay for unusually heavy expenses resulting from extraordinary conditions. The applicability of the ER program to a natural disaster is based on the extent and intensity of the disaster. Damage to highways must be severe, occur over a wide area, and result in unusually high expenses to the highway agency. Examples of natural disasters include floods, hurricanes, earthquakes, tornadoes, tidal waves, severe storms, and landslides. Applicability of the ER program to a catastrophic failure due to an external cause is based on the criteria that the failure was not the result of an inherent flaw in the facility but was sudden, caused a disastrous impact on transportation services, and resulted in unusually high expenses to the highway agency. A bridge suddenly collapsing after being struck by a barge is an example of a catastrophic failure from an external cause. The ER program provides for repair and restoration of highway facilities to pre-disaster conditions. Restoration in kind is therefore the predominant type of repair expected to be accomplished with ER funds. Generally, all elements of the damaged highway within its cross section are eligible for ER funds. Roadway items that are eligible may include: pavement, shoulders, slopes and embankments, guardrail, signs and traffic control devices, bridges, culverts, bike and pedestrian paths, fencing, and retaining walls. Other eligible items may include: engineering and right-of-way costs, debris removal, transportation system management strategies, administrative expenses, and equipment rental expenses. This information collection is needed for the FHWA to fulfill its statutory obligations regarding funding determinations for ER eligible damages following a disaster. The regulations covering the FHWA ER program are contained in 23 CFR Part 668.

Respondents: 50 State Transportation Departments, the District of Columbia, Puerto Rico, Guam, American Samoa, Northern Mariana Islands, and the Virgin Islands.

Estimated Average Annual Burden: The respondents submit an estimated total of 30 applications each year. Each application requires an estimated average of 250 hours to complete.

Estimated Total Annual Burden Hours: Total estimated average annual burden is 7,500 hours.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection of information is necessary for the U.S. DOT's performance, including whether the information will have practical utility; (2) the accuracy of the U.S. DOT's estimate of the burden of the proposed information collection; (3) ways to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized, including the use of electronic technology, without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1.48.

Issued On: August 5, 2014.

Michael Howell,

Information Collection Officer.

[FR Doc. 2014–19031 Filed 8–11–14; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2014–0213]

Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders

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

ACTION: Notice of applications for exemptions; request for comments.

SUMMARY: FMCSA announces receipt of applications from 6 individuals for an exemption from the prohibition against persons with a clinical diagnosis of epilepsy or any other condition which is likely to cause a loss of consciousness or any loss of ability to operate a commercial motor vehicle (CMV) from operating CMVs in interstate commerce. The regulation and the associated advisory criteria published in the Code of Federal Regulations as the ''Instructions for Performing and Recording Physical Examinations'' have resulted in numerous drivers being prohibited from operating CMVs in interstate commerce based on the fact that they have had one or more seizures and are taking anti-seizure medication, rather than an individual analysis of their circumstances by a qualified medical examiner. If granted, the exemptions would enable these individuals who have had one or more seizures and are taking anti-seizure medication to operate CMVs for 2 years in interstate commerce.

DATES: Comments must be received on or before September 11, 2014.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket ID FMCSA–2014–0213 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- *Fax:* 1–202–493–2251.

Each submission must include the Agency name and the docket ID for this Notice. Note that DOT posts all comments received without change to *http://www.regulations.gov,* including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The FDMS is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on January 17, 2008 (73 FR 3316; January 17, 2008). This information is also available at *http://Docketinfo.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Elaine Papp, Chief, Medical Programs Division, (202) 366–4001, or via email at *fmcsamedical@dot.gov,* or by letter FMCSA, Room W64–113, Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31315 and 31136(e), FMCSA may grant an exemption for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption.'' The statutes also allow the Agency to renew exemptions at the end of the 2-year period. The 6 individuals listed in this notice have recently requested an exemption from the epilepsy prohibition in 49 CFR 391.41(b)(8), which applies to drivers who operate CMVs as defined in 49 CFR 390.5, in interstate commerce. Section 391.41(b)(8) states that a person is physically qualified to drive a commercial motor vehicle if that person has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause the loss of consciousness or any loss of ability to control a CMV.

FMCSA provides medical advisory criteria for use by medical examiners in determining whether drivers with certain medical conditions should be certified to operate CMVs in intrastate commerce. The advisory criteria indicate that if an individual has had a sudden episode of a non-epileptic seizure or loss of consciousness of unknown cause which did not require anti-seizure medication, the decision whether that person's condition is likely to cause the loss of consciousness or loss of ability to control a CMV should be made on an individual basis by the medical examiner in consultation with the treating physician. Before certification is considered, it is suggested that a 6-month waiting period elapse from the time of the episode. Following the waiting period, it is suggested that the individual have a complete neurological examination. If the results of the examination are negative and anti-seizure medication is not required, then the driver may be qualified.

In those individual cases where a driver had a seizure or an episode of loss of consciousness that resulted from a known medical condition (e.g., drug reaction, high temperature, acute infectious disease, dehydration, or acute metabolic disturbance), certification should be deferred until the driver has fully recovered from that condition, has no existing residual complications, and is not taking anti-seizure medication. Drivers who have a history of epilepsy/seizures, off anti-seizure medication and seizure-free for 10 years, may be qualified to operate a CMV in interstate commerce. Interstate drivers with a history of a single unprovoked seizure may be qualified to drive a CMV in interstate commerce if seizure-free and off anti-seizure medication for a 5-year period or more.

Submitting Comments

You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission. To submit your comment online, go to *http://www.regulations.gov* and in the search box insert the docket number ''FMCSA–2014–0213'' and click the search button. When the new screen appears, click on the blue ''Comment Now!'' button on the right hand side of

the page. On the new page, enter information required including the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

We will consider all comments and material received during the comment period and may change this proposed rule based on your comments. FMCSA may issue a final rule at any time after the close of the comment period.

Viewing Comments and Documents

To view comments, as well as any documents mentioned in this preamble, To submit your comment online, go to *http://www.regulations.gov* and in the search box insert the docket number ''FMCSA–2014–0213'' and click ''Search.'' Next, click ''Open Docket Folder'' and you will find all documents and comments related to the proposed rulemaking.

Summary of Applications

Lee H. Anderson

Mr. Anderson is a 41 year-old driver in Massachusetts. He has a history of seizures and has remained seizure free since 2002. He takes anti-seizure medication with the dosage and frequency remaining the same since that time. If granted an exemption, he would like to drive a CMV. His physician states he is supportive of Mr. Anderson receiving an exemption.

Brian Justin Brown

Mr. Brown is a 35 year-old class A CDL holder in Pennsylvania. He has a history of seizures and has remained seizure free since 2008. He takes anti-seizure medication with the dosage and frequency remaining the same since that time. If granted the exemption, he would like to drive a CMV. His physician states that he is supportive of Mr. Brown receiving an exemption.

Gary A. Combs, Jr.

Mr. Combs is a 38 year-old driver in Kentucky. He has a history of one seizure in 2006 due to a brain tumor which was removed and has remained seizure free since that time. He does not take anti-seizure medication. If granted an exemption, he would like to drive a CMV. His physician states he is supportive of Mr. Combs receiving an exemption.

Roland K Mezger

Mr. Mezger is a 41 year-old driver in Pennsylvania. He has a history of juvenile epilepsy and has remained seizure free since 1997. He takes anti-seizure medication with the dosage and frequency remaining the same since that time. If granted the exemption, he would like to drive a CMV. His physician states he is supportive of Mr. Mezger receiving an exemption.

Adam B. Schultz

Mr. Schultz is a 22 year-old driver in Maryland. He has a history of epilepsy and has remained seizure free since 2009. He takes anti-seizure medication with the dosage and frequency remaining the same since that time. If granted the exemption, he would like to drive a CMV. His physician states that he is supportive of Mr. Schultz receiving an exemption.

Robert Thomas, Jr.

Mr. Thomas is a 47 year-old driver in North Carolina. He has a history of seizures and has remained seizure free since 1999. He takes anti-seizure medication with the dosage and frequency remaining the same since that time. If granted the exemption, he would like to drive a CMV. His physician states that he is supportive of Mr. Thomas receiving an exemption.

Request for Comments

In accordance with 49 U.S.C. 31315 and 31136(e), FMCSA requests public comment from all interested persons on the exemption applications described in this notice. We will consider all comments received before the close of business on the closing date indicated earlier in the notice.

Issued on: August 4, 2014.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2014–19076 Filed 8–11–14; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2014–0006]

Qualification of Drivers; Exemption Applications; Vision

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

ACTION: Notice of final disposition.

SUMMARY: FMCSA confirms its decision to exempt 34 individuals from the vision requirement in the Federal Motor Carrier Safety Regulations (FMCSRs). They are unable to meet the vision requirement in one eye for various reasons. The exemptions allow these individuals to operate commercial motor vehicles (CMVs) in interstate commerce without meeting the prescribed vision requirement in one eye.

DATES: The new exemptions are effective July 22, 2014. All exemptions expire two years from the effective date.

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, Chief, Medical Programs Division, 202–366–4001, U.S. Department of Transportation, FMCSA, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION FOR NEW EXEMPTIONS:

Electronic Access

You may see all the comments related to new exemptions discussed in this docket online through the Federal Document Management System (FDMS) at: *http://www.regulations.gov.*

Docket: For access to the dockets to read background documents or comments, go to *http://www.regulations.gov* and/or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: Anyone may search the electronic form of all comments received into any of DOT's dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, or other entity). You may review DOT's Privacy Act Statement for the Federal Docket Management System (FDMS) published in the **Federal Register** on January 17, 2008 (73 FR 3316).

Background

FMCSA has published notices of receipt of Federal vision exemption applications and its intent to grant the exemptions. The Agency also requested comments from the public. The comment period closed 30 days after the publication date, and the exemptions were issued 1 day after the comment period closed.

FMCSA evaluated the eligibility of the drivers and determined that granting the exemptions to these individuals would achieve a level of safety equivalent to or greater than the level that would be

achieved by complying with the current regulation 49 CFR 391.41(b)(10).

The determining criteria for and the conditions and requirements of the exemptions, to which all exempted drivers are subject, were discussed in detail when the docket was originally published (79 FR 35212). As always, any adverse comments that come in after the exemption is granted will be evaluated, and if they indicate that the driver is not achieving a level of safety equivalent to, or greater than, the level of safety that would be obtained by complying with the regulation, the exemption will be revoked. When granted, the exemptions will enable these individuals with vision deficiencies in one eye to operate in interstate commerce.

Exemptions Granted

The following 34 individuals are included in Docket No. FMCSA–2014–0006 (79 FR 35212), originally published on June 19, 2014:

Abdullahi M. Abukar (KY)
Gregory K. Banister (SC)
Amanuel W. Behon (WA)
Oscar N. Bolton (OH)
Kenneth W. Bos (MN)
Jerry W. Brinson (GA)
Michael C. Brown (IN)
Larry O. Burr (WI)
Brian L. Elliot (MO)
Juneau A. Faulkner (GA)
Gregory E. Gage (IA)
Robert Hall III (NC)
Bradley C. Hansell (OR)
Andrew P. Hawkins (SC)
Daniel Hollins (KY)
Clarence H. Jacobsma (IN)
Samuel L. Klaphake (MN)
Timothy L. Klose (PA)
Phillip E. Mason (MO)
David P. Monti (NJ)
Timothy L. Morton (NC)
Larry G. Nikkel (WA)
Kenneth A. Orrino (WA)
Ruel W. Reed (NC)
Jose L. Sanchez (IL)
Nicholas J. Schiltgen (MN)
Warren J. Shatzer (PA)
Loren A. Smith (SD)
Harlan L. Sugars (IA)
Seth D. Sweeten (ID)
George R. Tieskoetter (IA)
Ronald L. Weiss (MN)
John T. White, Jr. (NC)
Henry P. Wurtz (SD),

The public comment period for this docket closed on July 21, 2014, and the exemptions were issued and effective on July 22, 2014. The exemptions will expire two years from the effective date on July 22, 2016.

FMCSA received no comments in this proceeding.

Issued on: August 4, 2014.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2014–19077 Filed 8–11–14; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF THE TREASURY

Foreign Assets Control Office

Actions Taken Pursuant to Executive Order 13551

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control (''OFAC'') is publishing the names of two entities whose property and interests in property are blocked pursuant to Executive Order 13551 of August 30, 2010, as well as the names of 18 vessels in which these entities have property interests.

DATES: OFAC's actions pursuant to Executive Order 13551 described in this notice were effective July 30, 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

Additional information concerning OFAC is available from OFAC's Web site (*www.treas.gov/ofac*). Certain general information pertaining to OFAC's sanctions programs is available via facsimile through a 24-hour fax-on-demand service, tel.: 202/622–0077.

Background

On August 30, 2010, the President issued Executive Order 13551 (''Blocking Property of Certain Persons With Respect to North Korea'') (the ''Order'').

Section 1 of the Order blocks, with certain exceptions, all property and interests in property that are in the United States, that hereafter come within the United States, or that hereafter come within the possession or control of any United States person, including any foreign branch, of persons listed in the Annex to the Order, as well as persons determined by the Secretary of the Treasury, in consultation with the Secretary of State, to meet any of the criteria set forth in subsection (a)(ii) of section 1.

On July 30, 2014, the Director of OFAC designated the following two entities as persons whose property and interests in property are blocked pursuant to section 1 of E.O. 13551:

Entities

1. CHONGCHONGANG SHIPPING COMPANY LIMITED (a.k.a. CHONG CHON GANG SHIPPING CO. LTD; a.k.a. CHONGCHONGANG SHIPPING CO LTD), 817, Haeun, Donghung-dong, Central District, Pyongyang, Korea, North; 817, Haeun, Tonghun-dong, Chung-gu, Pyongyang, Korea, North; Identification Number IMO 5342883 [DPRK].
2. OCEAN MARITIME MANAGEMENT COMPANY LIMITED (a.k.a. EAST SEA SHIPPING COMPANY), Dongheung-dong Changgwang Street, Chung-ku, PO Box 125, Pyongyang, Korea, North; Donghung Dong, Central District, PO Box 120, Pyongyang, Korea, North; No. 10, 10th Floor, Unit 1, Wu Wu Lu 32–1, Zhong Shan Qu, Dalian City, Liaoning Province, China; 22 Jin Cheng Jie, Zhong Shan Qu, Dalian City, Liaoning Province, China; 43–39 Lugovaya, Vladivostok, Russia; CPO Box 120, Tonghung-dong, Chung-gu, Pyongyang, Korea, North; Bangkok, Thailand; Lima, Peru; Port Said, Egypt; Singapore; Brazil; Identification Number IMO 1790183 [DPRK].

In addition, on July 30, 2014, the Director of OFAC identified the following vessel as blocked property of CHONGCHONGANG SHIPPING COMPANY LIMITED, an entity whose property and interests in property are blocked pursuant to E.O. 13551:

Vessel

1. CHONG CHON GANG General Cargo Democratic People's Republic of Korea flag; Vessel Registration Identification IMO 7937317 (vessel) [DPRK].

Finally, on July 30, 2014, the Director of OFAC identified the following 17 vessels as blocked property of OCEAN MARITIME MANAGEMENT COMPANY LIMITED, an entity whose property and interests in property are blocked pursuant to E.O. 13551:

Vessels

1. AM NOK GANG (a.k.a. AP ROK GANG) General Cargo Democratic People's Republic of Korea flag; Vessel Registration Identification IMO 8132835 (vessel) [DPRK].
2. BAEK MA KANG General Cargo Democratic People's Republic of Korea flag; Vessel Registration Identification IMO 7944683 (vessel) [DPRK].

3. DAI HONG DAN General Cargo Democratic People's Republic of Korea flag; Vessel Registration Identification IMO 7944695 (vessel) [DPRK].
4. DOK CHON General Cargo Democratic People's Republic of Korea flag; Vessel Registration Identification IMO 7411260 (vessel) [DPRK].
5. HWANG GUM SAN 2 General Cargo Democratic People's Republic of Korea flag; Vessel Registration Identification IMO 8405270 (vessel) [DPRK].
6. HYOK SIN 2 Bulk Carrier Democratic People's Republic of Korea flag; Vessel Registration Identification IMO 8018900 (vessel) [DPRK].
7. JANG JA SAN CHONG NYON HO Bulk Carrier Democratic People's Republic of Korea flag; Vessel Registration Identification IMO 8133530 (vessel) [DPRK].
8. JON JIN 2 Bulk Carrier Democratic People's Republic of Korea flag; Vessel Registration Identification IMO 8018912 (vessel) [DPRK].
9. MU DU BONG General Cargo Democratic People's Republic of Korea flag; Vessel Registration Identification IMO 8328197 (vessel) [DPRK].
10. O UN CHONG NYON HO General Cargo Democratic People's Republic of Korea flag; Vessel Registration Identification IMO 8330815 (vessel) [DPRK].
11. PHO THAE General Cargo Democratic People's Republic of Korea flag; Vessel Registration Identification IMO 7632955 (vessel) [DPRK].
12. PI RUY GANG General Cargo Democratic People's Republic of Korea flag; Vessel Registration Identification IMO 8829593 (vessel) [DPRK].
13. PO THONG GANG General Cargo Democratic People's Republic of Korea flag; Vessel Registration Identification IMO 8829555 (vessel) [DPRK].
14. RAK WON 2 General Cargo Democratic People's Republic of Korea flag; Vessel Registration Identification IMO 8819017 (vessel) [DPRK].
15. RYONG GANG 2 General Cargo Democratic People's Republic of Korea flag; Vessel Registration Identification IMO 7640378 (vessel) [DPRK].
16. RYONG GUN BONG General Cargo Democratic People's Republic of Korea flag; Vessel Registration Identification 8606173 (vessel) [DPRK].
17. TAE DONG GANG General Cargo Democratic People's Republic of Korea flag; Vessel Registration Identification IMO 7738656 (vessel) [DPRK].

The entities and vessels named above have been added to OFAC's List of Specially Designated Nationals and Blocked Persons with the identifying tag ''DPRK.''

Dated: July 30, 2014.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. 2014–19012 Filed 8–11–14; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF VETERANS AFFAIRS

Draft Policy and Implementation Plan for Public Access to Scientific Publications and Digital Data From Research Funded by the Department of Veterans Affairs (VA)

AGENCY: Department of Veterans Affairs.

ACTION: Notice and Request for Comments.

SUMMARY: This **Federal Register** Notice announces an opportunity for public review and comment on the *draft Policy and Implementation Plan for Public Access to Scientific Publications and Digital Data from Research Funded by the Department of Veterans Affairs.*

DATES: Comments must be received by VA on or before October 14, 2014.

ADDRESSES: Written comments may be submitted through *http://www.Regulations.gov;* by mail or hand delivery to the Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Comments should indicate that they are submitted in response to ''Policy and Implementation Plan for Public Access to Scientific Publications and Digital Data from Research Funded by the Department of Veterans Affairs.'' Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment (this is not a toll-free number). In addition, during the comment period, comments may be viewed online through the Federal Docket Management System at *http://www.Regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Tom Puglisi, Ph.D., Executive Director, Office of Research Oversight (10R), 810 Vermont Avenue NW., Washington, DC 20420, (202) 632–7676 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: VA's draft policy and implementation plan for increased public access to the results of its research was developed in response to recent White House initiatives on federally-funded scientific research. In its February 22, 2013, memorandum, the White House Office of Science and Technology Policy (OSTP) directed each Federal agency with over $100 million in annual expenditures for the conduct of research and development to develop a plan to support increased public access to the results of research funded by the Federal Government, including digital data sets and results published in peer-reviewed scholarly publications arising directly from federally-funded research (OSTP, *Increasing Access to the Results of Federally Funded Scientific Research,* February 22, 2013).

In implementing policies on public access to research publications and digital research data, VA must first remain cognizant of its ethical and legal obligations to safeguard the privacy of Veterans (and VA's other research subjects) and the confidentiality of their private information, while promoting the highest quality science. VA also recognizes that Veterans and the public at-large have a substantive interest in accessing the results of the research that VA conducts. VA's responsibility precludes unlimited public access to private information about individual research subjects. With this in mind, VA has carefully weighed the public benefits versus the risks of harm to Veterans in establishing the draft requirements.

VA is committed to ensuring that the final study results, including peer-reviewed publications and digital data sets from VA-funded scientific research are made available to the scientific community, industry, and the general public with the fewest constraints possible, while protecting the privacy of the Veterans (and others) about whom research data are obtained and safeguarding the confidentiality of their data.

Proposed requirements for public access to scientific publications will apply to all peer-reviewed publications reporting results of research that are either funded by the VA Office of Research and Development (ORD) or conducted, supported, or sponsored by any Veterans Health Administration (VHA) program office.

Proposed requirements for public access to digital data will apply to the final research data underlying all peer-

reviewed publications reporting results of studies supported by ORD Cooperative Studies Program or ORD research awards of $500,000 or more in direct costs for any one year; and national studies conducted, supported, or sponsored by VHA program offices. VA proposes to begin sharing digital research data through controlled public access mechanisms and move toward open public access to the extent that the protection of Veterans' identifiable private information can be ensured.

Availability: Persons with access to the Internet may obtain the document at: *http://www.va.gov/ORO/Docs/Guidance/Plan_for_Access_to_Results_of_VA_Funded_Rsch_02_14_2014.pdf.* Alternatively, the document may be obtained by mail or by calling the Office of Research Oversight at (202) 632–7676 (this is not a toll-free number).

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Jose D. Riojas, Chief of Staff, Department of Veterans Affairs, approved this document on July 31, 2014, for publication.

Dated: August 6, 2014.

Robert C. McFetridge,

Director, Regulation Policy and Management, Office of the General Counsel, Department of Veterans Affairs.

[FR Doc. 2014–18975 Filed 8–11–14; 8:45 am]

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Part II

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Florida Leafwing and Bartram's Scrub-Hairstreak Butterflies; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2013–0031; 4500030114]

RIN 1018–AZ59

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Florida Leafwing and Bartram's Scrub-Hairstreak Butterflies

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, designate critical habitat for the Florida leafwing *(Anaea troglodyta floridalis)* and Bartram's scrub-hairstreak *(Strymon acis bartrami)* butterflies under the Endangered Species Act. In total, approximately 4,273 hectares (10,561 acres) in Miami-Dade and Monroe Counties, Florida, fall within the boundaries of the critical habitat designation for the Florida leafwing butterfly, and approximately 4,670 hectares (11,539 acres) in Miami-Dade and Monroe Counties, Florida, fall within the boundaries of the critical habitat designation for the Bartram's scrub-hairstreak butterfly.

DATES: This rule is effective on September 11, 2014.

ADDRESSES: This final rule is available on the Internet at *http://www.regulations.gov* and *http://www.fws.gov/verobeach/*. Comments and materials we received, as well as supporting documentation used in preparation of this rule, are available for public inspection at *http://www.regulations.gov*. All of the comments, materials, and documentation that we considered in this rulemaking are available by appointment, during normal business hours at: U.S. Fish and Wildlife Service, South Florida Ecological Services Office, 1339 20th Street, Vero Beach, FL 32960; telephone 772–562–3909; facsimile 772–562–4288.

The coordinates, plot points, or both from which the maps are generated are included in the administrative record for this critical habitat designation and are available at *http://www.fws.gov/verobeach/*, at *http://www.regulations.gov* at Docket No. FWS–R4–ES–2013–0031, and at the South Florida Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**). Any additional tools or supporting information that we develop for this critical habitat designation will also be available at the Fish and Wildlife Service Web site and Field Office set out above, and may also be included in the preamble of this rule and at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Craig Aubrey, Field Supervisor, U.S. Fish and Wildlife Service, South Florida Ecological Services Office, 1339 20th Street, Vero Beach, FL 32960; telephone 772–562–3909; or facsimile 772–562–4288. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Endangered Species Act, when the U.S. Fish and Wildlife Service (Service) determines that a species is endangered or threatened, we are required to designate critical habitat to the maximum extent prudent and determinable. Designations of critical habitat can only be completed by issuing a rule. Elsewhere in today's **Federal Register**, we list the Florida leafwing and Bartram's scrub-hairstreak butterflies as endangered species.

Basis for our action. Section 4(b)(2) of the Act states that the Secretary shall designate critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat.

The areas we are designating in this rule constitute our current best assessment of the areas that meet the definition of critical habitat for the Florida leafwing and Bartram's scrub-hairstreak butterflies. In total, we are designating approximately 4,273 hectares (ha) (10,561 acres (ac)) in four units as critical habitat for the Florida leafwing butterfly and approximately 4,670 ha (11,539 ac) in seven units as critical habitat for the Bartram's scrub-hairstreak butterfly.

We have prepared an economic analysis of the designation of critical habitat. We have prepared an analysis of the economic impacts of the critical habitat designation and related factors. We announced the availability of the draft economic analysis in the **Federal Register** on May 8, 2014 (79 FR 26392), allowing the public to provide comments. We have incorporated the comments and have completed the analysis concurrently with this final designation.

Peer review and public comment. We sought comments from independent experts to ensure that our designation is based on scientifically sound data and analyses. We obtained opinions from seven knowledgeable individuals with scientific expertise to review our technical assumptions analysis, and to determine whether or not we had used the best available information. These peer reviewers generally concurred with our methods and conclusions, and provided additional information, clarifications, and suggestions to improve this final rule. We also considered all comments and information we received from the public during the comment periods. Information we received during the comment period is incorporated in this final designation as appropriate.

Previous Federal Actions

On August 15, 2013, we published proposed rules to list the Florida leafwing and Bartram's scrub-hairstreak butterflies as endangered species (78 FR 49878) and to designate their critical habitat (78 FR 49832), under the Endangered Species Act of 1973, as amended (Act; 16 U.S.C. 1531 *et seq.*). All Federal actions related to protection under the Act for these subspecies prior to August 15, 2013, are outlined in the preamble to the proposed listing rule (78 FR 49878). On May 8, 2014, we announced the availability of the draft economic analysis (DEA) for the proposed critical habitat designation, as well as revisions to the proposed rule, and we reopened the comment period on the proposed rule for 30 days (79 FR 26392).

Summary of Comments and Recommendations

We requested written comments from the public on the proposed designation of critical habitat for Florida leafwing and Bartram's scrub-hairstreak butterflies during two comment periods. The first comment period opened with the publication of the proposed rule on August 15, 2013, and closed on October 15, 2013 (78 FR 49832). The second comment period, during which we requested comments on the proposed critical habitat designation and associated DEA, opened May 8, 2014, and closed on June 9, 2014 (79 FR 26392). We also contacted appropriate Federal, State, and local agencies; scientific organizations; and other interested parties, and we invited them to comment on the proposed rule and draft economic analysis during these comment periods.

Although the proposed listing rule and proposed critical habitat rule were published in separate **Federal Register** notices, we received combined comments from the public on both

actions. However, in this final rule we address only those comments that apply to the designation of critical habitat for the Florida leafwing and Bartram's scrub-hairstreak butterflies. Comments on the proposed listing are addressed in the final listing rule, which is published elsewhere in today's **Federal Register**.

During the first comment period, we received two State agency comments and one letter from a member of the public directly commenting on the proposed critical habitat designation for the Florida leafwing and Bartram's scrub-hairstreak. During the second comment period, we received two letters from members of the public on the proposed critical habitat designation. While both of these letters expressed support for the proposed designation, neither provided substantive comments or information requiring response. We did not receive any requests for a public hearing during either comment period. All substantive information provided during the comment periods specifically relating to the proposed critical habitat designation for the Florida leafwing and Bartram's scrub-hairstreak is addressed in the following summary and incorporated into this final rule as appropriate.

Peer Review

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited expert opinions from eight knowledgeable individuals with scientific expertise that included familiarity with at least one of the two subspecies, the geographic region in which these subspecies occur, and conservation biology principles. Of those reviewers, three were experts on the Florida leafwing and Bartram's scrub-hairstreak or the butterflies of southern Florida. We received responses from seven of the peer reviewers including all three experts on the Florida leafwing and Bartram's scrub-hairstreak.

We reviewed all comments we received from the peer reviewers for substantive issues and new information regarding the Florida leafwing and Bartram's scrub-hairstreak. The peer reviewers generally concurred with our methods and conclusions, and provided additional information, clarifications, and suggestions to improve this final critical habitat rule. Peer reviewer comments are addressed in the following summary and incorporated into this final rule as appropriate.

Peer Reviewer Comments

(1) *Comment:* One peer reviewer indicated that existing data do not support the necessity of including a specified return interval for disturbance (i.e., 3- to 5-year return interval for fire), as indicated under the fourth primary constituent element (PCE) for occupied critical habitat. The commenter indicated that the butterflies have been observed at varying densities within pine rocklands that have burned at intervals of up to 10 years.

Our Response: We agree. While the literature (FNAI 2010, p. 3) indicates a fire return interval of approximately 3 to 7 years is appropriate for maintaining the pine rockland ecosystem, there is considerable variability in population numbers of the Florida leafwing and Bartram's scrub-hairstreak from year-to-year. Observations of the Florida leafwing and Bartram's scrub-hairstreak within portions of Long Pine Key that have experienced fire or other disturbance regimes at intervals of up to 10 years (Salvato and Salvato 2010a, p. 91; 2010b, p. 154; Sadle 2013c, pers. comm.) suggest further studies are required on the influence of these factors on butterfly ecologies. We have modified this PCE for both butterflies to reflect a more variable return interval for dynamic natural or artificial disturbances.

(2) *Comment:* One peer reviewer suggested that the physical or biological features (PBFs) be modified to mention both fire and storms as disturbance regimes.

Our Response: We appreciate the information provided and have revised the PBFs appropriately below.

(3) *Comment:* One peer reviewer indicated that the boundaries of the proposed critical habitat in units FLB1 and BSHB1 did not accurately represent those of pine rockland habitat within Everglades National Park (ENP). In addition, several areas with a substantial number of Florida leafwing and Bartram's scrub-hairstreak sightings, in areas with host plants, were not included within the proposed critical habitat boundaries.

Our Response: Based on the information provided by this peer reviewer and in coordination with ENP, we revised the proposed critical habitat designation for the Florida leafwing and Bartram's scrub-hairstreak when we announced the availability of the DEA, and we reopened the comment period on our proposal (79 FR 26392; May 8, 2014). The proposed revisions increased the size of the ''Everglades National Park, Miami-Dade County, Florida'' Units of both butterflies (FLB1 and BSHB1) from 2,313 ha (5,716 ac) to 3,235 ha (7,994 ac) to incorporate the additional pine rockland and associated habitats within the Long Pine Key region of ENP where additional recent sightings have been documented. This expansion will ensure connectivity between viable populations within Long Pine Key.

(4) *Comment:* One peer reviewer indicated that a few parcels (Rockland Pineland and Gould's Pineland Preserve) that meet the criteria for inclusion in the proposed critical habitat for the Bartram's scrub-hairstreak were not included in BSHB4.

Our Response: We appreciate the information and acknowledge that a few parcels within the proposed critical habitat units in Miami-Dade County, which meet the minimum size requirement (7 ha (18 ac) or above) or other criteria, were not included within the units. We attempted to select an appropriate network of pine rockland parcels to serve as stepping stones between units BSHB3 and BSHB4, to aide in the dispersal and conservation of the Bartram's scrub-hairstreak. However, in order to streamline the corridor of stepping stones within and between units BSHB3 and BSHB4, some parcels at the periphery (such as Rockland Pineland and Gould's Pineland Preserve) were not selected. It was not our intent to indicate that all parcels within these units meeting the criteria of 7 ha (18 ac) are to be included in the designation, and we have modified language in this final rule to reflect this under *Criteria Used To Identify Critical Habitat for the Bartram's Scrub-hairstreak Butterfly.*

Comments From States

Section 4(b)(5)(A)(ii) of the Act requires the Secretary, not less than 90 days before the effective date of a final rule, give actual notice of the rule to the State agency in each State in which the species is believed to occur, and invite the comment of such agency on the proposal. The two subspecies only occur in Florida, and we received comments from two entities from the State of Florida regarding the proposed critical habitat designation. The Florida Fish and Wildlife Conservation Commission (FWC) found the document to comprehensive, with conclusions that are well-documented and justified, but otherwise did not provide substantive comments requiring a response. The Florida Department of Agriculture and Consumer Services (FDACS) neither supported nor opposed the proposed critical habitat designation, but indicated its intent to work with the Service and other stakeholders in protecting imperiled species, as well as determining ways to mitigate potential risks of pesticide use and mosquito control towards imperiled species in Florida.

(5) *Comment:* FDACS indicated that given the current stakeholder cooperation, any future considerations concerning research addressing potential for and magnitude of impact of mosquito control practices on imperiled butterflies, including the Florida leafwing and Bartram's scrub-hairstreak, should continue to be discussed in this forum where stakeholders can actively participate.

Our Response: We agree and appreciate stakeholder cooperation and willingness to help support and direct research to minimize potential pesticide impacts on imperiled butterflies. Previously, the Service has worked proactively with mosquito control districts within habitat of the endangered Schaus swallowtail butterfly (*Heraclides (=Papilio) aristodemus ponceanus*) (Hennessey *et al.* 1992, p. 715; Salvato 2001, p. 8) in order to coordinate mosquito control activities in such a way that public health is adequately protected while still promoting conservation and recovery of the species. In addition, the Florida Keys Mosquito Control District has coordinated with the Service and multiple partners to study and measure the potential influence of pesticide applications on the endangered Miami blue butterfly (*Cyclargus thomasi bethunebakeri*) on northern Key Largo (Zhong *et al.* 2010, pp. 1961–1972).

Public Comments

(6) *Comment:* Lee County stated that the data presented in the document do not support the designation of mosquito control activities as a PBF. The County states that the cited reports of Pierce (2009, 2011) do not directly indicate effects on any butterflies or other insects.

Our Response: The objective of the Pierce (2009, 2011) study was to document and quantify the deposition of mosquito control chemicals in and around National Key Deer Refuge (NKDR) following application events. Examining effects on biota was not an objective of the studies. No impacts to invertebrate species were noted because quantifying such effects were not part of the study plans and were not examined.

Summary of Changes From Proposed Rule

Based on information we received in comments, we make the following changes:

(1) We adopt our proposed revision to our critical habitat designation for the Florida leafwing and Bartram's scrub-hairstreak butterflies (see 79 FR 26392; May 8, 2014) by increasing the size of the ''Everglades National Park, Miami-Dade County, Florida'' Units of both butterflies (FLB1 and BSHB1) from 2,313 ha (5,716 ac) to 3,235 ha (7,994 ac) to incorporate the additional pine rockland and associated habitats within the Long Pine Key region of ENP where additional recent sightings have been documented.

(2) Based on the revision described in (1), above, the total amount of critical habitat we are designating in this rule increased from 3,351 ha (8,283 ac) to 4,273 ha (10,561 ac) for the Florida leafwing, and from 3,748 ha (9,261 ac) to 4,670 ha (11,539 ac) for the Bartram's scrub-hairstreak.

(3) Based on the revision described in (1), above, the overall percentage of ownerships of designated critical habitat changed from 81 percent to 85 percent for Federal lands, 4 percent to 3 percent for State lands, and 15 percent to 12 percent for private and other lands for the Florida leafwing, and from 75 percent to 80 percent for Federal lands, and 20 percent to 15 percent for private and other lands for the Bartram's scrub-hairstreak.

(4) Based on the revision described in (1), above, we also revise our discussion regarding overlap of the critical habitat we are designating for both butterflies within ENP (FLB1 and BSHB1) with that already designated for other currently listed species.

(5) We include hydric pine flatwoods, when interspersed within pine rockland habitat, as a plant community used by the Florida leafwing and Bartram's scrub-hairstreak.

(6) We modify the PCE of natural disturbance regimes, for both butterflies, to reflect a more variable fire-return interval and to specify both fire and storms as disturbance regimes.

Critical Habitat

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) of the Act would apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and the landowner is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species, and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those PBFs within an area, we focus on the principal biological or physical constituent elements (PCEs such as

roost sites, nesting grounds, seasonal wetlands, water quality, tide, soil type) that are essential to the conservation of the species. PCEs are the specific elements of PBFs that provide for a species' life-history processes and are essential to the conservation of the species.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. For example, an area currently occupied by the species but that was not occupied at the time of listing may be essential for the conservation of the species and may be included in the critical habitat designation. We designate critical habitat in areas outside the geographical area occupied by a species only when a designation limited to its range would be inadequate to ensure the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, other unpublished materials, or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, would continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act, (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species, and (3) section 9 of the Act's prohibitions on taking any individual of the species, including taking caused by actions that affect habitat. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of these subspecies. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Physical or Biological Features

In accordance with section 3(5)(A)(i) and 4(b)(1)(A) of the Act and regulations at 50 CFR 424.12, in determining which areas within the geographical area occupied by the species at the time of listing to designate as critical habitat, we consider the PBFs that are essential to the conservation of the species and which may require special management considerations or protection. These include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distributions of a species.

We derived the specific PBFs essential for the Florida leafwing and Bartram's scrub-hairstreak butterflies from studies of both of the butterflies' habitat, ecology, and life histories as described in the Critical Habitat section of the proposed rule to designate critical habitat published in the **Federal Register** on August 15, 2013 (78 FR 49832), and in the information presented below.

We have determined that PBFs presented below are required for the conservation of the Florida leafwing and Bartram's scrub-hairstreak butterflies. One change to these features in this final determination from the proposed rule is a result of the peer review process: Hydric pine flatwoods is added to the plant communities known for the Florida leafwing and Bartram's scrub-hairstreak butterflies to describe the plant community more accurately in ENP (Sadle 2013c, pers. comm.). We also specify the disturbance regime of storms as a PBF for both butterflies. We clarify the criteria for inclusion of parcels within critical habitat for the Bartram's scrub-hairstreak butterfly. We also modify the fourth PCE for both butterflies, to reflect a more variable return interval for dynamic natural or artificial disturbances.

Physical or Biological Features for the Florida Leafwing Butterfly

Space for Individual and Population Growth

The Florida leafwing butterfly occurs within pine rockland habitat, and occasionally associated rockland hammock and hydric pine flatwoods interspersed in these pinelands, throughout its entire lifecycle. Description of these communities and associated native plant species are provided in the Status Assessment for the Florida Leafwing and Bartram's Scrub-hairstreak Butterflies section in the final listing rule published elsewhere in today's **Federal Register** and in the information on hydric pine flatwoods in this final rule. The lifecycle of the Florida leafwing occurs entirely within the pine rockland habitat, and in some instances, associated rockland hammocks and hydric pine flatwoods (Salvato and Salvato 2008, p. 246; 2010a, p. 96; Minno 2009, pers. comm.; Sadle 2013c, pers. comm.). At present, the Florida leafwing is extant within ENP and, until 2006, had occurred on Big Pine Key in the Florida Keys and historically in pineland fragments on mainland Miami-Dade County (Smith *et al.* 1994, p. 67; Salvato and Salvato 2010a, p. 91; 2010c, p. 139), the smallest viable population being Navy Wells Pineland Preserve (120 ha (296 ac)). The Florida leafwing

was only sporadic in occurrence north of Miami-Dade County (Smith *et al.* 1994, p. 67; Salvato and Hennessey 2003, p. 243). Studies indicate butterflies are capable of dispersing throughout the landscape, sometimes as far as 5 kilometers (km) (3 miles (mi)), utilizing high-quality habitat patches (Davis *et al.* 2007, p. 1351; Bergman *et al.* 2004, p. 625). The Florida leafwing, with its strong flight abilities, can disperse to make use of appropriate habitat in ENP (Salvato and Salvato 2010a, p. 95). At present, ongoing surveys suggest the Florida leafwing actively disperses throughout the Long Pine Key region of ENP (Salvato and Salvato 2010a, p. 91; 2010c, p. 139). However, once locally common at Navy Wells Pineland Preserve and the Richmond Pine Rocklands (which occur approximately 8 and 27 km (5 and 17 mi) to the northeast of ENP, respectively), Florida leafwings are not known to have bred at either location in over 25 years (Salvato and Hennessey 2003, p. 243; Salvato 2012, pers. comm.). Therefore, based on the information above, we identify pine rockland habitats and associated rockland hammock and hydric pine flatwoods that are at least 120 ha (296 ac) in size to be a PBF for this butterfly.

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

The Florida leafwing is dependent on pine rocklands that retain the butterfly's sole hostplant, pineland croton (*Croton linearis*) (Hennessey and Habeck 1991, pp. 13–17; Smith *et al.* 1994, p. 67; Worth *et al.* 1996, pp. 64–65). The immature stages of this butterfly feed on the croton for development (Worth *et al.* 1996, pp. 64–65; Minno *et al.* 2005, p. 115). Adult Florida leafwings will feed on tree sap, take minerals from mud, and occasionally visit flowers within the pine rockland (Lenczewski 1980, p. 17; Salvato and Salvato 2008, p. 326; Salvato and Salvato 2010a, p. 96). Therefore, based on the information above, we identify pine rockland and associated rockland hammocks and hydric pine flatwoods (specifically those containing pineland croton and other herbaceous vegetation typical of these plant communities that fulfill the larval development and adult dietary requirements of the Florida leafwing) to be a PBF for the Florida leafwing.

Cover or Shelter

Immature stages of the Florida leafwing occur entirely on the hostplant, pineland croton. Adult Florida leafwing disperse and roost within the pine rockland canopy, and also in associated rockland hammock and hydric pine flatwood vegetation interspersed within these pinelands. Because of their use of the croton and their choice of roosting sites, the former Florida leafwing population on Big Pine Key may have been deleteriously impacted by exposure to seasonal pesticide applications designed to control mosquitoes. The potential for mosquito control chemicals to drift into nontarget areas on the island and to persist for varying periods of time has been well documented (Hennessey and Habeck 1989, pp. 1–22; 1991, pp. 1–68; Hennessey *et al.* 1992, pp. 715–721; Pierce 2009, pp. 1–17). If exposed, studies have indicated that both immature and adult butterflies could be affected (Zhong *et al.* 2010, pp. 1961–1972; Bargar 2012, pp. 1–7). Truck-applied pesticides were found to drift considerable distances from target areas with residues that persisted for weeks on the hostplant (Pierce 2009, pp. 1–17), possibly threatening larvae. Salvato (2001, p. 13) suggested that adult Florida leafwings were particularly vulnerable to aerial applications based on their tendency to roost within the pineland canopy, an area with maximal exposure to such treatments. Therefore, based on the information above, we identify pine rocklands, and associated rockland hammock and hydric pine flatwood communities with pineland croton for larval development and ample roosting sites for adults and limited or restricted pesticide application, to be a PBF for this subspecies.

Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring

The Florida leafwing, with its strong flight abilities, can disperse to make use of appropriate habitat in ENP (Salvato and Salvato 2010a, p. 95). Reproduction and larval development occur entirely within the pine rocklands. The Florida leafwing is multivoltine (i.e., produces multiple generations per year), with an entire life cycle of about 2 to 3 months (Hennessey and Habeck 1991, p. 17) and maintains continuous broods throughout the year (Baggett 1982, pp. 78–79; Salvato 1999, p. 121). Natural history studies by Salvato and Salvato (2012, p. 1) indicate that the extant Florida leafwing population within Long Pine Key experiences up to 80 percent mortality amongst immature larval stages from parasites. All parasitic mortality noted for the Florida leafwing by Salvato and Salvato (2012, pp. 1–3) has been from native species; however, mortality from both native and nonnative predators has been observed. Therefore, based on the information above, we identify pine rockland and associated rockland hammocks and hydric pine flatwoods (specifically those containing pineland croton and other herbaceous vegetation typical of these plant communities, with limited nonnative predation, that fulfill the larval development and adult reproductive requirements of the Florida leafwing) to be a PBF for this subspecies.

Pine rockland native vegetation includes, but is not limited to, canopy vegetation dominated by slash pine (*Pinus elliottii* var. *densa*); subcanopy vegetation that may include, but is not limited to, saw palmetto (*Serenoa repens*), cabbage palm (*Sabal palmetto*), silver palm *(Coccothrinax argentata),* brittle thatch palm *(Thrinax morrisii),* wax myrtle (*Myrica cerifera*), myrsine *(Rapanea punctata),* poisonwood *(Metopium toxiferum),* locustberry *(Byrsonima lucida),* varnishleaf *(Dodonaea viscosa),* tetrazygia *(Tetrazygia bicolor),* rough velvetseed *(Guettarda scabra),* marlberry *(Ardisia escallonioides),* mangrove berry *(Psidium longipes),* willow bustic *(Sideroxylon salicifolium),* and winged sumac *(Rhus copallinum);* short-statured shrubs that may include, but are not limited to, a subcanopy with running oak *(Quercus elliottii),* white indigoberry *(Randia aculeata),* Christmas berry *(Crossopetalum ilicifolium),* redgal *(Morinda royoc),* and snowberry *(Chiococca alba);* and understory vegetation that may include, but is not limited to, bluestem *(Andropogon* spp., *Schizachyrium gracile, S. rhizomatum,* and *S. sanguineum),* arrowleaf threeawn *(Aristida purpurascens),* lopsided indiangrass *(Sorghastrum secundum),* hairawn muhly *(Muhlenbergia capillaris),* Florida white-top sedge *(Rhynchospora floridensis),* pineland noseburn *(Tragia saxicola),* devil's potato *(Echites umbellata),* pineland croton, several species of sandmats *(Chamaesyce* spp.*),* partridge pea *(Chamaecrista fasciculata),* coontie *(Zamia pumila),* and maidenhair pineland fern *(Anemia adiantifolia).* Rockland hammock native vegetation includes, but is not limited to, a canopy vegetated by gumbo limbo *(Bursera simaruba),* false tamarind (*Lysiloma latisiliquum*), paradisetree *(Simarouba glauca),* black ironwood *(Krugiodendron ferreum),* lancewood *(Ocotea coriacea),* Jamaican dogwood *(Piscidia piscipula),* West Indies mahogany *(Swietenia mahagoni),* willow bustic, inkwood *(Exothea paniculata),* strangler fig *(Ficus aurea),* pigeon plum *(Coccoloba diversifolia),* poisonwood , buttonwood

(Conocarpus erectus), blolly *(Guapira discolor),* and devil's claw *(Pisonia* spp.*);* subcanopy vegetation that may include, but is not limited to, Spanish stopper *(Eugenia foetida), Thrinax,* torchwood *(Amyris elemifera),* marlberry, wild coffee *(Psychotria nervosa), Sabal,* gumbo limbo, lignumvitae *(Guaiacum sanctum),* hog plum *(Ximenia americana),* and *Colubrina;* and understory vegetation that may include, but is not limited to, coonti, barbed-wire cactus *(Acanthocereus tetragonus),* and basket grass *(Oplismenus hirtellus).* Hydric pine flatwoods vegetation includes, but is not limited to, canopy consisting of slash pine; subcanopy vegetation, if present, of scattered sweetbay, swamp bay, loblolly bay, pond cypress, dahoon, titi, and/or wax myrtle; shrubs, commonly including large gallberry, fetterbush, titi, black titi, sweet pepperbush, red chokeberry, azaleas, saw palmetto, gallberry, and cabbage palm, both in the subcanopy and shrub layers; and herbs, including wiregrass, blue maidencane, and/or hydrophytic species such as toothache grass, cutover muhly, coastalplain yellow-eyed grass, Carolina redroot, beaksedges, and pitcherplants, among others.

Habitats Protected From Disturbance or Representative of the Historical, Geographic, and Ecological Distributions of the Subspecies

The Florida leafwing continues to occur in habitats that are protected from human-generated disturbances and are only partially representative of the butterfly's historical, geographical, and ecological distribution because its range within these habitats has been reduced. The subspecies is still found in its representative plant communities of pine rocklands and associated rockland hammocks and hydric pine flatwoods. Representative plant communities are located on Federal, State, local, and private conservation lands that implement conservation measures benefitting the butterfly.

Pine rockland is dependent on some degree of disturbance, most importantly from natural or prescribed burns (Loope and Dunevitz 1981, p. 5; Snyder *et al.* 2005, p. 1; Bradley and Saha 2009, p. 4; Saha *et al.* 2011, pp. 169–184; Florida Natural Areas Inventory (FNAI) 2010, p. 1). These fires are a vital component in maintaining native vegetation, such as croton, within this ecosystem. Without fire, successional climax from tropical pineland to rockland hammock is too rapid, and displacement of native species by invasive, nonnative plants often occurs.

The Florida leafwing, as with other subtropical butterflies, has adapted over time to the influence of tropical storms and other forms of adverse weather conditions (Minno and Emmel 1994, p. 671; Salvato and Salvato 2007, p. 154). Hurricanes and other significant weather events create openings in the pine rockland habitat (FNAI 2010, p. 3). However, given the substantial reduction in the historical range of the butterfly in the past 50 years, the threat and impact of tropical storms and hurricanes on its remaining populations is much greater than when its distribution was more widespread (Salvato and Salvato 2010a, p. 96; 2010c, p. 139). Therefore, based on the information above, we identify disturbance regimes natural or prescribed to mimic natural disturbances, such as fire and storms, to be a PBF for this subspecies.

Primary Constituent Elements for the Florida Leafwing Butterfly

Under the Act and its implementing regulations, we are required to identify the PBFs essential to the conservation of the Florida leafwing in areas occupied at the time of listing, focusing on the features' PCEs. PCEs are those specific elements of the PBFs that provide for a species' life-history processes and are essential to the conservation of the species.

Based on our current knowledge of the PBFs and habitat characteristics required to sustain the butterfly's life-history processes, we determine that the PCEs for the Florida leafwing butterfly are:

(1) Areas of pine rockland habitat, and in some locations, associated rockland hammocks and hydric pine flatwoods.

(a) Pine rockland habitat contains:

(i) Open canopy, semi-open subcanopy, and understory;

(ii) Substrate of oolitic limestone rock; and

(iii) A plant community of predominately native vegetation.

(b) Rockland hammock habitat associated with pine rocklands contains:

(i) Canopy gaps and edges with an open to semi-open canopy, subcanopy, and understory;

(ii) Substrate with a thin layer of highly organic soil covering limestone or organic matter that accumulates on top of the underlying limestone rock; and

(iii) A plant community of predominately native vegetation.

(c) Hydric pine flatwood habitat associated with pine rocklands contains:

(i) Open canopy with a sparse or absent subcanopy, and dense understory;

(ii) Substrate with a thin layer of poorly drained sands and organic materials that accumulates on top of the underlying limestone or calcareous rock; and

(iii) A plant community of predominately native vegetation.

(2) Competitive nonnative plant species in quantities low enough to have minimal effect on survival of the Florida leafwing butterfly.

(3) The presence of the butterfly's hostplant, pineland croton, in sufficient abundance for larval recruitment, development, and food resources, and for adult butterfly roosting habitat and reproduction.

(4) A dynamic natural disturbance regime or one that artificially duplicates natural ecological processes (e.g., fire, hurricanes, or other weather events, at appropriate intervals) that maintains the pine rockland habitat and associated rockland hammock and hydric pine flatwood plant communities.

(5) Pine rockland habitat and associated rockland hammock and hydric pine flatwood plant communities that are sufficient in size to sustain viable Florida leafwing populations.

(6) Pine rockland habitat and associated rockland hammock and hydric pine flatwood plant communities with levels of pesticide low enough to have minimal effect on the survival of the butterfly or its ability to occupy the habitat.

Special Management Considerations or Protection for the Florida Leafwing Butterfly

When designating critical habitat, we assess whether the specific areas within the geographic areas occupied by the species at the time of listing contain features that are essential to the conservation of the species and which may require special management considerations or protections. The features essential to the conservation of this subspecies may require special management considerations or protection to reduce the following threats:

Habitat Destruction and Modification by Development—The Florida leafwing butterfly has experienced substantial destruction, modification, and curtailment of its habitat and range. The pine rockland community of south Florida, on which both the butterfly and its hostplant depend, is critically imperiled globally (FNAI 2012, p. 27). Destruction of the pinelands for economic development has reduced this habitat community by 90 percent on mainland south Florida (O'Brien 1998, p. 208). All known mainland populations of the Florida leafwing

occur on publicly owned land that is managed for conservation, ameliorating some of the threat. However, any unknown extant populations of the butterfly or suitable habitat that may occur on private land or non-conservation public land are vulnerable to habitat loss. In Miami-Dade County, occupied Florida leafwing habitat occurs in the Long Pine Key region of ENP and is actively managed by the National Park Service (NPS) for the Florida leafwing and the pine rockland ecosystem, in general.

Sea Level Rise—Various model scenarios developed at the Massachusetts Institute of Technology (MIT) have projected possible trajectories of future transformation of the south Florida landscape by 2060 based upon four main drivers: Climate change, shifts in planning approaches and regulations, human population change, and variations in financial resources for conservation (Vargas-Moreno and Flaxman 2010, pp. 1–6). The Service used various MIT scenarios in combination with extant and historical Florida leafwing occurrences and remaining hostplant-bearing pine rocklands to predict climate change impacts to the butterfly and its habitat.

In the best case scenario, which assumes low sea level rise, high financial resources, proactive planning, and only trending human population growth, analyses suggest that the extant Florida leafwing population within ENP is susceptible to future losses, with losses attributed to increases in sea level and human population. In the worst case scenario, which assumes high sea level rise, low financial resources, a ''business as usual'' approach to planning, and a doubling of human population, the habitat at Long Pine Key may be lost, resulting in the complete extirpation of the Florida leafwing. Actual impacts may be greater or less than anticipated based upon high variability of factors involved (e.g., sea level rise, human population growth) and assumptions made. Being proactive to address sea level rise may be beyond the feasibility of land owners or managers. However, while land owners or land managers may not be able to be proactive in preventing these events, they may be able to respond with management or protection. Management actions or activities that could ameliorate sea level rise include providing protection of suitable habitats unaffected or less affected by sea level rise.

Lack of Natural or Prescribed Burns—The threat of habitat destruction or modification is further exacerbated by a lack of adequate fire management (Salvato and Salvato 2010a, p. 91; 2010c, p. 139). Historically, lightning-induced fires were a vital component in maintaining native vegetation, including pineland croton, within the pine rockland ecosystem (Loope and Dunevitz 1981, p. 5; Slocum *et al.* 2003, p. 93; Snyder *et al.* 2005, p. 1; Salvato and Salvato 2010b, p. 154). Resprouting after burns is the primary mechanism allowing for the persistence of perennial shrubs, including pineland croton, in pine habitat (Olson and Platt 1995, p. 101). Without fire, perennial native vegetation can be displaced by invasive, nonnative plants.

In recent years, ENP has used partial and systematic prescribed burns to treat the Long Pine Key pine rocklands in their entirety over a 3-year window (NPS 2005, p. 27). These methods attempt to burn adjacent pine rockland habitats alternately. In addition, refugia (i.e., unburned areas of croton hostplant) have been included as part of burns conducted within occupied butterfly habitat, wherever possible (Anderson 2011, pers. comm.). Providing refugia directly within (as well as adjacent to) the treatment area during prescribed burn activities may substantially increase the potential for the Florida leafwing to recolonize recently burned areas and to remain within or near the fire-treated pineland. Outside of ENP, Miami-Dade County has implemented various conservation measures, such as burning in a mosaic pattern and on a small scale, during prescribed burns to protect the butterfly (Maguire 2010, pers. comm.).

Fire management of pine rocklands in NKDR is hampered by the pattern of land ownership and development; residential and commercial properties are embedded within or in close proximity to pineland habitat (Snyder *et al.* 2005, p. 2; Anderson 2012, pers. comm.). Ongoing management activities designed to ameliorate this threat include the use of small-scale prescribed burns or mechanical clearing to maintain the native vegetative structure in the pine rockland required by the subspecies.

Hurricanes and Storm Surge—The Florida leafwing, as with other subtropical butterflies, have adapted over time to the influence of tropical storms and other forms of adverse weather conditions (Minno and Emmel 1994, p. 671; Salvato and Salvato 2007, p. 154). Hurricanes and other significant weather events create openings in the pine rockland habitat (FNAI 2010, p. 3). However, given the substantial reduction in the historical range of the butterfly in the past 50 years, the threat and impact of tropical storms and hurricanes on its remaining populations are much greater than when its distribution was more widespread (Salvato and Salvato 2010a, p. 96; 2010c, p. 139). While land owners or land managers may not be able to be proactive in preventing these events, they may be able to respond with management or protection resulting from these threats. Management actions or activities that could enhance pine rockland recovery following tropical storms include hand removal of damaged vegetation, as well as by other mechanical means or prescribed burns.

Mosquito Control Pesticide Applications—Efforts to control salt marsh mosquitoes (*Aedes taeniorhynchus,* among others) have increased as human activity and population have increased in south Florida. To control mosquito populations, second-generation organophosphate (naled) and pyrethroid (permethrin) adulticides are applied by mosquito control districts throughout south Florida. The use of such pesticides (applied using both aerial and ground-based methods) for mosquito control presents a potential risk to nontarget species, such as the Florida leafwing butterfly. Mosquito control pesticides use within Miami-Dade County's pine rockland areas is limited (approximately two to four times per year, and only within a portion of critical habitat) (Vasquez 2013, pers. comm.), and no spraying is conducted in Long Pine Key within ENP.

Pesticide spraying practices by the Mosquito Control District at NKDR have changed to reduce pesticide use over the years. Since 2003, expanded larvicide treatments to surrounding islands have significantly reduced adulticide use on Big Pine Key, No Name Key, and the Torch Keys. In addition, the number of aerially applied naled treatments allowed on NKDR has been limited since 2008 (Florida Key Mosquito Control District 2012, pp. 10–11). No spray zones that include the core habitat used by pine rockland butterflies and several linear miles of pine rockland habitat within the Refuge-neighborhood interface were excluded from truck spray applications (Anderson 2012, pers. comm.; Service 2012, p. 32). These exclusions and buffer zones encompass over 95 percent of extant croton distribution on Big Pine Key, and include the majority of known recent and historical Florida leafwing population centers on the island (Salvato 2012, pers. comm.). However, some areas of pine rocklands within NKDR are still sprayed with naled (aerially applied adulticide), and buffer zones remain at risk from drift;

additionally, private residential areas and roadsides across Big Pine Key are treated with permethrin (ground-based applied adulticide) (Salvato 2001, p. 10). Therefore, if extant, the leafwing and their habitat on Big Pine Key may be directly or indirectly (via drift) exposed to adulticides used for mosquito control at some unknown level.

Criteria Used To Identify Critical Habitat for the Florida Leafwing Butterfly

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. In accordance with the Act and our implementing regulations at 50 CFR 424.12(b), we review available information pertaining to the habitat requirements of the species and identify occupied areas at the time of listing that contain the features essential to the conservation of the species. If after identifying currently occupied areas we determine that those areas are inadequate to ensure conservation of the species (in accordance with the Act and our implementing regulations at 50 CFR 424.12(e)), we then consider whether designating additional areas—outside those currently occupied—are essential for the conservation of the species. We are designating critical habitat in areas within the geographical area occupied by the species at the time of listing in 2014. As described below, we also are designating specific areas outside the geographical area occupied by the species at the time of listing that were historically occupied, but are presently unoccupied, because we have determined that such areas are essential for the conservation of the subspecies.

To determine the location and boundaries of critical habitat, the Service used the following sources of information and considerations:

(1) Historical and current records of Florida leafwing occurrence and distribution found in publications, reports, and associated voucher specimens housed at museums and private collections.

(2) Institute for Regional Conservation (IRC) and Fairchild Tropical Gardens (FTG) geographic information system (GIS) data showing the location and extent of documented occurrences of the pine rockland habitat with pineland croton.

(3) Reports prepared by ecologists, biologists, and botanists with the IRC, ENP, FTG, and Service assessing the current and historical distribution of pine rockland habitat and pineland croton. Some of these were funded by the Service; others were requested or volunteered by biologists with the Service, NPS, or IRC.

(4) Historical records of pineland croton found in publications, reports and associated voucher specimens housed at herbaria, all of which are also referenced in the above mentioned reports from the IRC and cited publications.

Small butterfly populations with limited, fragmented distributions, such as the Florida leafwing, are highly vulnerable to localized extirpations (Schultz and Hammond 2003, pp. 1377, 1379; Frankham 2005, pp. 135–136). Historical populations of endangered south Florida butterflies such as the Miami blue (Saarinen 2009, p. 79) and Schaus swallowtail (Daniels and Minno 2012, p. 2), once linked, now are subject to the loss of genetic diversity from genetic drift, the random loss of genes, and inbreeding. In general, isolation, whether caused by geographic distance, ecological factors, or reproductive strategy, will likely prevent the influx of new genetic material and can result in a highly inbred population with low viability and/or fecundity (Chesser 1983, p. 68). Fleishman *et al.* (2002, pp. 706–716) indicated that factors such as habitat quality may influence metapopulation dynamics of butterflies, driving extinction and colonization processes, especially in systems that experience substantial natural and anthropogenic environmental variability. In addition, natural fluctuations in rainfall, hostplant vigor, or butterfly predators may weaken a population to such an extent that recovery to a viable level would be impossible. Isolation of habitat can prevent recolonization from other sites and result in extinction. Because of the dangers associated with small populations or limited distributions, the recovery of many rare butterfly species includes the creation of new sites or reintroductions within the historical range to ameliorate these effects.

When designating critical habitat, we consider future recovery efforts and conservation of the species. We have determined that all currently known occupied habitat should be designated as critical habitat. However, realizing that the current occupied habitat is not adequate for the conservation of the Florida leafwing, we used habitat and historical occurrence data to identify unoccupied habitat essential for the conservation of the subspecies.

Only one extant Florida leafwing population remains (Salvato and Salvato 2010c, p. 139). Population estimates for the Florida leafwing are estimated to be only several hundred or fewer at any given time. Although this population occurs on conservation lands, management and law enforcement are limited. We believe it is necessary for conservation that additional populations of the Florida leafwing be established within the subspecies' historical range. Therefore, we are designating three unoccupied areas as critical habitat, one on Big Pine Key within the Florida Keys, and two others on the mainland within Miami-Dade County, where the Florida leafwing was historically recorded, but has since been extirpated.

The critical habitat areas in Miami-Dade County are large pine rockland fragments (Navy Wells Pineland Preserve) or contiguous fragments (Richmond Pine Rocklands), which we believe provide the minimal habitat size (at least 120 ha (296 ac)) required for the subspecies to persist. The Florida leafwing was known to occur at Navy Wells Pineland Preserve within the past 25 years (Smith *et al.* 1994, p. 67). Although causes for the Florida leafwing's subsequent disappearance from Navy Wells are unknown, we believe that, with proper management and restoration efforts (consistent prescribed burns and habitat enhancement) and given its strong flight abilities, the leafwing will be able to recolonize both this and the Richmond Pine Rockland area. The critical habitat unit on Big Pine Key in the Florida Keys is a former stronghold for the subspecies (Smith *et al.* 1994, p. 67; Salvato and Salvato 2010c, p. 39), where appropriate hostplant-bearing habitat was historically recorded, but has since become degraded and unsuitable for butterfly use. Here also, we believe that, following habitat restoration activities (vegetation and fire management), the Florida leafwing will be able to be reestablished on this site, thereby returning a vital population of the subspecies to the Florida Keys.

The current distribution of the Florida leafwing is much reduced (90 percent) from its historical distribution. We anticipate that recovery will require continued protection of the remaining extant population and habitat, as well as establishing populations in additional areas that more closely approximate its historical distribution in order to ensure there are adequate numbers of butterflies in stable populations and that these populations occur over a wide geographic area. This will help to ensure that catastrophic events, such as storms, cannot simultaneously affect all known populations.

Areas Occupied at the Time of Listing

For the purpose of designating critical habitat for the Florida leafwing, we

defined the geographical area currently occupied by the subspecies as required by section 3(5)(A)(i) of the Act. The occupied critical habitat unit was delineated around the one documented extant population. This unit included the mapped extent of the population that contains one or more of the elements of the PBFs.

We considered the following when identifying occupied areas of critical habitat for the Florida leafwing:

(1) Space to allow for the successional nature of the occupied pine rockland habitat. While suitable, only a portion of this habitat is optimal for the Florida leafwing at any one time, and the size and location of optimal areas is successional over time, being largely driven by the frequency and scale of natural or prescribed burns or other disturbances such as storms. Correspondingly the abundance and distribution of pineland croton within the pine rockland habitat varies greatly from time to time depending on habitat changes because of these events. Although prescribed burns are administered on the conservation land that retains the Florida leafwing population, fire return intervals and scope are inconsistent. As a result, areas within the pine rockland habitat supporting the subspecies may not always provide optimal habitat for the butterfly in the future as a lack of adequate fire management or other disturbances removes or fragments hostplant distribution. Conversely, changes in hostplant distribution over time following fires or other disturbances may allow the butterfly to return, expand, and colonize areas with shifting hostplant populations.

(2) Space to plan for the persistence of the current Florida leafwing population in the face of imminent effects on habitats as a result of sea level rise. Although currently occupied and containing the elements of PBFs, this area may be altered, as a result of vegetation shifts or salt water intrusion, to an extent to which cannot be predicted at this time.

Units are designated based on sufficient elements of PBFs being present to support Florida leafwing life processes. Some units contain all of the identified elements of PBFs and support multiple life processes. Some segments contain only some elements of the PBFs necessary to support the Florida leafwing's particular use of that habitat.

Areas Outside of the Geographic Range at the Time of Listing

After following the above criteria, we determined that occupied areas are not sufficient for the conservation of the subspecies for the following reasons:

(1) Restoring the subspecies to its historical range and reducing its vulnerability to stochastic events, such as hurricanes and storm surge, require reintroduction to areas where the subspecies occurred in the past but has since been extirpated;

(2) Providing increased connectivity for populations and areas for small populations to expand requires currently unoccupied habitat; and

(3) Reintroduction or assisted migration to reduce the vulnerability of the subspecies to sea level rise and storm surge requires higher elevation sites that currently are unoccupied by the Florida leafwing.

Therefore, we looked to unoccupied areas that may be essential for the conservation of the subspecies.

We used habitat and historical occurrence data to identify unoccupied habitat essential for the conservation of the subspecies.

The unoccupied areas are essential for the conservation of the subspecies because they:

(1) Represent areas of sufficient size to support ecosystem processes for populations of the Florida leafwing. The historical distribution of the Florida leafwing appeared limited to large pine rocklands parcels 120 ha (296 ac) or greater. For many years the leafwing persisted at Navy Wells, which has an area of 120 ha (296 ac), long after being extirpated from everywhere else in Miami-Dade County that was smaller in area. The only other leafwing populations that occurred outside of the Everglades in the past 25 years were those in the Richmond Pine Rocklands and Big Pine Key, which have approximately 364 and 567 ha (900 and 1,400 ac) of pine rocklands, respectively. We believe appropriately sized units should be, at a minimum, the size of Navy Wells (i.e., 120 ha (296 ac)). Large contiguous parcels of habitat are more likely to be resilient to ecological processes of disturbance and succession, and support viable populations of the Florida leafwing. The unoccupied areas selected were at least 120 ha (296 ac) or greater in size.

(2) Provide areas to maintain connectivity of habitat to allow for population expansion. Isolation of habitat can prevent recolonization of the Florida leafwing and result in extinction. Because of the dangers associated with small populations or limited distributions, the recovery of many rare butterfly species includes the creation of new sites or reintroductions to ameliorate these effects.

(3) Provide areas that, once restored, will allow the Florida leafwing to disperse and recolonize, and in some instances may be able to support expansion and a larger number of the subspecies either through reintroduction or expansion from areas already occupied by the butterfly. These areas generally are habitats within or adjacent to pine rocklands that have been affected by natural or anthropogenic impacts but retain areas that are still suitable for the butterfly or that could be restored. These areas would help to offset the anticipated loss and degradation of habitat occurring or expected from the effects of climate change (such as sea level rise) or due to development.

When determining critical habitat boundaries within this final rule, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack PBFs for the Florida leafwing. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this final rule have been excluded by text in the rule and are not designated as critical habitat. Therefore, a Federal action involving these lands will not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat.

The critical habitat designation is defined by the map or maps, as modified by any accompanying regulatory text, presented at the end of this document in the Regulation Promulgation section. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. We will make the coordinates, plot points, or both on which each map is based available to the public on *http://www.regulations.gov* at Docket No. FWS–R4–ES–2013–0031, on our Internet site at *http://www.fws.gov/verobeach/*, and at the field office responsible for the designation (see **FOR FURTHER INFORMATION CONTACT**, above).

Final Critical Habitat Designation for the Florida Leafwing Butterfly

We are designating four units as critical habitat for the Florida leafwing. The critical habitat areas described below constitute our best assessment at this time of areas that meet the definition of critical habitat for the

Florida leafwing. The four units we are designating as critical habitat are:

(1) FLB1 Everglades National Park, Miami-Dade County, Florida;

(2) FLB2 Navy Wells Pineland Preserve, Miami-Dade County, Florida;

(3) FLB3 Richmond Pine Rocklands, Miami-Dade County, Florida; and

(4) FLB4 Big Pine Key, Monroe County, Florida.

Land ownership within the designated critical habitat consists of Federal (85 percent), State (3 percent), and private and other (12 percent). Table 1 shows the land ownership, area, and occupancy by unit.

TABLE 1—FLORIDA LEAFWING BUTTERFLY CRITICAL HABITAT UNITS

Unit No.	Unit name	Ownership	Percent	Hectares (acres)	Occupied
FLB1	Everglades National Park	Federal	100	3,235 (7,994)	yes.
		Total	*100*	*3,235 (7,994)*	
FLB2	Navy Wells Pineland Preserve.	State	29	35 (85)	no.
		Private-Other	71	85 (211)	
		Total	*100*	*120 (296)*	
FLB3	Richmond Pine Rocklands	Federal	14	50 (122)	no.
		Private-Other	86	309 (767)	
		Total	*100*	*359 (889)*	
FLB4	Big Pine Key	Federal	65	365 (901)	no.
		State	16	90 (223)	
		Private-Other	19	104 (258)	
		Total	*100*	*559 (1,382)*	
Total All Units		Federal	85	3,650 (9,017)	
		State	3	125 (308)	
		Private-Other	12	498 (1,236)	
		All	100	4,273 (10,561)	

Note: Area sizes may not sum due to rounding.

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for the Florida leafwing, below.

Unit FLB1: Everglades National Park, Miami-Dade County, Florida

Unit FLB1 consists of 3,235 ha (7,994 ac) in Miami-Dade County. This unit is composed entirely of lands in Federal ownership, 100 percent of which are located within the Long Pine Key region of ENP. This unit is currently occupied and contains all the PBFs required by the subspecies, and contains the PCE of pine rockland. The PBFs in this unit may require special management considerations or protection to address threats of a lack of adequate fire management, habitat fragmentation, poaching, and sea level rise. However, in most cases these threats are being addressed or coordinated with the ENP to implement needed actions.

For instance, ENP is currently in the process of updating its fire management plan (FMP) and environmental assessment which will assess the impacts of fire on various environmental factors, including listed, proposed, and candidate species (Land 2011, pers. comm.; Sadle 2013a, pers. comm.). ENP is actively coordinating with the Service, as well as other members of the Imperiled Butterfly Working Group (IBWG), to review and adjust the prescribed burn practices outlined in the FMP to help maintain or increase Florida leafwing population sizes, protect pine rocklands, expand or restore remnant patches of hostplants, and ensure that short-term negative effects from fire (i.e., loss of hostplants, loss of eggs and larvae) can be avoided or minimized.

Unit FLB2: Navy Wells Pineland Preserve, Miami-Dade County, Florida

Unit FLB2 consists of 120 ha (296 ac) in Miami-Dade County. This unit is comprised entirely of conservation lands located within the Navy Wells Pineland Preserve, which is jointly owned by Miami-Dade County (85 ha (211 ac)) and the State (35 ha (85 ac)). State lands are interspersed within Miami-Dade County Parks and Recreation Department lands, which are managed for conservation. This unit is bounded on the north by SW 348 Street, on the south by SW 360 Street, on the east by State Road 9336, and on the west by the vicinity of SW 202 Avenue.

The unit was occupied historically by the Florida leafwing and includes some of the largest remaining contiguous fragments of pine rockland habitats outside of ENP. This unit is not currently occupied but is essential for the conservation of the butterfly because it serves to protect habitat needed to recover the subspecies, reestablish wild populations within the historical range of the subspecies, and maintain populations throughout the historic distribution of the subspecies in Miami-Dade County, and it provides habitat for recovery in the case of stochastic events if the butterfly is extirpated from the one location where it is presently found.

Unit FLB3: Richmond Pine Rocklands, Miami-Dade County, Florida

Unit FLB3 consists of 359 ha (889 ac) in Miami-Dade County. This unit is comprised of lands in Federal (U.S. Coast Guard (Homeland Security) (29 ha (72 ac)), U.S. Army Corps of Engineers (Department of Defense (DoD) (8 ha (20 ac)), National Oceanic Atmospheric Administration (NOAA) (4 ha (9 ac)), Federal Bureau of Prisons (Department of Justice (DoJ) (9 ha (21 ac))), and private or other (309 ha (767 ac)) ownership. This unit is bordered on the

north by Coral Reef Drive, on the south by SW 168 Street, on the east by SW 117 Avenue, and on the west by SW 137 Avenue; then is bordered on the north by SW 168 Street, on the south by SW 184 Street, on the east by SW 122 Avenue, and on the west by SW 137 Avenue.

Unit FLB4: Big Pine Key, Monroe County, Florida

Unit FLB4 consists of 559 ha (1,382 ac) in Monroe County. This unit includes Federal lands within NKDR (365 ha (901 ac)), State lands (90 ha (223 ac)), and property in private or other ownership (104 ha (258 ac)). State lands are interspersed within NKDR lands and managed as part of the Refuge. The unit begins on northern Big Pine Key on the southern side of Gulf Boulevard, and continues south on both sides of Key Deer Boulevard (County Road 940 (CR 940)) to the vicinity of Osprey Lane on the western side of CR 940 and Tea Lane to the east of CR 940; then resumes on both sides of CR 940 from Osprey Lane south of the vicinity of Driftwood Lane; then resumes south of Osceola Street, between Fern Avenue to the west and Baba Lane to the east; then resumes north of Watson Boulevard in the vicinity of Avenue C; then continues south on both sides of Avenue C to South Street; then resumes on both sides of CR 940 south to U.S. 1 between Ships Way to the west and Sands Street to the east; then resumes south of U.S. 1 from Newfound Boulevard to the west and Deer Run Trail to the east; and then resumes south of U.S. 1 from Palomino Horse Trail to the west and Industrial Road to the east.

This unit was historically occupied by the Florida leafwing. This unit is not currently occupied but is essential for the conservation of the Florida leafwing because it serves to protect habitat needed to recover the subspecies, reestablish wild populations within the historical range of the subspecies, and maintain populations throughout the historic distribution of the subspecies in the Lower Florida Keys, and it provides area for recovery in the case of stochastic events if the butterfly is extirpated from the one location where it is presently found. In the Lower Florida Keys National Wildlife Refuge's Comprehensive Conservation Plan (CCP), management objective number 11 provides specifically for maintaining and restoring butterfly populations of special conservation concern, including the Florida leafwing butterfly.

Physical or Biological Features for the Bartram's Scrub-Hairstreak Butterfly

Space for Individual and Population Growth and for Normal Behavior

Bartram's scrub-hairstreak butterfly's entire lifecycle occurs within pine rockland habitat and occasionally associated rockland hammock and hydric pine flatwoods interspersed in these pinelands. A description of these communities and associated native plant species are provided in the Status Assessment for the Florida Leafwing and Bartram's Scrub-hairstreak Butterflies section in the final listing rule published elsewhere in today's **Federal Register** and in the information on hydric pine flatwoods in this rule.

At present, the Bartram's scrub-hairstreak butterfly is extant on Big Pine Key, within ENP, and several pineland fragments on mainland Miami-Dade County (Smith *et al.* 1994, p. 118; Salvato and Salvato 2010b, p. 154), the smallest being Navy Wells Pineland Preserve outparcel number 39 (7 ha (18 ac)), which represents the minimum known extant sustained population size. The Bartram's scrub-hairstreak was historically less common and sporadic in occurrence north of Miami-Dade County (Smith *et al.* 1994, pp. 118; Salvato and Hennessey 2004, p. 223). Studies indicate butterflies are capable of dispersing throughout the landscape, sometimes as far as 5 km (3 mi), and utilizing high-quality habitat patches (Davis *et al.* 2007, p. 1351; Bergman *et al.* 2004, p. 625). Stepping stones may be particularly useful to the Bartram's scrub-hairstreak, which exhibits low vagility (movement), rarely venturing from the pine rockland habitat or away from large areas of contiguous patches of hostplant. Therefore, based on the information above, we identify pine rockland habitats and associated rockland hammock and hydric pine flatwoods that are at least 7 ha (18 ac) in size and are located no more than 5 km (3 miles) apart to allow for habitat connectivity to be a PBF for this butterfly.

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

The Bartram's scrub-hairstreak butterfly is dependent on pine rocklands that retain the butterfly's sole hostplant, pineland croton. The immature stages of this butterfly feed on the croton for development (Minno and Emmel 1993, p. 129; Worth *et al.* 1996, p. 62). Adult Bartram's scrub-hairstreaks actively visit flowers for nectar (Minno and Emmel 1993, p. 129; Worth *et al.* 1996, p. 65; Calhoun *et al.* 2002, p. 14; Salvato and Hennessey 2004, p. 226; Salvato and Salvato 2008, p. 324) within open pine areas and edges and openings within associated rockland hammocks and hydric pine flatwoods. Therefore, based on the information above, we identify pine rockland and associated rockland hammocks and hydric pine flatwoods (specifically those containing pineland croton and other herbaceous vegetation typical of these plant communities that fulfill the larval development and adult dietary requirements) to be PBFs for the Bartram's scrub-hairstreak butterfly.

Cover or Shelter

Immature stages of the Bartram's scrub-hairstreak butterfly occur entirely on the hostplant, pineland croton. Adult Bartram's scrub-hairstreaks prefer more open pine areas, at the edges and openings of associated rockland hammocks and hydric pine flatwoods. The Bartram's scrub-hairstreak population on Big Pine Key may be deleteriously impacted by exposure to seasonal pesticide applications designed to control mosquitoes because of where the butterflies congregate in the vegetation. Salvato (2001, p. 13) suggested that the Bartram's scrub-hairstreak is particularly vulnerable to truck-based applications based on the fact that the subspecies commonly aggregates on low-lying shrubs occurring along frequently treated roadsides. Therefore, based on the information above, we identify the absence of pesticide in the pine rocklands and associated rockland hammock and hydric pine flatwood communities, or pesticides in low enough quantities that they are not detrimental to the butterfly, to be a PBF for this subspecies.

Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring

Bartram's scrub-hairstreak butterfly's reproduction and larval development occur entirely within the pine rocklands. The butterfly has been observed during every month throughout its range; however the exact number of broods appears to be sporadic from year to year, with varying peaks in seasonal abundance (Baggett 1982, p. 81; Hennessey and Habeck 1991, pp. 17–19; Emmel *et al.* 1995, pp. 14–15; Minno and Minno 2009, pp. 70–76; Salvato and Salvato 2010b, p. 156; Anderson 2012, pers. comm.; Sadle 2013b, pers. comm.). The Bartram's scrub-hairstreak retains breeding populations within pine rocklands on Big Pine Key and Long Pine Key in ENP, and within a number of pine rockland fragments adjacent to ENP (Salvato and

Salvato 2010b, p. 154). Therefore, based on the information above, we identify pine rockland and associated rockland hammocks and hydric pine flatwoods (specifically those containing pineland croton and other herbaceous vegetation typical of these plant communities that fulfill the larval development and adult reproductive requirements of the Bartram's scrub-hairstreak) to be a PBF for this subspecies. For a detailed description of pine rockland native vegetation, see *Physical or Biological Features for the Florida Leafwing Butterfly,* above.

Habitats Protected From Disturbance or Representative of the Historical, Geographic, and Ecological Distributions of the Subspecies

The Bartram's scrub-hairstreak butterfly continues to occur in habitats that are protected from human-generated disturbances and are representative of the butterfly's historical, geographical, and ecological distribution, although its range has been reduced. The subspecies is still found in its representative plant communities of pine rocklands. Representative communities are located on Federal, State, local, and private conservation lands that implement conservation measures benefitting the butterfly.

Pine rockland is dependent on some degree of disturbance, most importantly from natural or prescribed burns (Loope and Dunevitz 1981, p. 5; Carlson *et al.* 1993, p. 914; Slocum *et al.* 2003, p. 93; Snyder *et al.* 2005, p. 1; Bradley and Saha 2009, p. 4; Saha *et al.* 2011, pp. 169–184; FNAI 2010, p. 1). These fires are a vital component in maintaining native vegetation, such as pineland croton, within this ecosystem. Without fire, successional climax from tropical pineland to rockland hammock is too rapid, and displacement of native species by invasive, nonnative plants often occurs.

The Bartram's scrub-hairstreak butterfly, as with other subtropical butterflies, have adapted over time to the influence of tropical storms and other forms of adverse weather conditions (Minno and Emmel 1994, p. 671; Salvato and Salvato 2007, p. 154). Hurricanes and other significant weather events create openings in the pine rockland habitat (FNAI 2010, p. 3). However, given the substantial reduction in the historical range of the butterfly in the past 50 years, the threat and impact of tropical storms and hurricanes on their remaining populations is much greater than when their distribution was more widespread (Salvato and Salvato 2010a, p. 96; 2010c, p. 139). Therefore, based on the information above, we identify disturbance regimes natural or prescribed to mimic natural disturbances, such as fire and storms, to be a PBF for this subspecies.

Primary Constituent Elements for the Bartram's Scrub-Hairstreak Butterfly

Based on our current knowledge of the PBFs and habitat characteristics required to sustain the butterfly's life-history processes, we determine that the PCEs for the Bartram's scrub-hairstreak are:

(1) Areas of pine rockland habitat, and in some locations, associated rockland hammocks and hydric pine flatwoods. For a detailed description of this PCE, see the discussion of PCE 1 for the Florida leafwing in *Primary Constituent Elements for the Florida Leafwing Butterfly,* above.

(2) Competitive nonnative plant species in quantities low enough to have minimal effect on survival of Bartram's scrub-hairstreak butterfly.

(3) The presence of the butterfly's hostplant, pineland croton, in sufficient abundance for larval recruitment, development, and food resources, and for adult butterfly nectar source and reproduction.

(4) A dynamic natural disturbance regime or one that artificially duplicates natural ecological processes (e.g., fire, hurricanes, or other weather events, at appropriate intervals) that maintains the pine rockland habitat and associated rockland hammock and hydric pine flatwood plant communities.

(5) Pine rockland habitat and associated rockland hammock and hydric pine flatwood plant communities that allow for connectivity and are sufficient in size to sustain viable populations of the Bartram's scrub hairstreak butterfly.

(6) Pine rockland habitat and associated rockland hammock and hydric pine flatwood plant communities with levels of pesticide low enough to have minimal effect on the survival of the butterfly or its ability to occupy the habitat.

Special Management Considerations or Protection for Bartram's Scrub-Hairstreak Butterfly

The special management considerations or protections for the Bartram's scrub-hairstreak, and the primary threats to the PBFs on which the Bartram's scrub-hairstreak depends, are the same as those described for the Florida leafwing above, except where noted below.

Habitat Destruction and Modification by Development—The majority of known mainland populations of the Bartram's scrub-hairstreak butterfly occur on publicly owned lands that are managed for conservation. In Miami-Dade County, occupied Bartram's scrub-hairstreak habitat occurs in the Long Pine Key region of ENP and is actively managed by the NPS for the Bartram's scrub-hairstreak and the pine rockland ecosystem, in general. Outside of the ENP, extant occupied habitat for the Bartram's scrub-hairstreak occurs on lands owned by Miami-Dade County, University of Miami, and the U.S. Coast Guard, which are managed for the conservation of the pine rockland ecosystem ameliorating some of the threat.

Sea Level Rise—Based on modeling using best case scenario, which assumes low sea level rise, high financial resources, proactive planning, and only trending population growth, analyses suggest that the Big Pine Key population of the Bartram's scrub-hairstreak may be lost or greatly reduced. Based upon the above assumptions, extant Bartram's scrub-hairstreak populations on Big Pine Key and Long Pine Key appear to be most susceptible to future losses attributed to increases in sea level and human population. In the worst case scenario, which assumes high sea level rise, low financial resources, a ''business as usual'' approach to planning, and a doubling of human population, the habitat at Big Pine Key and Long Pine Key may be lost. Under the worst case scenario, pine rockland habitat would remain within Navy Wells Pineland Preserve and the Richmond Pine Rocklands, both of which currently retain Bartram's scrub-hairstreak populations. Proactively addressing sea level rise may be beyond the feasibility of land owners or managers. However, while land owners or land managers may not be able to be proactive in preventing these events, they may be able to respond with management or protection. Management actions or activities that could ameliorate sea level rise include providing protection of suitable habitats unaffected or less affected by sea level rise.

Lack of Natural or Prescribed Burns—For a detailed description of this special management considerations or protection, see the discussion of *Special Management Considerations or Protection for the Florida Leafwing Butterfly.*

Mosquito Control Pesticide Applications—For a detailed description of this special management consideration or protection, see the discussion of *Special Management Considerations or Protection for the Florida Leafwing Butterfly.*

Criteria Used To Identify Critical Habitat for the Bartram's Scrub-Hairstreak Butterfly

The criteria used to identify critical habitat for the Bartram's scrub-hairstreak are the same as those discussed above for the Florida leafwing, except where noted below.

Isolation of habitat can prevent recolonization of Bartram's scrub-hairstreak from other sites and result in extinction. Because of the dangers associated with small populations or limited distributions, the recovery of many rare butterfly species includes the creation of new sites or reintroductions to ameliorate these effects. In addition, establishing corridors or employing small patches (stepping stones) of similar habitats have been shown to facilitate dispersal, reduce extinction rates, and increase gene flow of imperiled butterflies (Schultz 1998, p. 291; Haddad 2000, pp. 739; 744; Haddad *et al.* 2003, p. 614; Wells *et al.* 2009, p. 709). Leidner and Haddad (2010, pp. 2318–2319) suggest that small natural areas within the urban landscape may serve an important role in promoting butterfly dispersal and gene flow in fragmented landscapes. Davis *et al.* (2007, p. 1351) and Bergman *et al.* (2004, p. 625) indicate butterflies are capable of dispersing throughout the landscape, sometimes as far as 5 km (3 miles), and utilizing high-quality habitat patches. Stepping stones may be particularly useful to the Bartram's scrub-hairstreak, which like most lycaenids, exhibits low vagility, rarely venturing from the pine rockland habitat or away from large areas of contiguous patches of hostplant.

Accordingly, realizing that the current occupied habitat is not adequate for the conservation of Bartram's scrub-hairstreak butterfly, we used habitat and historical occurrence data to identify unoccupied habitat essential for the conservation of the subspecies.

Only five extant Bartram's scrub-hairstreak populations remain within the subspecies' historical range. Total population estimates for the Bartram's scrub-hairstreak are estimated to be only several hundred or fewer at any given time. Although these populations occur on conservation lands, management and law enforcement are limited. We believe it is necessary for conservation and recovery that additional populations of the Bartram's scrub-hairstreak be established within the subspecies' historical range. Therefore, as described below, we are designating two critical habitat units in the Florida Keys where appropriate hostplant-bearing habitat was historically recorded, which has since been degraded and became unsuitable for butterfly use. We believe that, given proper management and restoration efforts, the Bartram's scrub-hairstreak may be able to be established on these units, thereby providing an essential fortification of the subspecies' population in the Florida Keys.

Areas Occupied at the Time of Listing

We considered the following when identifying occupied areas of critical habitat for the Bartram's scrub-hairstreak butterfly:

(1) Space to allow for population growth and expansion. In ENP, the distribution of the Bartram's scrub-hairstreak is across a larger area than at any other single location. Outside of ENP, units are limited to three units composed of pine rockland fragments within the current distribution of the subspecies that contain the elements of the PBFs. These units retain extant, localized Bartram's scrub-hairstreak populations. The units include only pine rocklands fragments that are at least 7 ha (18 ac) in size (which represents the minimum known extant population size) and are currently occupied. On Big Pine Key, the distribution of the Bartram's scrub-hairstreak is across all extant pine rocklands on the island that contain the elements of the PBFs.

(2) Space to plan for the persistence of the current Bartram's scrub-hairstreak populations in the face of imminent effects on habitats as a result of sea level rise. Under the worst case scenario for sea level rise (as discussed above in *Special Management Considerations or Protection*), pine rockland habitat would remain at both Navy Wells, Camp Owaissa Bauer, and the Richmond Pine Rocklands, each of which retain Bartram's scrub-hairstreak populations. However, even in these areas, pine rocklands may be altered as a result of vegetation shifts or salt water intrusion, at an extent to which cannot be predicted at this time.

Areas Outside of the Geographic Range at the Time of Listing

After following the above criteria, we determined that occupied areas were not sufficient for the conservation of the subspecies for the following reasons:

(1) Restoring the subspecies to its historical range and reducing its vulnerability to stochastic events, such as hurricanes and storm surge, requires reintroduction to areas where it occurred in the past but has since been extirpated.

(2) Providing increased connectivity for populations and areas for small populations to expand requires currently unoccupied habitat.

(3) Reintroduction or assisted migration to reduce the vulnerability of the subspecies to sea-level rise and storm surge requires higher elevation sites that currently are unoccupied by the Bartram's scrub-hairstreak.

Therefore, we looked to unoccupied areas that may be essential for the conservation of the subspecies.

We used habitat and historical occurrence data to identify unoccupied habitat essential for the conservation of the subspecies as described below.

The unoccupied areas are essential for the conservation of the subspecies because they:

(1) Represent large contiguous parcels of habitat that are more likely to be resilient to ecological processes of disturbance and succession, and support viable populations of the Bartram's scrub-hairstreak butterfly. However, in Miami-Dade County, the Bartram's scrub-hairstreak is extant on parcels as small as 7 ha (18 ac), which lay adjacent to larger pine rocklands. Bartram's scrub-hairstreak populations may be able to utilize these smaller fragments while dispersing between units. Therefore, pine rockland fragments, at least 7 ha (18 ac) in size, that are currently unoccupied and within 5 km (3 miles) of an extant Bartram's scrub-hairstreak population within Miami-Dade County, were identified as critical habitat for the Bartram's scrub-hairstreak.

(2) Provide areas needed to maintain connectivity of habitat and aid butterfly dispersal within and between occupied units (i.e., stepping stones for dispersal). These areas maintain connectivity within and between populations and allow for population expansion within the butterfly's historical range.

(3) Provide areas that are needed to allow the dynamic ecological nature of the pine rockland habitat to continue. The abundance and distribution of pineland croton within the pine rockland habitat varies greatly throughout the range of the Bartram's scrub-hairstreak. At any one time, only a portion of this habitat is optimally suitable for the Bartram's scrub-hairstreak and the size and location of suitable areas is dynamic over time, being largely driven by the frequency and scale of natural or prescribed burns. Historically, lighting-induced fires maintained native vegetation within the pine rockland ecosystem, including pineland croton. Although prescribed burns are administered on the majority of conservation lands that retain Bartram's scrub-hairstreak populations,

fire return intervals and scope are inconsistent. In addition, little or no fire management occurs on private lands. Thus, areas of pine rockland that now support the subspecies may not provide as optimal habitat in the future as a lack of adequate fire management removes or fragments hostplant distribution. Conversely, hostplants may return or increase in areas following prescribed burns, allowing the butterflies to expand or colonize within them in the future.

When determining critical habitat boundaries within this final rule, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack PBFs for the Bartram's scrub-hairstreak butterfly. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this final rule have been excluded by text in the rule and are not designated as critical habitat. Therefore, a Federal action involving these lands will not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the PBFs in the adjacent critical habitat.

The critical habitat designation is defined by the map or maps, as modified by any accompanying regulatory text, presented at the end of this document in the Regulation Promulgation section. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. We will make the coordinates, plot points, or both on which each map is based available to the public on *http://www.regulations.gov* at Docket No. FWS–R4–ES–2013–0031, on our Internet site at *http://www.fws.gov/verobeach/*, and at the field office responsible for the designation (see **FOR FURTHER INFORMATION CONTACT**, above).

Final Critical Habitat Designation for the Bartram's Scrub-hairstreak Butterfly

We are designating seven units as critical habitat for the Bartram's scrub-hairstreak. The critical habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for the Bartram's scrub-hairstreak. The seven areas we are designating as critical habitat are:

(1) BSHB1 Everglades National Park, Miami-Dade County, Florida;

(2) BSHB2 Navy Wells Pineland Preserve, Miami-Dade County, Florida;

(3) BSHB3 Camp Owaissa Bauer, Miami-Dade County, Florida;

(4) BSHB4 Richmond Pine Rocklands, Miami-Dade County, Florida;

(5) BSHB5 Big Pine Key, Monroe County, Florida;

(6) BSHB6 No Name Key, Monroe County, Florida; and

(7) BSHB7 Little Pine Key, Monroe County, Florida.

Land ownership within the designated critical habitat consists of Federal (80 percent), State (5 percent), and private and other (15 percent). Table 2 summarizes these units. Designated critical habitat for the Florida leafwing butterfly occurs entirely within Bartram's scrub- hairstreak units BSHB1, BSHB2, BSHB4, and BSHB5.

TABLE 2—BARTRAM'S SCRUB-HAIRSTREAK CRITICAL HABITAT UNITS

Unit No.	Unit name	Ownership	Percent	Hectares (acres)	Occupied
BSHB1	Everglades National Park	Federal	100	3,235 (7,994)	yes.
		Total	*100*	*3,235 (7,994)*	
BSHB2	Navy Wells Pineland Preserve	State	30	62 (153)	yes.
		Private-Other	70	141 (349)	
		Total	*100*	*203 (502)*	
BSHB3	Camp Owaissa Bauer	State	20	29 (71)	yes.
		Private-Other	80	117 (288)	
		Total	*100*	*146 (359)*	
BSHB4	Richmond Pine Rocklands	Federal	11	50 (122)	yes.
		State	7	32 (79)	
		Private-Other	82	356 (881)	
		Total	*100*	*438 (1,082)*	
BSHB5	Big Pine Key	Federal	65	365 (901)	yes.
		State	16	90 (223)	
		Private-Other	19	104 (258)	
		Total	*100*	*559 (1,382)*	
BSHB6	No Name Key	Federal	75	30 (75)	no.
		State	18	9 (22)	
		Private-Other	7	11 (26)	
		Total	*100*	*50 (123)*	
BSHB7	Little Pine Key	Federal	100	39 (97)	no.
		Total	*100*	*39 (97)*	

TABLE 2—BARTRAM'S SCRUB-HAIRSTREAK CRITICAL HABITAT UNITS—Continued

Unit No.	Unit name	Ownership	Percent	Hectares (acres)	Occupied
Total All Units		Federal	80	3,719 (9,189)	
		State	5	222 (548)	
		Private-Other	15	729 (1,802)	
		All	100	4,670 (11,539)	

Note: Area sizes may not sum due to rounding.

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for the Bartram's scrub-hairstreak butterfly, below.

Unit BSHB1: Everglades National Park, Miami-Dade County, Florida

Unit BSHB1 consists of 3,235 ha (7,994 ac) in Miami-Dade County. This unit is composed entirely of lands in Federal ownership, 100 percent of which are located within the Lone Pine Key region of ENP. This unit is currently occupied by the Bartram's scrub-hairstreak and contains all the PBFs, including suitable habitat (pine rockland habitat of sufficient size), hostplant presence, natural or artificial disturbance regimes, low levels of nonnative vegetation and larval parasitism, and restriction of pesticides, and the unit contains the PCE of pine rockland. The PBFs in this unit may require special management considerations or protection to address threats of a lack of adequate fire management, habitat fragmentation, poaching, and sea level rise. However, in most cases these threats are being addressed or coordinated with the NPS to implement needed actions.

ENP is currently in the process of updating its FMP and environmental assessment, which will assess the impacts of fire on various environmental factors, including listed, proposed, and candidate species (Land 2011, pers. comm.; Sadle 2013a, pers. comm.). ENP is actively coordinating with the Service, as well as other members of the IBWG, to review and adjust the prescribed burn practices outlined in the FMP to help maintain or increase Bartram's scrub-hairstreak population sizes, protect pine rocklands, expand or restore remnant patches of hostplants, and ensure that short-term negative effects from fire (i.e., loss of hostplants, loss of eggs and larvae) can be avoided or minimized.

Unit BSHB2: Navy Wells Pineland Preserve, Miami-Dade County, Florida

Unit BSHB2 consists of 203 ha (502 ac) in Miami-Dade County. This unit is comprised of lands in State (62 ha (153 ac)) and private or other (141 ha (349 ac)) ownership. The 120-ha (296-ac) Navy Wells Pineland Preserve is jointly owned by Miami-Dade County (85 ha (211 ac)) and the State (35 ha (85 ac)). State lands are interspersed within Miami-Dade County Parks and Recreation Department lands, which are managed for conservation.

This unit begins in Homestead, Florida, on SW 304 Street, between SW 198 Avenue to SW 204 Avenue; then resumes between SW 340 Street and SW 344 Street, between SW 213 Avenue and SW 214 Avenue; then resumes between SW 344 Street and SW 360 Street on SW 209 Avenue; then resumes along SW 268 Street, between SW 202 Avenue and SW 205 Avenue; then resumes along SW 360 Street, between SW 202 Avenue and SW 188 Avenue; then resumes between SW 7 Street and SW 158 Street, in the vicinity of SW 180 Avenue; then resumes along Palm Drive and SW 3 Terrace, between SW 6 Avenue and SW 8 Avenue.

This unit is occupied by the Bartram's scrub-hairstreak butterfly and contains all the PBFs, including suitable habitat, hostplant, adult food sources, breeding sites, disturbance regimes, and restriction of pesticides, and the unit contains pine rockland and rockland hammock PCEs. The PBFs in this unit may require special management considerations or protection to address threats of a lack of adequate fire management, habitat fragmentation, poaching, and sea level rise. However, in most cases these threats are being addressed or coordinated with our partners and landowners to implement needed actions.

Unit BSHB3: Camp Owaissa Bauer, Miami-Dade County, Florida

Unit BSHB3 consists of 146 ha (359 ac) in Miami-Dade County. This unit is comprised of lands in State (29 ha (71 ac)) and private or other (117 ha (288 ac)) ownership, of which one large fragment (40 ha (99 ac)) is owned by Miami-Dade County-Camp Owaissa Bauer. State lands are interspersed within Miami-Dade County Parks and Recreation Department lands, which are managed for conservation.

This unit begins in Homestead, Florida, on SW 147 Ave, between SW 216 Street and SW 200 Street; then resumes on both sides of SW 157 Avenue, between SW 216 Street and SW 228 Street; then resumes along SW 232 Street, between SW 142 Avenue and SW 144 Avenue; then continues south of SW 232 Street along both sides of SW 142 Ave to SW 248 Street; then resumes along SW 248 Street, south to SW 256 Street, between SW 144 Avenue and the vicinity of SW 157 Avenue; then resumes along SW 240 Street, north to the vicinity of SW 238 Street, between SW 152 Avenue and SW 147 Avenue; then resumes between SW 264 Street and SW 272 Street, along both sides of SW 155 Avenue; then resumes along both sides of SW 264 Street in the vicinity of SW 162 Avenue.

This unit is occupied by the Bartram's scrub-hairstreak butterfly and contains all the PBFs, including suitable habitat, hostplant, adult food sources, breeding sites, disturbance regimes, and restriction of pesticides required by the subspecies, and the unit contains the pine rockland and rockland hammock PCEs. The PBFs in this unit may require special management considerations or protection to address threats of a lack of adequate fire management, habitat fragmentation, poaching, and sea level rise. However, in most cases these threats are being addressed or coordinated with our partners and landowners to implement needed actions.

Unit BSHB4: Richmond Pine Rocklands, Miami-Dade County, Florida

Unit BSHB4 consists of 438 ha (1,082 ac) in Miami-Dade County. This unit comprises lands in both Federal (U.S. Coast Guard (Homeland Security) (29 ha (72 ac)), U.S. Army Corps of Engineers (DoD) (8 ha (20 ac)), National Oceanic Atmospheric Administration (NOAA) (4 ha (9 ac)), Federal Bureau of Prisons (DoJ) (9 ha (21 ac))), State (32 ha (79 ac)), and private or other (356 ha (881 ac)) ownership. The unit includes some of the largest remaining contiguous

fragments of pine rockland habitats outside of ENP known to be occupied by the Bartram's scrub-hairstreak butterfly.

This unit begins in Miami, Florida, at SW 120 Street, north to SW 112 Street, between SW 142 Avenue and the vicinity of SW 137 Avenue; then resumes along SW 124 Street south to SW 128 Street, between SW127 Avenue and the vicinity of SW 137 Avenue; then resumes in the vicinity of SW 136 Street and SW 122 Avenue; then resumes on Coral Reef Drive (State Road 992) south to SW 168 Street, between U.S. 1 and SW 117 Avenue; then resumes from Coral Reef Drive south to SW 184 Street, between FL–832 and SW 137 Avenue.

This unit is currently occupied by the Bartram's scrub-hairstreak butterfly and contains all the PBFs, including suitable habitat, hostplant, adult food sources, breeding sites, disturbance regimes, and restriction of pesticides, and the unit contains the pine rockland and rockland hammock PCEs. The PBFs in this unit may require special management considerations or protection to address threats of a lack of adequate fire management, habitat fragmentation, poaching, and sea level rise. However, in most cases these threats are being addressed or coordinated with our partners and landowners to implement needed actions. The U.S. Army Corps of Engineers lands do not have an integrated natural resources management plan (INRMP) or other natural resource management plan.

Unit BSHB5: Big Pine Key, Monroe County, Florida

Unit BSHB5 consists of 559 ha (1,382 ac) in Monroe County. This unit includes Federal lands within NKDR (365 ha (901 ac)), State lands (90 ha (223 ac)), and property in private or other ownership (104 ha (258 ac)). State lands are interspersed within NKDR lands and managed as part of the Refuge.

The unit begins on northern Big Pine Key on the southern side of Gulf Boulevard, continues south on both sides of Key Deer Boulevard (CR 940) to the vicinity of Osprey Lane on the western side of CR 940 and Tea Lane to the east of CR 940; then resumes on both sides of CR 940 from Osprey Lane to rest south of the vicinity of Driftwood Lane; then resumes south of Osceola Street, between Fern Avenue to the west and Baba Lane to the east; then resumes north of Watson Boulevard in the vicinity of Avenue C; then continues south on both sides of Avenue C to South Street; then resumes on both sides of CR 940 south to U.S. 1 between Ships Way to the west and Sands Street to the east; then resumes south of U.S. 1 from Newfound Boulevard to the west and Deer Run Trail to the east; then resumes south of U.S. 1 from Palomino Horse Trail to the west and Industrial Road to the east.

This unit is currently occupied by the Bartram's scrub-hairstreak butterfly. This unit contains several of the PBFs, including suitable habitat, hostplant, adult food sources, and breeding sites required by the subspecies, and it contains the pine rockland and rockland hammock PCEs. The PBFs in this unit may require special management considerations or protection to address threats of disturbance regimes (fire) and pesticide applications, as well as habitat fragmentation, poaching, and sea level rise. However, in most cases these threats are being addressed or coordinated with our partners and landowners to implement needed actions.

Unit BSHB6: No Name Key, Monroe County, Florida

Unit BSHB6 consists of 50 ha (123 ac) in Monroe County. This unit includes Federal lands within NKDR (30 ha (75 ac)), State lands (9 ha (22 ac)), and property in private or other ownership (11 ha (26 ac)). State lands are interspersed within NKDR lands and managed as part of the Refuge. The unit extends from Watson Road entirely on National Key Deer Refuge lands just south of the vicinity of Spanish Channel Drive eastward to the vicinity of Paradise Drive, then resumes north of Watson Road from No Name Drive east to Paradise Lane.

This unit is not currently occupied by the Bartram's scrub-hairstreak butterfly but is essential for the conservation of the subspecies because it serves to protect habitat needed to recover the subspecies, reestablish wild populations within the historical range of the subspecies, and maintain populations throughout the historical distribution of the subspecies in the Florida Keys, and the unit provides area for recovery in the case of stochastic events that otherwise hold the potential to eliminate the subspecies from the one or more locations where it is presently found. The Lower Florida Keys National Wildlife Refuge's CCP management objective number 11 provides specifically for maintaining and restoring butterfly populations of special conservation concern, including the Bartram's scrub-hairstreak butterfly.

Unit BSHB7: Little Pine Key, Monroe County, Florida

Unit BSHB7 consists of 39 ha (97 ac) in Monroe County. This unit comprises entirely lands in Federal ownership, 100 percent of which are located within NKDR. This unit is not currently occupied by the Bartram's scrub-hairstreak butterfly but is essential to the conservation of the subspecies because it serves to protect habitat needed to recover the subspecies, reestablish wild populations within the historical range of the subspecies, and maintain populations throughout the historical distribution of the subspecies in the Florida Keys, and it provides area for recovery in the case of stochastic events that otherwise hold the potential to eliminate the subspecies from one or more locations where it is presently found. The Lower Florida Keys National Wildlife Refuge's CCP management objective number 11 provides specifically for maintaining and restoring butterfly populations of special conservation concern, including the Bartram's scrub-hairstreak butterfly.

Unit BSHB7–Little Pine Key is designated critical habitat for the silver rice rat *(Oryzomys palustris natator;* 50 CFR 17.95(a)).

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action that is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

Decisions by the 5th and 9th Circuit Courts of Appeals have invalidated our regulatory definition of ''destruction or adverse modification'' (50 CFR 402.02) (see *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service,* 378 F. 3d 1059 (9th Cir. 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service,* 245 F.3d 434 (5th Cir. 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the effected critical habitat would continue to serve its intended conservation role for the species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat, and actions on State, tribal, local, or private lands that are not federally funded or authorized, do not require section 7 consultation.

As a result of section 7 consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define ''reasonable and prudent alternatives'' (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies sometimes may need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Application of the ''Adverse Modification'' Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species. Activities that may destroy or adversely modify critical habitat are those that alter the physical or biological features to an extent that appreciably reduces the conservation value of critical habitat for the Florida leafwing and Bartram's scrub-hairstreak butterflies. As discussed above, the role of critical habitat is to support life-history needs of these butterflies and provide for the conservation of these subspecies.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that may affect critical habitat, when carried out, funded, or authorized by a Federal agency, should result in consultation for the Florida leafwing and Bartram's scrub-hairstreak butterflies. These activities include, but are not limited to:

(1) Actions that would significantly alter the pine rockland and associated rockland hammock and hydric pine flatwood habitats. Such activities may include, but are not limited to, residential, commercial, or recreational development, including associated infrastructure.

(2) Actions that would significantly alter vegetation structure or composition, such as clearing vegetation for construction of residential, commercial, or recreational development; and associated infrastructure.

(3) Actions that would introduce nonnative plant species that would significantly alter vegetation structure or composition. Such activities may include, but are not limited to, residential and commercial development and associated infrastructure.

(4) Actions that would introduce nonnative arthropod species that would significantly influence the natural histories of the Florida leafwing and Bartram's scrub-hairstreak butterflies. Such activities may include release of parasitic or predator species (flies or wasps) for use in agriculture-based biological control programs.

(5) Actions that would introduce chemical pesticides into the pine rockland and associated rockland hammock and hydric pine flatwood habitats in a manner that impacts the butterflies. Such activities may include use of adulticides for control of mosquitos or agricultural-related pests.

Exemptions

Application of Section 4(a)(3) of the Act

Section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) provides that: ''The Secretary shall not designate as critical habitat any lands or other geographic areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an INRMP prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.'' There are DoD lands within the critical habitat designation area; however, none of these lands is covered by an INRMP. Accordingly, no lands that otherwise meet the definition of critical habitat are exempt under section 4(a)(3)(B)(i) of the Act.

Consideration of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if she determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless she determines, based on the best scientific

data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

Exclusions Based on Economic Impacts

Under section 4(b)(2) of the Act, we consider the economic impacts of specifying any particular area as critical habitat. In order to consider economic impacts, we prepared an incremental effects memorandum (IEM) and screening analysis, which together with our narrative interpretation of effects, constituted our draft economic analysis (DEA) of the proposed critical habitat designation and related factors (Service 2013, entire; IEc 2014, entire). The DEA was made available for public review from May 8, 2014, through June 9, 2014 (79 FR 26392). Following the close of the comment period, we reviewed and evaluated all information submitted during the comment period that may pertain to our consideration of the probable incremental economic impacts of this critical habitat designation.

Based on the analysis, the Service anticipates no more than eight to nine consultations per year in the critical habitat units. The analysis concluded the economic impacts of the designation are likely to range from $400 to $9,000 per consultation resulting in approximately $72,000 (2013 dollars) in a given year. Critical habitat is not likely to generate additional consultations, and in circumstances where consultation does occur, additional project modifications are unlikely. Additional information relevant to the probable incremental economic impacts of critical habitat designations for the Florida leafwing and Bartram's scrub-hairstreak butterflies are summarized in the DEA (IEc 2014, entire), available at *http://www.regulations.gov*.

In summary, our analysis did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary is not exercising her discretion to exclude any areas from this designation of critical habitat for the Florida leafwing and Bartram's scrub-hairstreak based on economic impacts.

Exclusions Based on National Security Impacts

Under section 4(b)(2) of the Act, we consider whether there are lands owned or managed by the DoD where a national security impact might exist. In preparing this final rule, we have determined that some lands within the designation of critical habitat for the Florida leafwing and Bartram's scrub-hairstreak are owned or managed by the DoD and the Department of Homeland Security. However, we anticipate no impact on national security. Consequently, the Secretary is not intending to exercise her discretion to exclude any areas from the final designation based on impacts on national security.

Exclusions Based on Other Relevant Impacts

Under section 4(b)(2) of the Act, we also consider any other relevant impacts resulting from the designation of critical habitat. We consider a number of factors, including whether the landowners have developed any HCPs or other management plans for the area, or whether there are conservation partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at any tribal issues, and consider the government-to-government relationship of the United States with tribal entities. We also consider any social impacts that might occur because of the designation.

In preparing this final rule, we have determined that there are currently no permitted HCPs or other management plans for the Florida leafwing and Bartram's scrub-hairstreak. An HCP for Big Pine and No Name Keys in Monroe County, Florida, which was implemented in 2006, did not address the Florida leafwing and Bartram's scrub-hairstreak. However, in order to fulfill the HCP's mitigation requirements, Monroe County has been actively acquiring parcels of high-quality habitats, including pine rocklands, and placing them into conservation. Natural lands acquired under the HCP will be managed for conservation, in perpetuity, either by the County or through agreements with the State or Service. These conservation actions have benefited the Florida leafwing and Bartram's scrub-hairstreak by protecting habitat. However, we anticipate no impact on the HCP from this final critical habitat designation. Furthermore, the final designation does not include any tribal lands or additional trust resources, so we anticipate no impact on tribal lands or partnerships from this final critical habitat designation. Accordingly, the Secretary is not exercising her discretion to exclude any areas from the final designation based on other relevant impacts.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining

concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under these designations as well as types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

The Service's current understanding of the requirements under the RFA, as amended, and following recent court decisions, is that Federal agencies are only required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself, and therefore, not required to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried by the agency is not likely to destroy or adversely modify critical habitat. Therefore, under section 7 only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Consequently, it is our position that only Federal action agencies will be directly regulated by these designations. There is no requirement under RFA to evaluate the potential impacts to entities not directly regulated. Moreover, Federal agencies are not small entities. Therefore, because no small entities are directly regulated by this rulemaking, the Service certifies that this final critical habitat designation will not have a significant economic impact on a substantial number of small entities.

During the development of this final rule we reviewed and evaluated all information submitted during the comment period that may pertain to our consideration of the probable incremental economic impacts of this critical habitat designation. Based on this information, we affirm our certification that this final critical habitat designation will not have a significant economic impact on a substantial number of small entities, and a regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. The Office of Management and Budget (OMB) has provided guidance for implementing this Executive Order that outlines nine outcomes that may constitute ''a significant adverse effect'' when compared to not taking the regulatory action under consideration.

Appendix A of the FEA discusses the potential for critical habitat to affect energy supply, distribution, or use through the additional cost of considering adverse modification in section 7 consultation. The FEA finds that none of the outcomes relative to significant adverse effect thresholds set forth by OMB are relevant to this analysis. Thus, based on information in the FEA, energy-related impacts associated with Florida leafwing and Bartram's scrub-hairstreak conservation activities within critical habitat are not expected. As such, the designation of critical habitat is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(1) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule will significantly or uniquely affect small governments because it will not produce a Federal mandate of $100 million or greater in any year, that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. Small governments will be affected only to the extent that any programs having Federal funds, permits, or other authorized activities must ensure that their actions will not adversely affect the critical habitat. The FEA concludes incremental impacts may occur due to administrative costs of section 7 consultations for activities related to commercial, residential, and recreational development and

associated actions; however, these are not expected to significantly affect small government entities. Consequently, we do not believe that the critical habitat designation will significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with Executive Order 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for the Florida leafwing and Bartram's scrub-hairstreak butterflies in a takings implications assessment. As discussed above, the designation of critical habitat affects only Federal actions. Although private parties that receive Federal funding or assistance, or that require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Based on the best available information, the takings implications assessment concludes that this designation of critical habitat for the Florida leafwing and Bartram's scrub-hairstreak does not pose significant takings implications.

Federalism—Executive Order 13132

In accordance with Executive Order 13132 (Federalism), this rule does not have significant Federalism effects. A federalism summary impact statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this critical habitat designation with appropriate State resource agencies in Florida. We received comments from FWC and FDACS and have addressed them in the Summary of Comments and Recommendations section of this rule. From a federalism perspective, the designation of critical habitat directly affects only the responsibilities of Federal agencies. The Act imposes no other duties with respect to critical habitat, either for States and local governments, or for anyone else. As a result, the rule does not have substantial direct effects either on the States, or on the relationship between the national government and the States, or on the distribution of powers and responsibilities among the various levels of government. The designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the PBFs of the habitat necessary to the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist these local governments in long-range planning (because these governments no longer have to wait for case-by-case section 7 consultations to occur).

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the applicable standards set forth in sections 3(a) and 3(b)(2) of the Order. We are designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, the rule identifies the elements of PBFs essential to the conservation of the Florida leafwing and Bartram's scrub-hairstreak butterflies. The designated areas of critical habitat are presented on maps, and the rule provides several options for the interested public to obtain more detailed location information, if desired.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (NEPA; 42 U.S.C. 4321 et seq.)

It is our position that we do not need to prepare environmental analyses pursuant to NEPA in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes.

As discussed above, we determined that there are no tribal lands that are currently occupied by the Florida leafwing and Bartram's scrub-hairstreak butterflies that contain the features essential for conservation of these subspecies, and no tribal lands unoccupied by the Florida leafwing and Bartram's scrub-hairstreak that are essential for the conservation of these subspecies.

References Cited

A complete list of references cited in this rulemaking is available on the Internet at *http://www.regulations.gov* and upon request from the South Florida Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this package are the staff members of the South Florida Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; 4201–4245, unless otherwise noted.

■ 2. In § 17.95, amend paragraph (i) by:

■ a. Adding an entry for ''Bartram's Scrub-hairstreak Butterfly (*Strymon acis bartrami*)'' immediately following the entry for ''Valley Elderberry Longhorn Beetle *(Desmocerus californicus dimorphus*) California. Sacramento County'' and

■ b. Adding an entry for ''Florida Leafwing Butterfly (*Anaea troglodyta floridalis*)'' immediately following the entry for ''Fender's Blue Butterfly *(Icaricia icarioides fenderi)''.*

The additions read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(i) *Insects.*

* * * * *

Bartram's Scrub-Hairstreak Butterfly (*Strymon Acis Bartrami*)

(1) Critical habitat units are depicted for Miami-Dade and Monroe Counties, Florida, on the maps below.

(2) Within these areas, the primary constituent elements of the physical or biological features essential to the conservation of the Bartram's scrub-hairstreak butterfly are:

(i) Areas of pine rockland habitat, and in some locations, associated rockland hammocks and hydric pine flatwoods.

(A) Pine rockland habitat contains:

(*1*) Open canopy, semi-open subcanopy, and understory.

(*2*) Substrate of oolitic limestone rock.

(*3*) A plant community of predominately native vegetation.

(B) Rockland hammock habitat associated with the pine rocklands contains:

(*1*) Canopy gaps and edges with an open semi-open canopy, subcanopy, and understory.

(*2*) Substrate with a thin layer of highly organic soil covering limestone or organic matter that accumulates on top of the underlying limestone rock.

(*3*) A plant community of predominately native vegetation.

(C) Hydric pine flatwood habitat associated with the pine rocklands contains:

(*1*) Open canopy with a sparse or absent subcanopy, and dense understory.

(*2*) Substrate with a thin layer of poorly drained sands and organic materials that accumulates on top of the underlying limestone or calcareous rock.

(*3*) A plant community of predominately native vegetation.

(ii) Competitive nonnative plant species in quantities low enough to have minimal effect on survival of Bartram's scrub-hairstreak butterfly.

(iii) The presence of the butterfly's hostplant, pineland croton, in sufficient abundance for larval recruitment, development, and food resources, and for adult butterfly nectar source and reproduction;

(iv) A dynamic natural disturbance regime or one that artificially duplicates natural ecological processes (e.g. fire, hurricanes or other weather events, at appropriate intervals) that maintains the pine rockland habitat and associated rockland hammock and hydric pine flatwood plant communities.

(v) Pine rockland habitat and associated rockland hammock and hydric pine flatwood plant communities that allow for connectivity and are sufficient in size to sustain viable populations of Bartram's scrub hairstreak butterfly.

(vi) Pine rockland habitat and associated rockland hammock and hydric pine flatwood plant communities with levels of pesticide low enough to have minimal effect on the survival of the butterfly or its ability to occupy the habitat.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on September 11, 2014.

(4) *Critical habitat map units.* Data layers defining map units were created using ESRI ArcGIS mapping software along with various spatial data layers. ArcGIS was also used to calculate the size of habitat areas. The projection used in mapping and calculating distances and locations within the units was North American Albers Equal Area Conic, NAD 83. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates, plot points, or both on which each map is based are available to the public at the Service's Internet site (*http://www.fws.gov/verobeach/*), the Federal eRulemaking Portal (*http://www.regulations.gov* at Docket No. FWS–R4–ES–2013–0031), and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) Index map of all critical habitat units for the Bartram's scrub-hairstreak butterfly follows:

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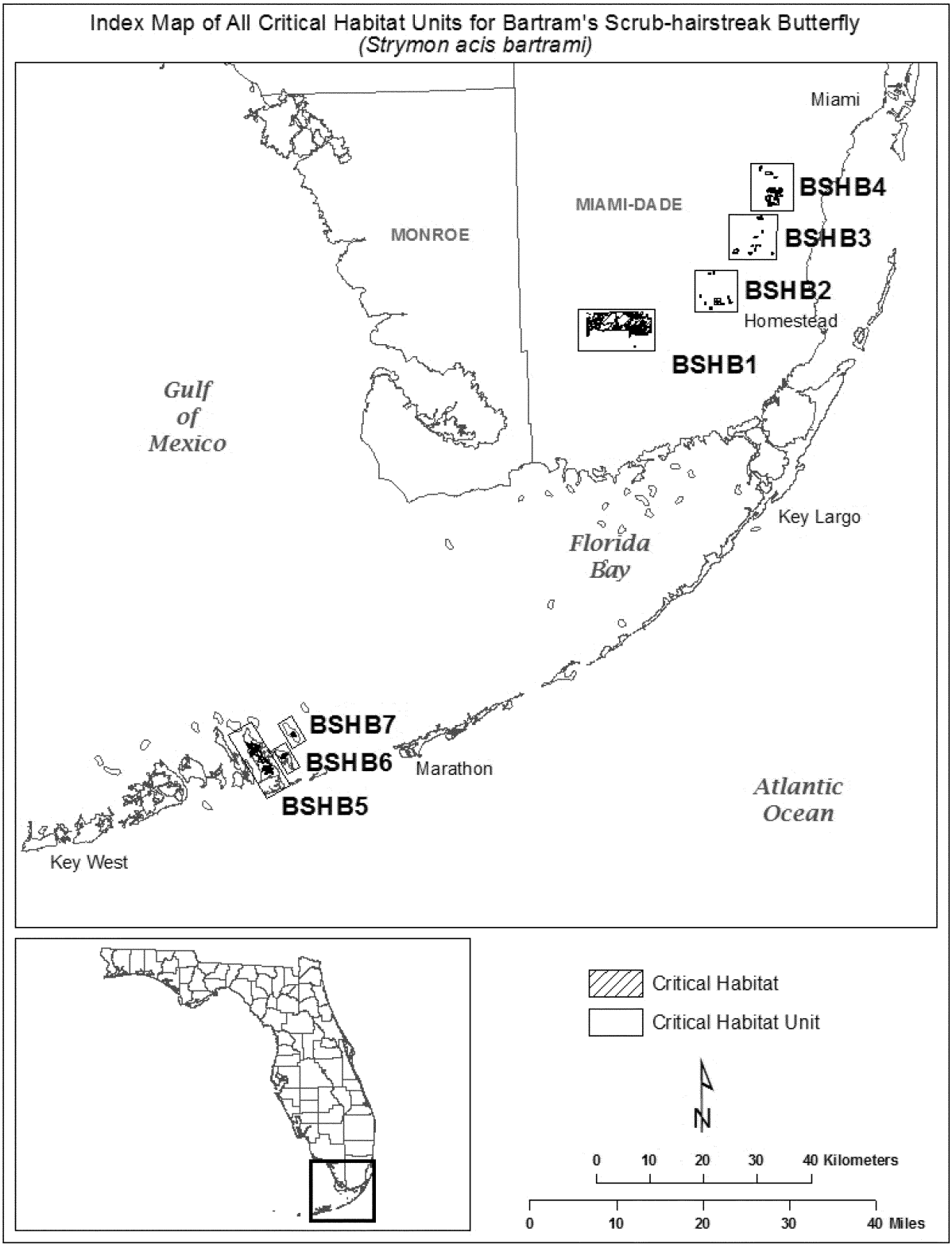
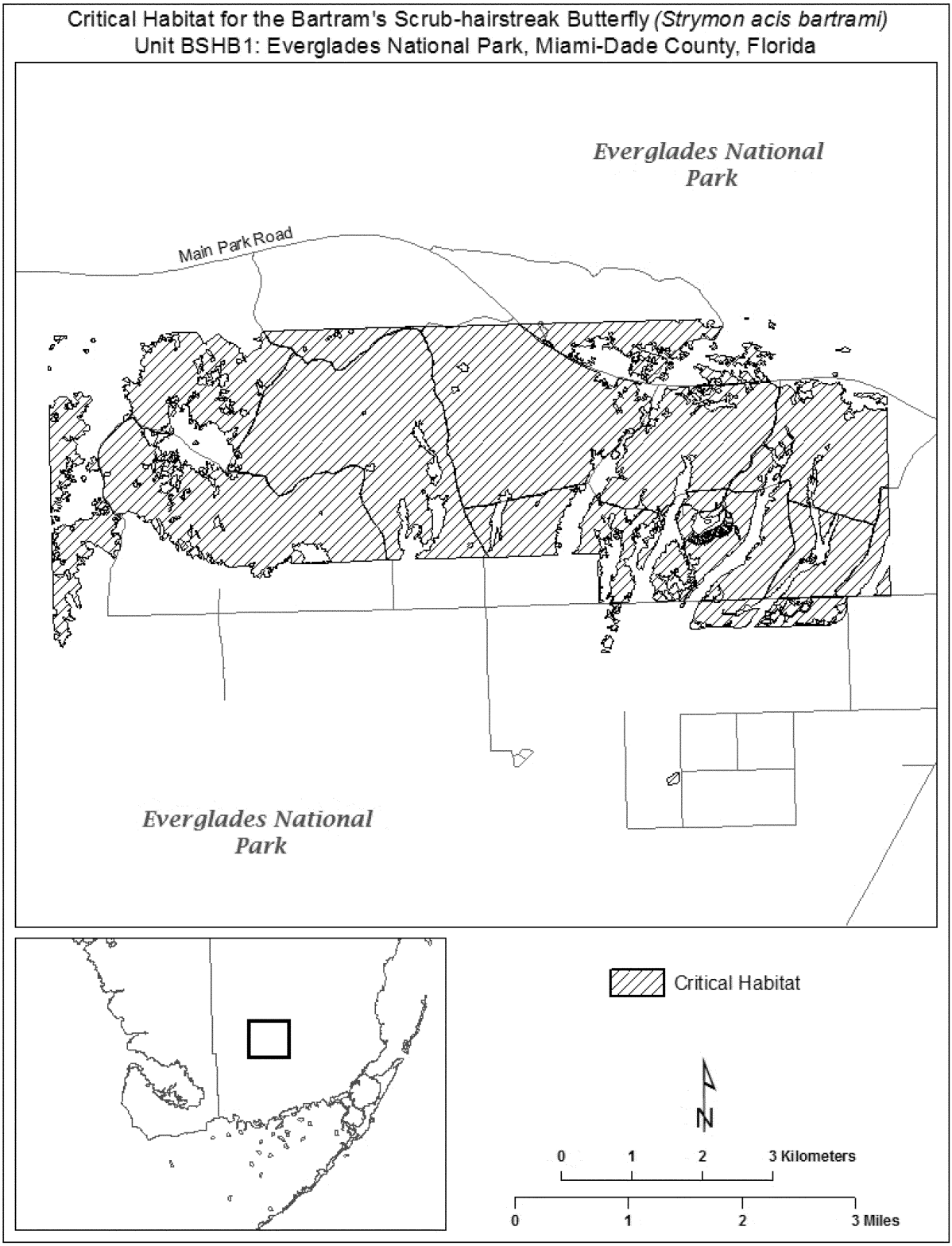


(6) Unit BSHB1: Everglades National Park, Miami-Dade County, Florida.

(i) *General description:* Unit BSHB1 consists of 3,235 ha (7,994 ac) in Miami-Dade County and is composed entirely of lands in Federal ownership, 100 percent of which are located within the Long Pine Key region of Everglades National Park.

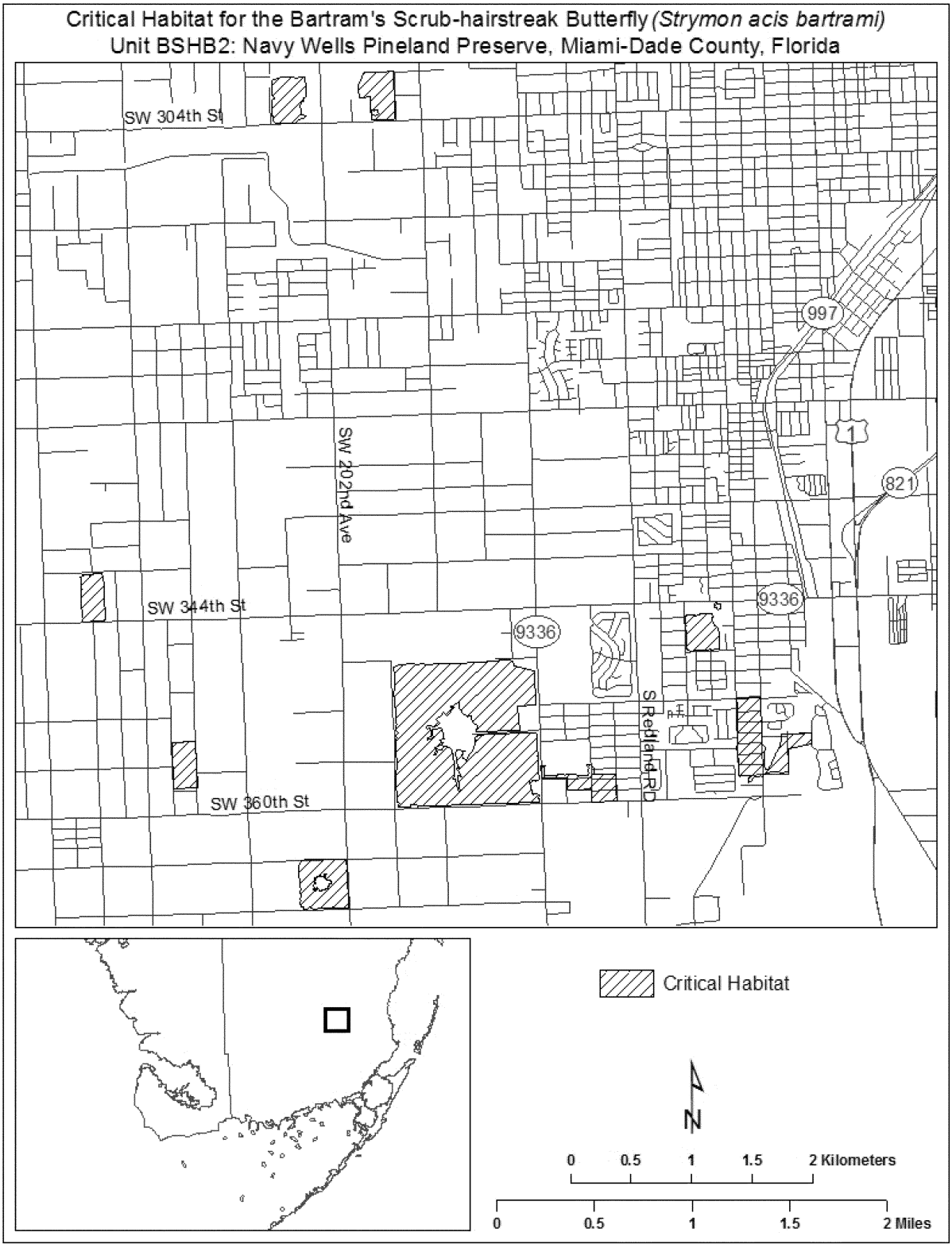
(ii) Map of Unit BSHB1 follows:



(7) Unit BSHB2: Navy Wells Pineland Preserve, Miami-Dade County, Florida.

(i) *General description:* Unit BSHB2 consists of 203 ha (502 ac) in Miami-Dade County and is composed of lands in State (62 ha (153 ac)), and private or other ownership (141 ha (349 ac)), including the County and State-owned Navy Wells Pineland Preserve.

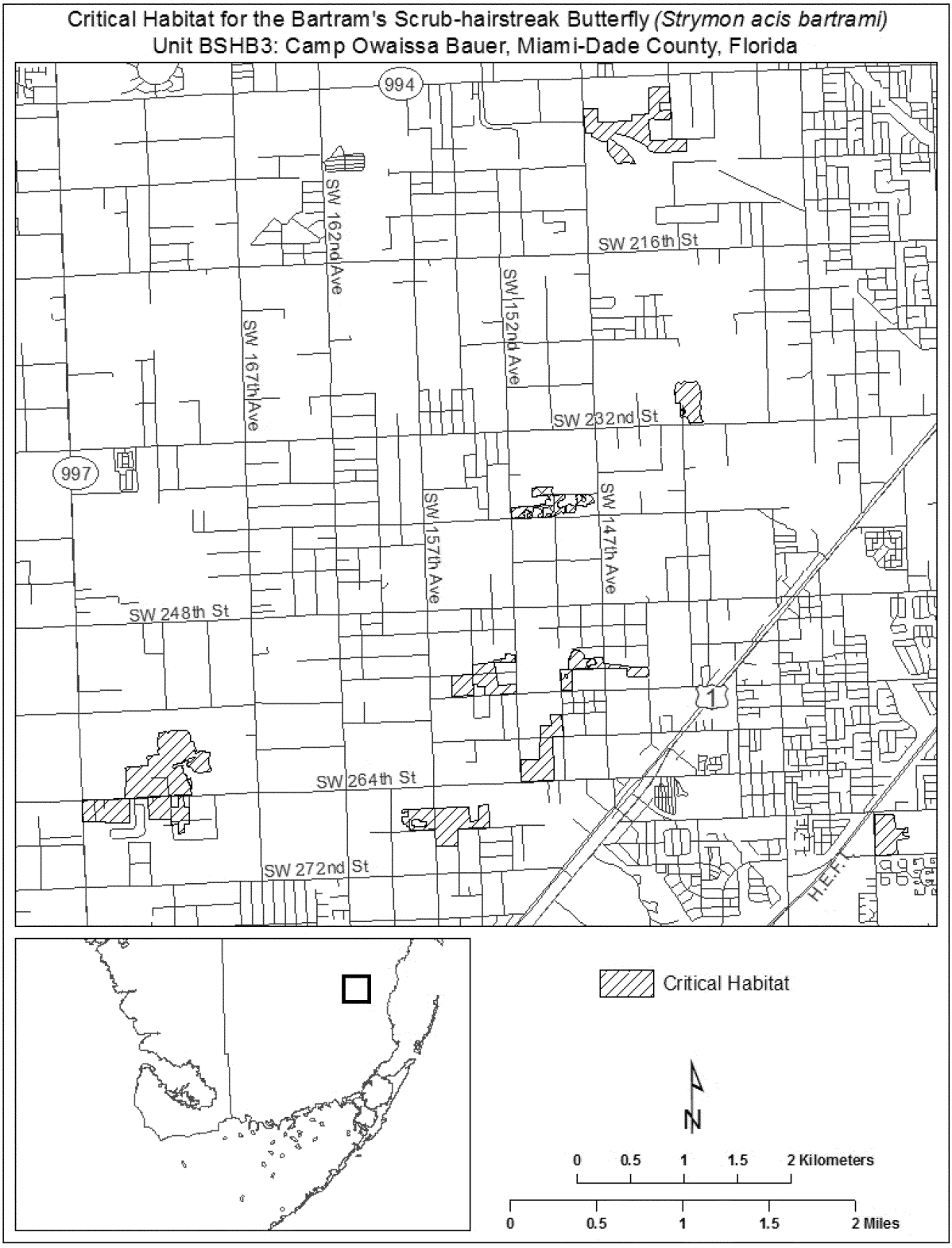
(ii) Map of Unit BSHB2 follows:



(8) Unit BSHB3: Camp Owaissa Bauer, Miami-Dade County, Florida.

(i) *General description:* Unit BSHB3 consists of 146 ha (359 ac) in Miami-Dade County and is comprised of lands in State (29 ha (71 ac)) and private or other ownership (117 ha (288 ac)), including 40 ha (99 ac) of Miami-Dade County-owned Camp Owaissa Bauer.

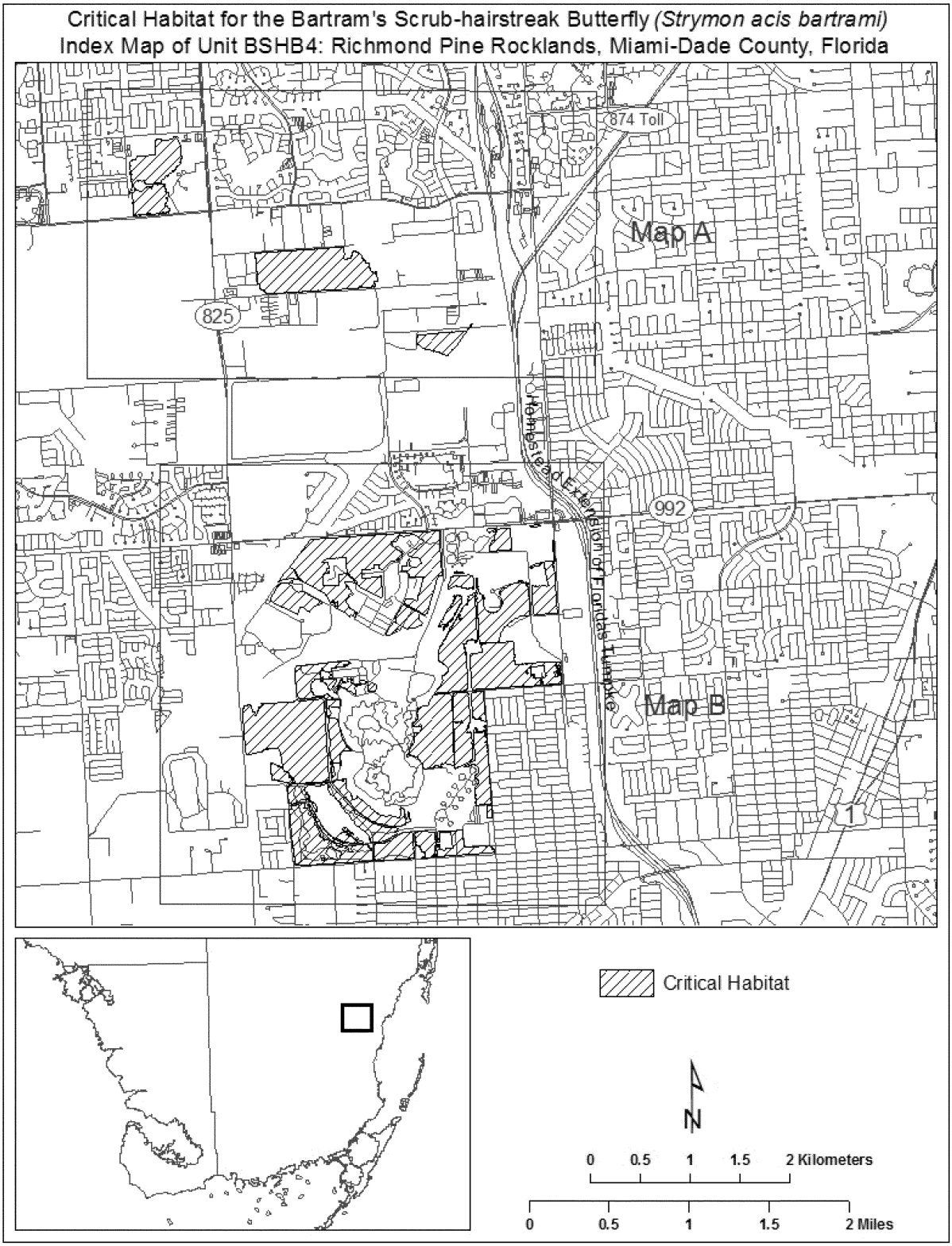
(ii) Map of Unit BSHB3 follows:



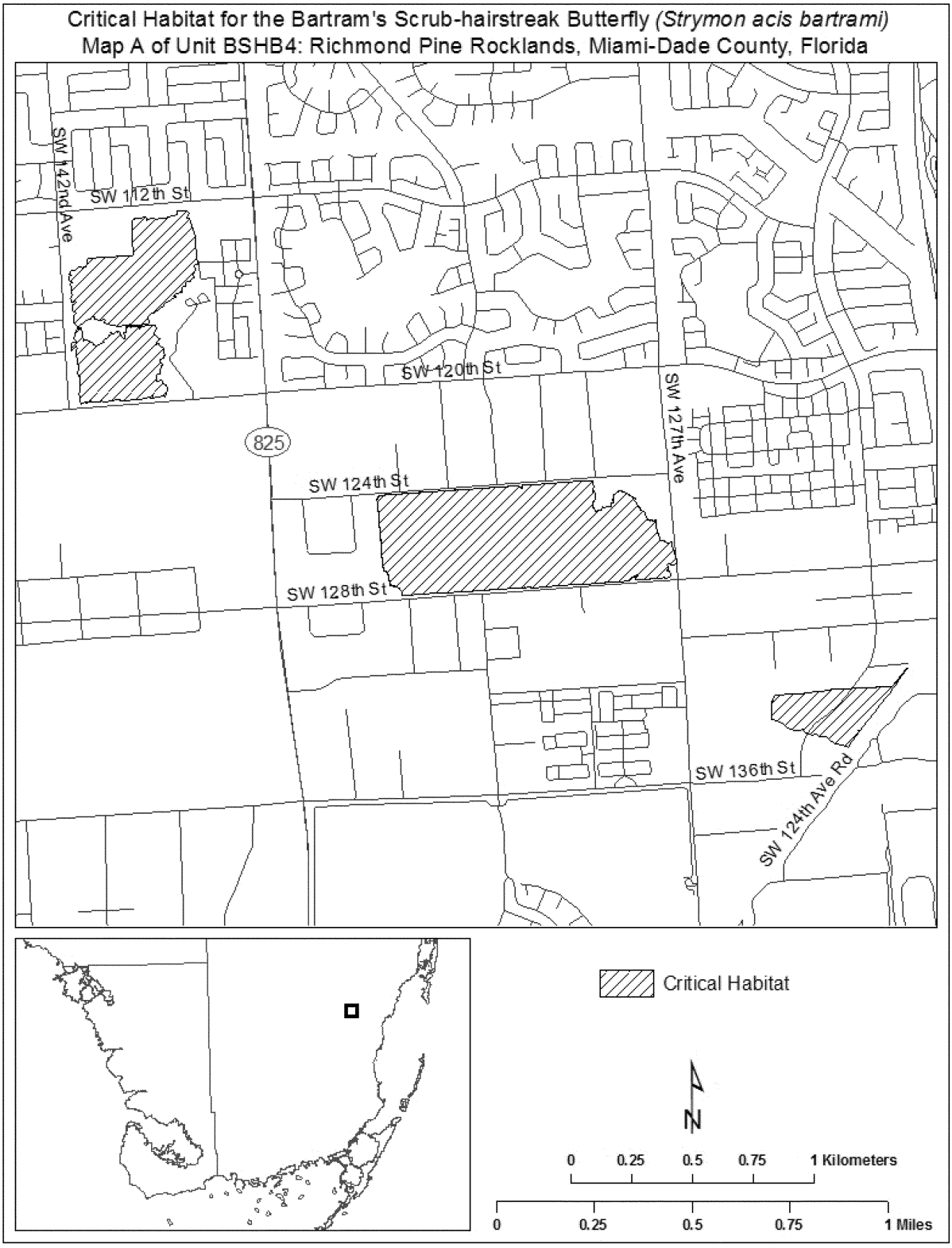
(9) Unit BSHB4: Richmond Pine Rocklands, Miami-Dade County, Florida.

(i) *General description:* Unit BSHB4 consists of 438 ha (1,082 ac) in Miami-Dade County and is composed of lands in Federal (U. S. Coast Guard, U.S. Army Corps of Engineers, Federal Bureau of Prisons, and National Oceanic and Atmospheric Administration (50 ha (122 ac)), State (32 ha (79 ac)) and private or other (356 ha (881 ac)) ownership.

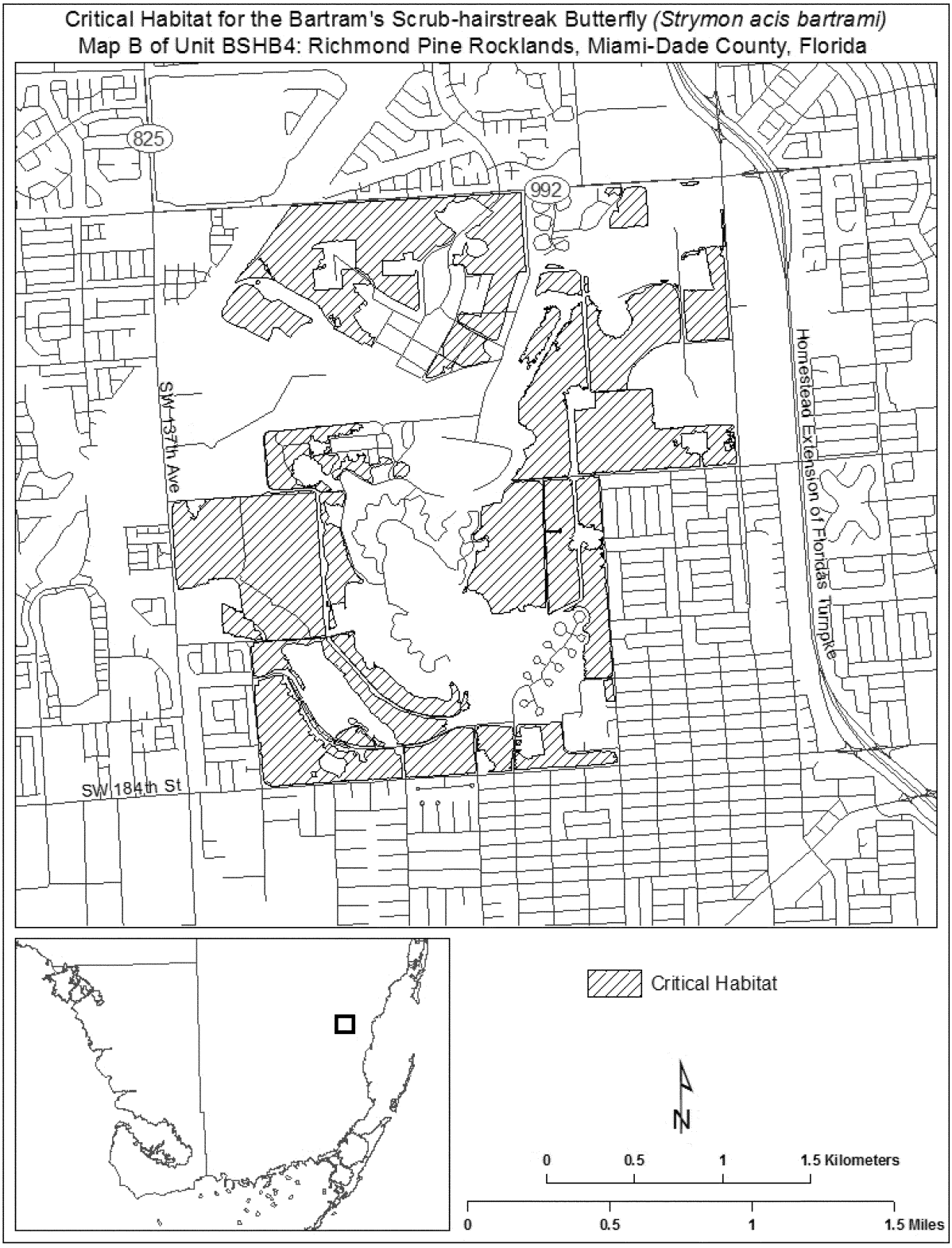
(ii) Index map of Unit BSHB4 follows:



(A) Map A of Unit BSHB4 follows:



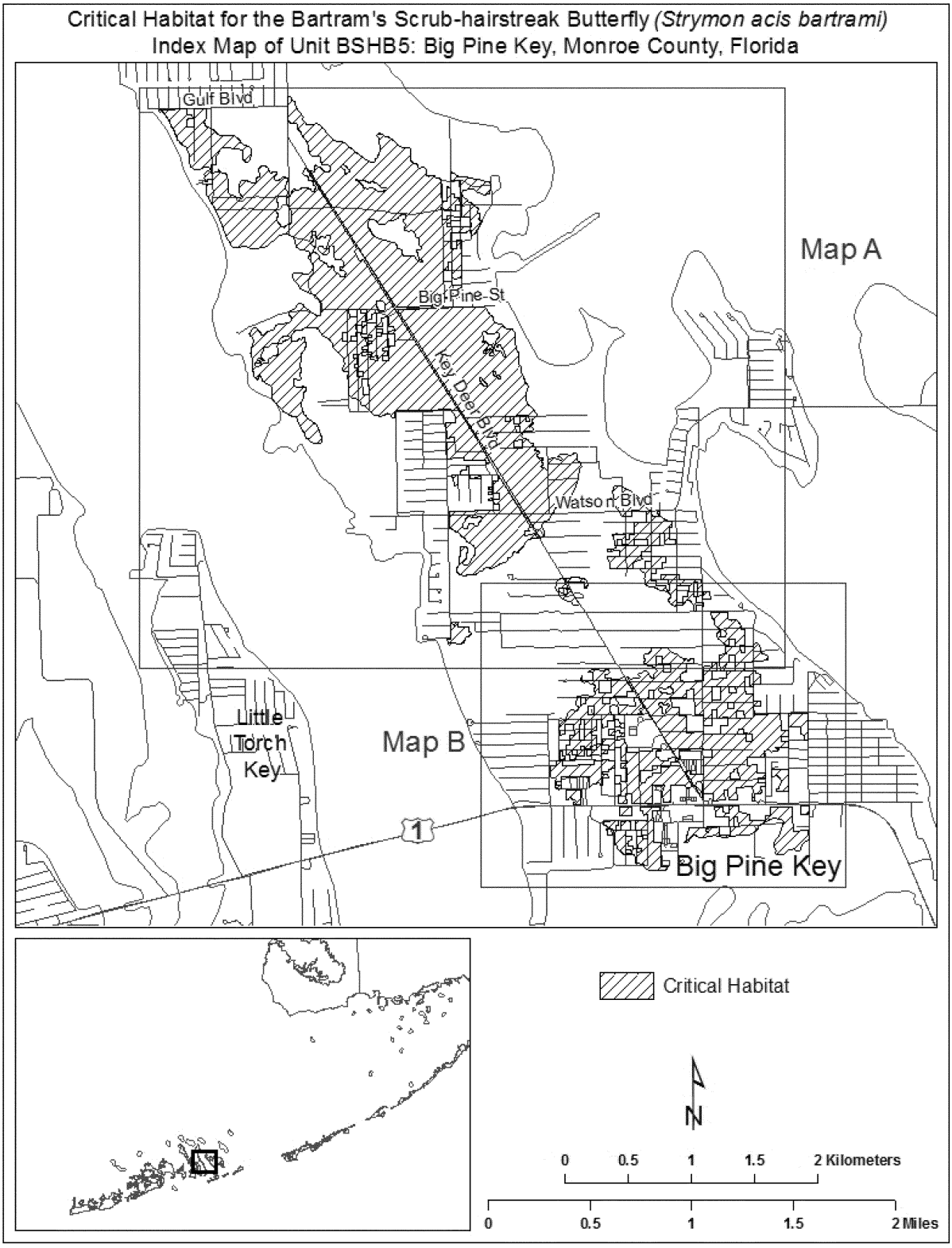
(B) Map B of Unit BSHB4 follows:



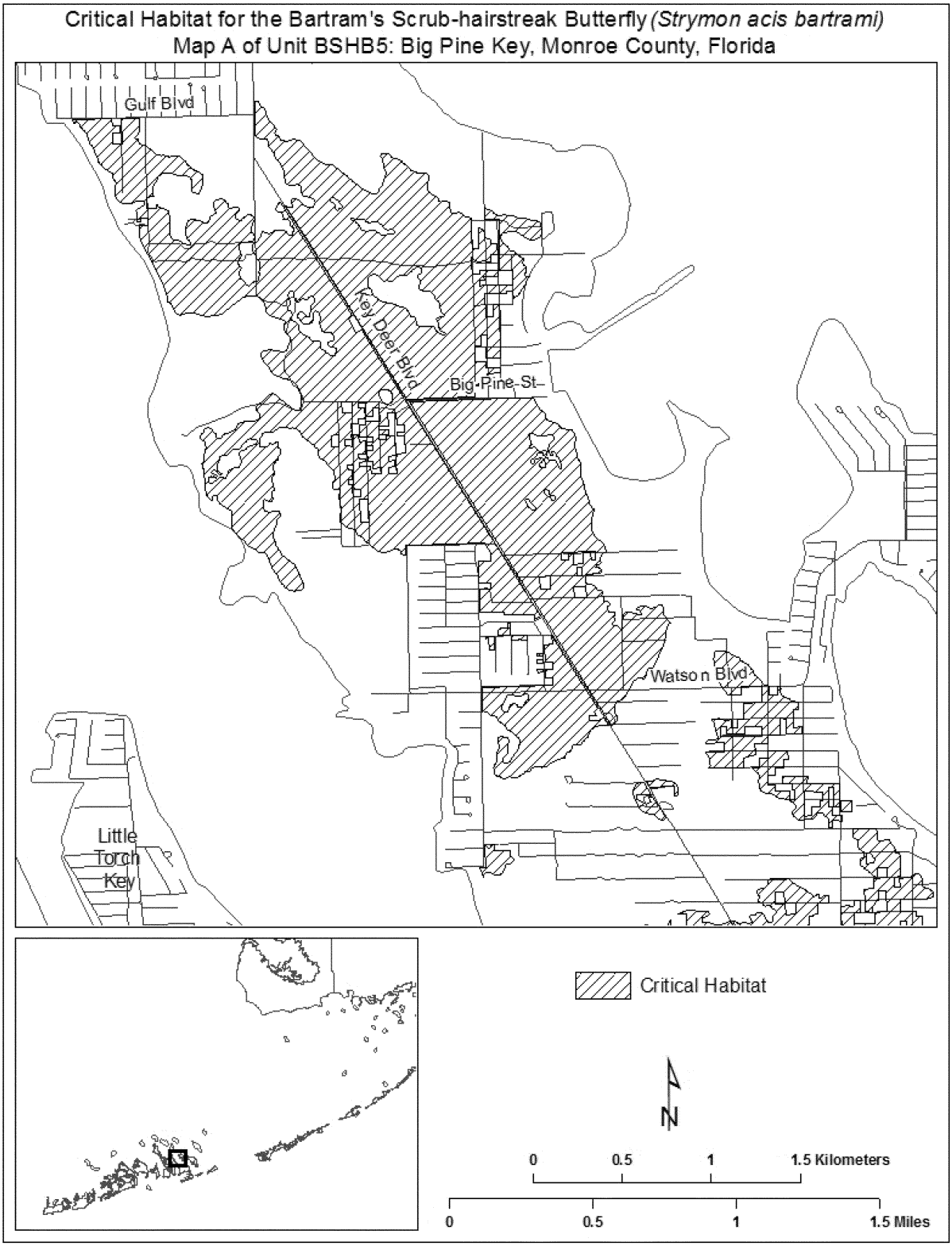
(10) Unit BSHB5: Big Pine Key, Monroe County, Florida.

(i) *General description:* Unit BSHB5 consists of 559 ha (1,382 ac) in Monroe County and is composed of lands in National Key Deer Refuge (NKDR) (365 ha (901 ac)), State ownership (90 ha (223 ac)), and private or other ownership (104 ha (258 ac)). State lands are interspersed within NKDR lands and managed as part of the Refuge.

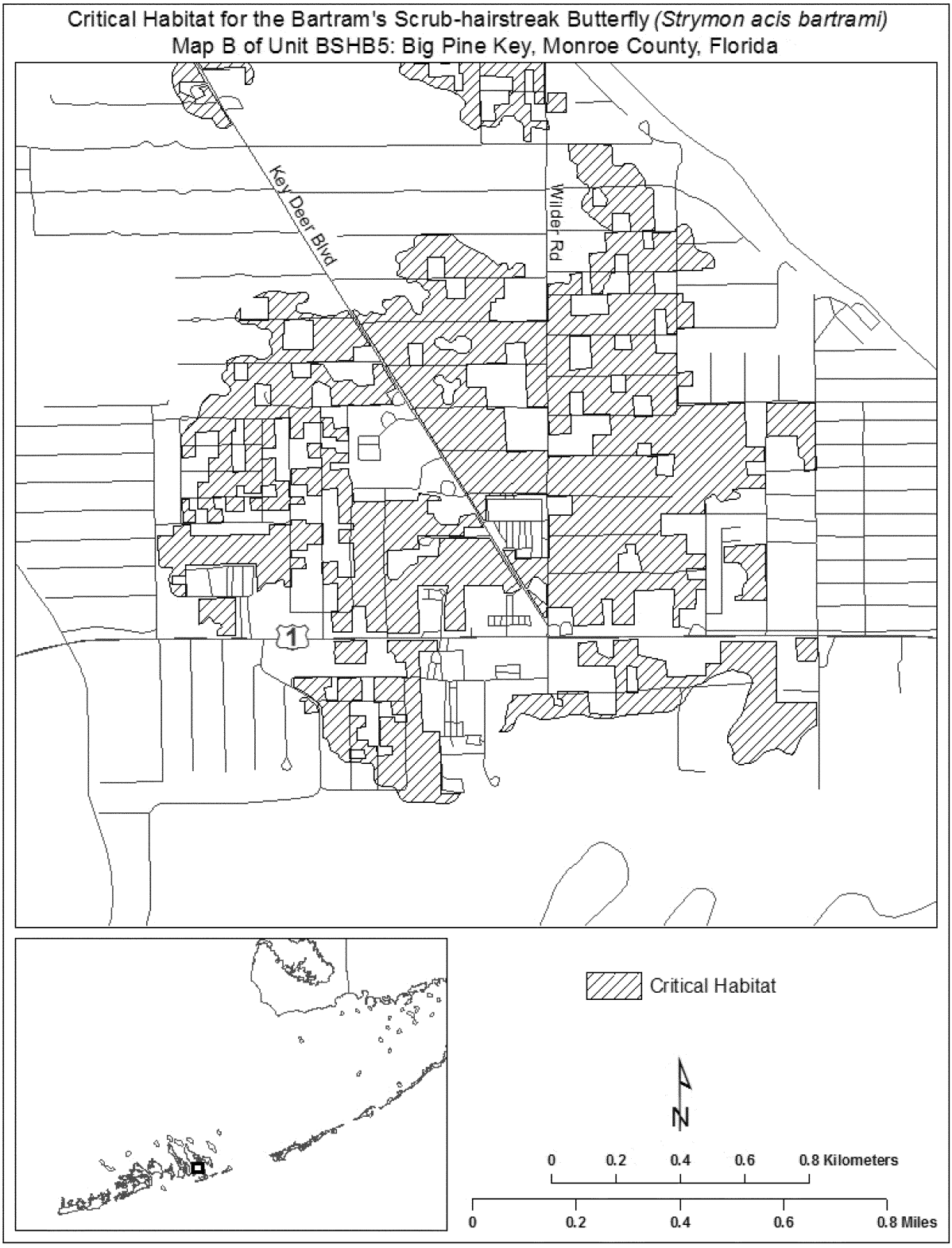
(ii) Index map of Unit BSHB5 follows:



(A) Map A of Unit BSHB5 follows:



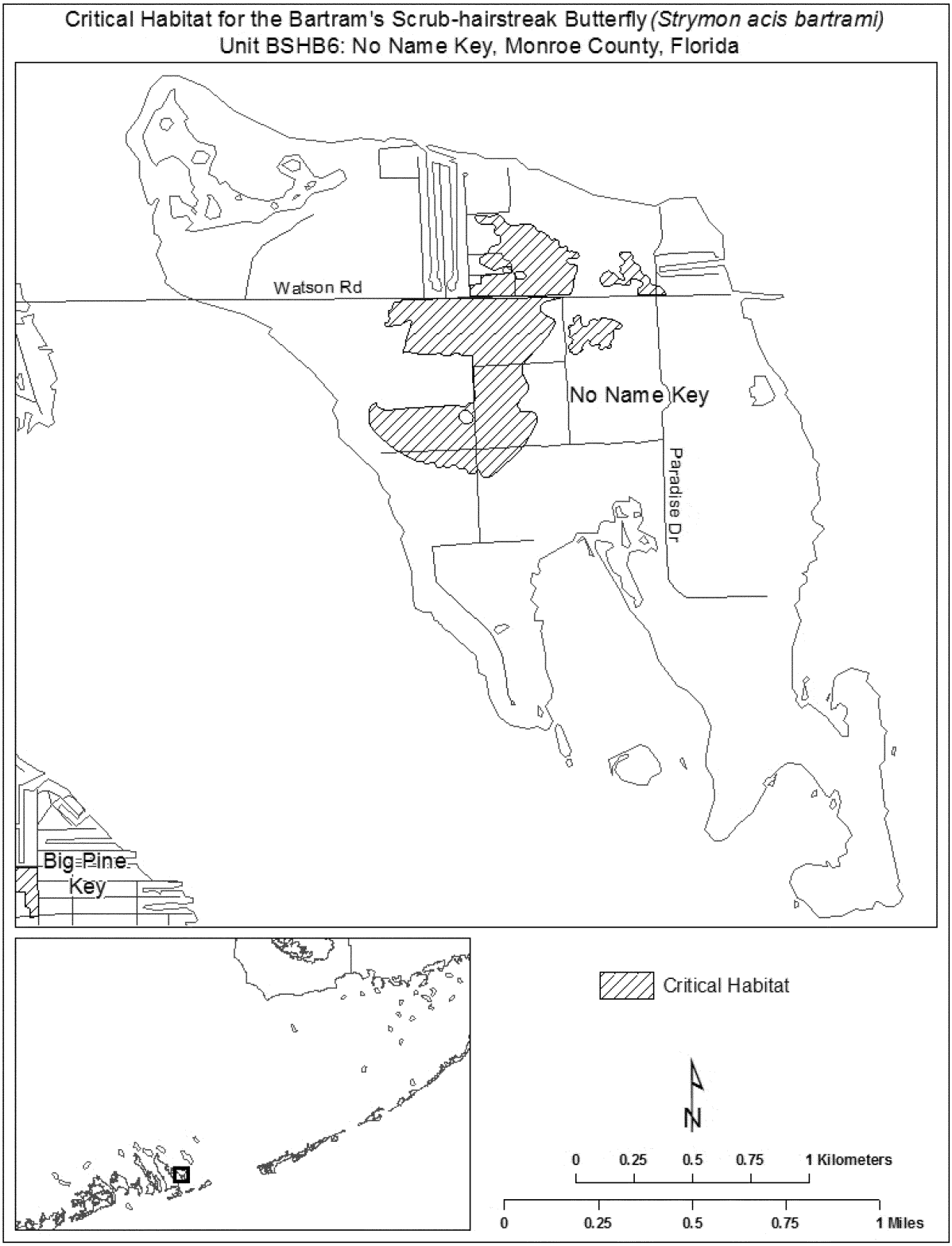
(B) Map B of Unit BSHB5 follows:



(11) Unit BSHB6: No Name Key, Monroe County, Florida.

(i) *General description:* Unit BSHB6 consists of 50 ha (123 ac) in Monroe County and is composed of lands in National Key Deer Refuge (NKDR) (30 ha (75 ac)), State ownership (9 ha (22 ac)), and private or other ownership (11 ha (26 ac)). State lands are interspersed within NKDR lands and managed as part of the Refuge.

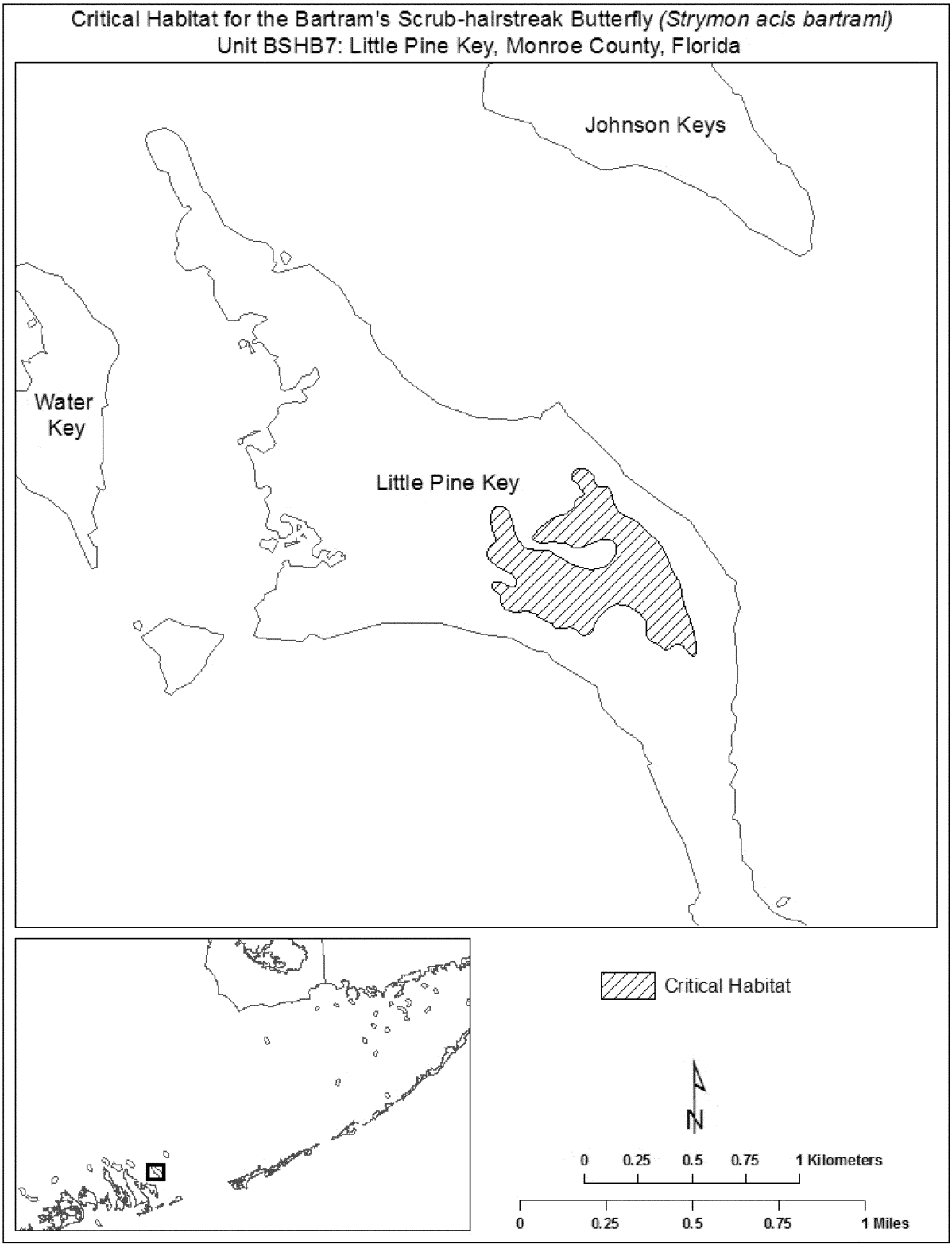
(ii) Map of Unit BSHB6 follows:



(12) Unit BSHB 7: Little Pine Key, Monroe County, Florida.

(i) *General description:* Unit BSHB7 consists of 39 ha (97 ac) in Monroe County. This unit is composed entirely of lands in Federal ownership, 100 percent of which are located within National Key Deer Refuge.

(ii) Map of Unit BSHB7 follows:



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* * * * *

Florida Leafwing Butterfly *(Anaea troglodyta floridalis)*

(1) Critical habitat units are depicted for Miami-Dade and Monroe Counties, Florida, on the maps below.

(2) Within these areas, the primary constituent elements of the physical or biological features essential to the conservation of the Florida leafwing butterfly consist of six components:

(i) Areas of pine rockland habitat, and in some locations, associated rockland hammocks and hydric pine flatwoods.

(A) Pine rockland habitat contains:

(*1*) Open canopy, semi-open subcanopy, and understory.

(*2*) Substrate of oolitic limestone rock.

(*3*) A plant community of predominately native vegetation.

(B) Rockland hammock habitat associated with pine rocklands contains:

(*1*) Canopy gaps and edges with an open to semi-open canopy, subcanopy, and understory.

(*2*) Substrate with a thin layer of highly organic soil covering limestone or organic matter that accumulates on top of the underlying limestone rock.

(*3*) A plant community of predominately native vegetation.

(C) Hydric pine flatwood habitat associated with pine rocklands contains:

(*1*) Open canopy with a sparse or absent subcanopy, and dense understory.

(*2*) Substrate with a thin layer of poorly drained sands and organic materials that accumulates on top of the underlying limestone or calcareous rock.

(*3*) A plant community of predominately native vegetation.

(ii) Competitive nonnative plant species in quantities low enough to have minimal effect on survival of the Florida leafwing butterfly.

(iii) The presence of the butterfly's hostplant, pineland croton, in sufficient abundance for larval recruitment, development, and food resources, and for adult butterfly roosting habitat and reproduction.

(iv) A dynamic natural disturbance regime or one that artificially duplicates natural ecological processes (e.g., fire, hurricanes or other weather events, at appropriate intervals) that maintains the pine rockland habitat and associated rockland hammock and hydric pine flatwood plant communities.

(v) Pine rockland habitat and associated rockland hammock and hydric pine flatwood plant communities sufficient in size to sustain viable Florida leafwing populations.

(vi) Pine rockland habitat and associated rockland hammock and hydric pine flatwood plant communities with levels of pesticide low enough to have minimal effect on the survival of the butterfly or its ability to occupy the habitat.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on September 11, 2014.

(4) *Critical habitat map units.* Data layers defining map units were created using ESRI ArcGIS mapping software along with various spatial data layers. ArcGIS was also used to calculate the size of habitat areas. The projection used in mapping and calculating distances and locations within the units was North American Albers Equal Area Conic, NAD 83. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates, plot points, or both on which each map is based are available to the public at the Service's Internet site (*http://www.fws.gov/verobeach*), the Federal eRulemaking Portal (*http://www.regulations.gov* at Docket No. FWS–R4–ES–2013–0031), and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) Index map of all critical habitat units for the Florida leafwing butterfly follows:

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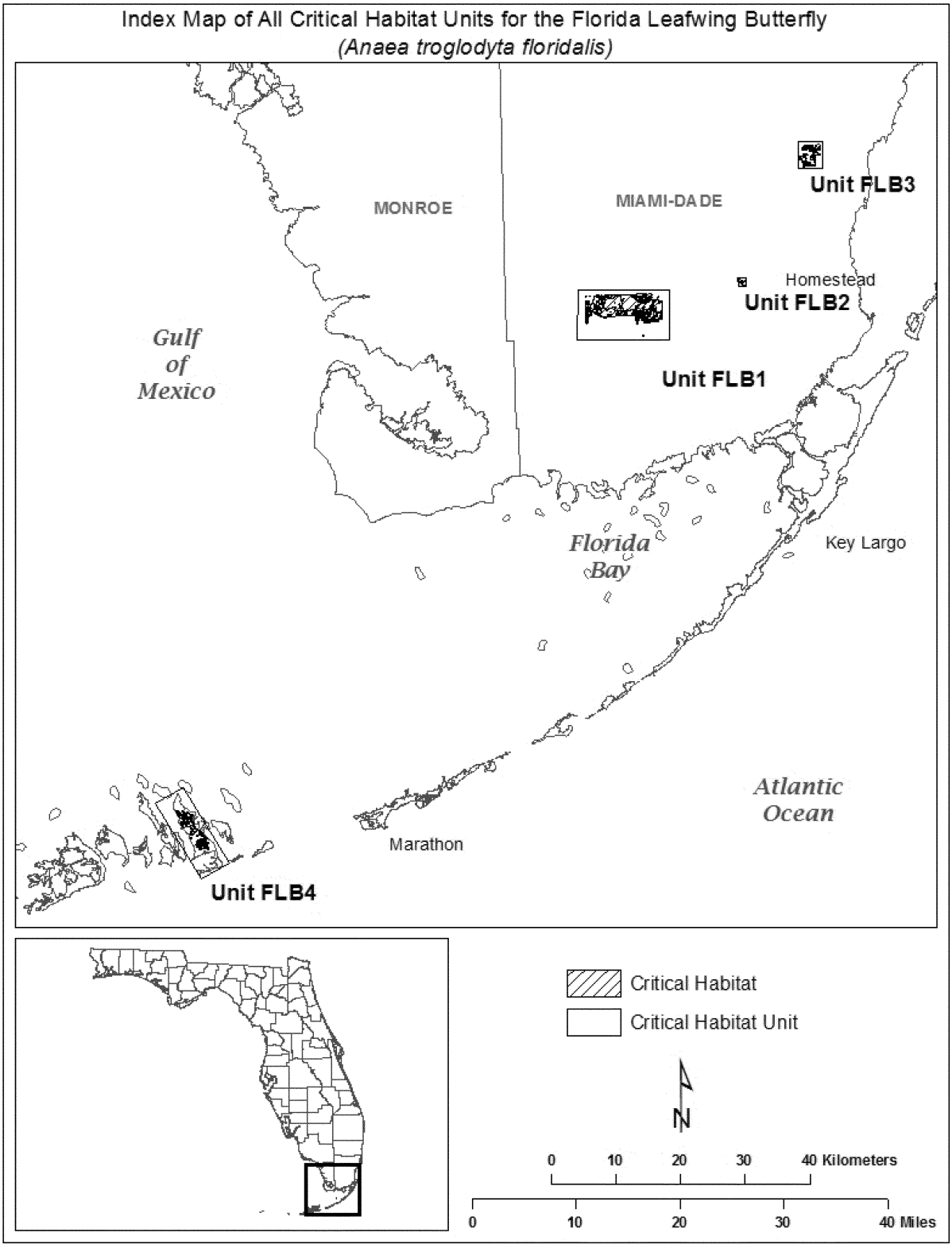
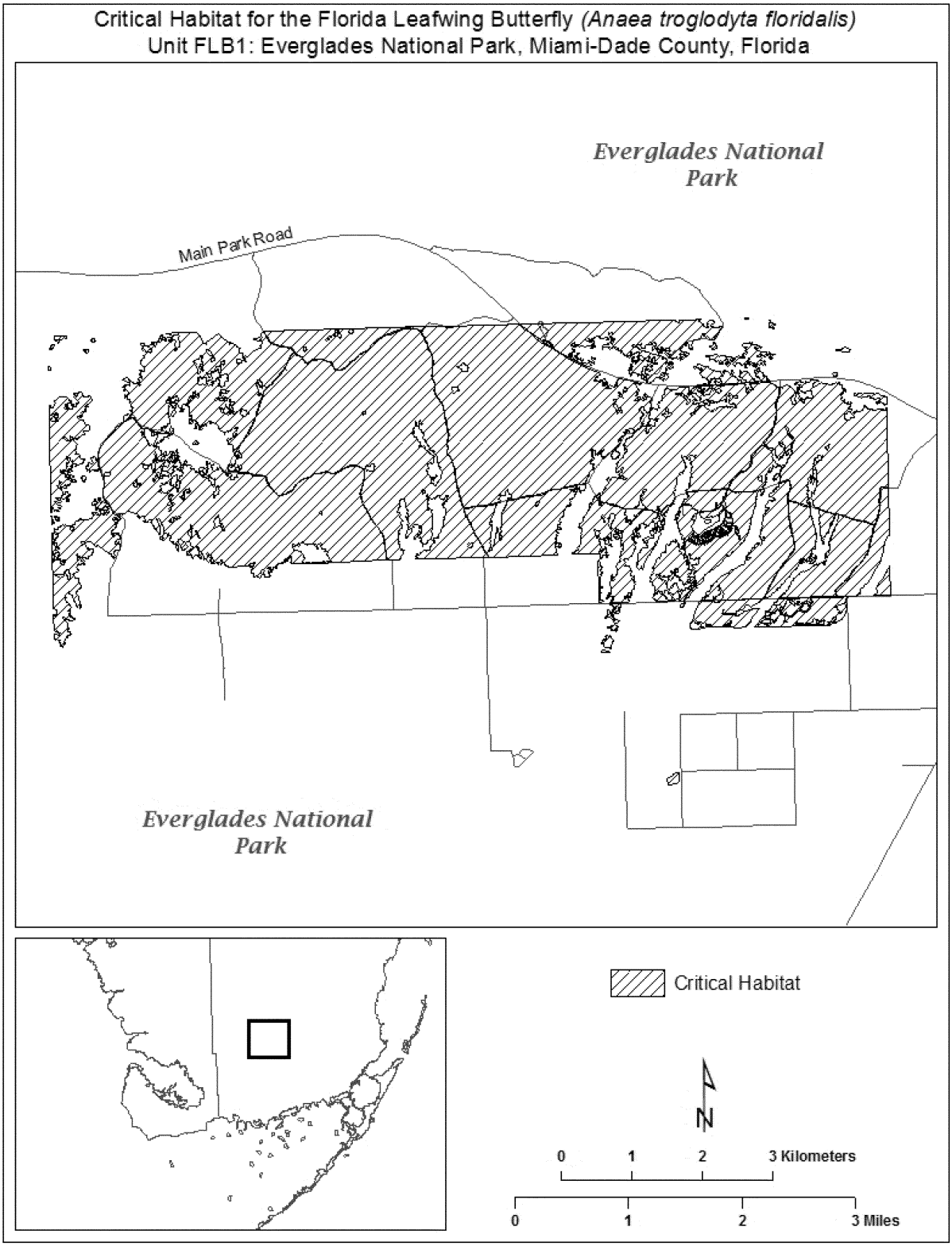


(6) Unit FLB1: Everglades National Park, Miami-Dade County, Florida.

(i) *General description:* Unit FLB1 consists of 3,235 ha (7,994 ac) composed entirely of lands in Federal ownership, 100 percent of which are located within the Long Pine Key region of Everglades National Park.

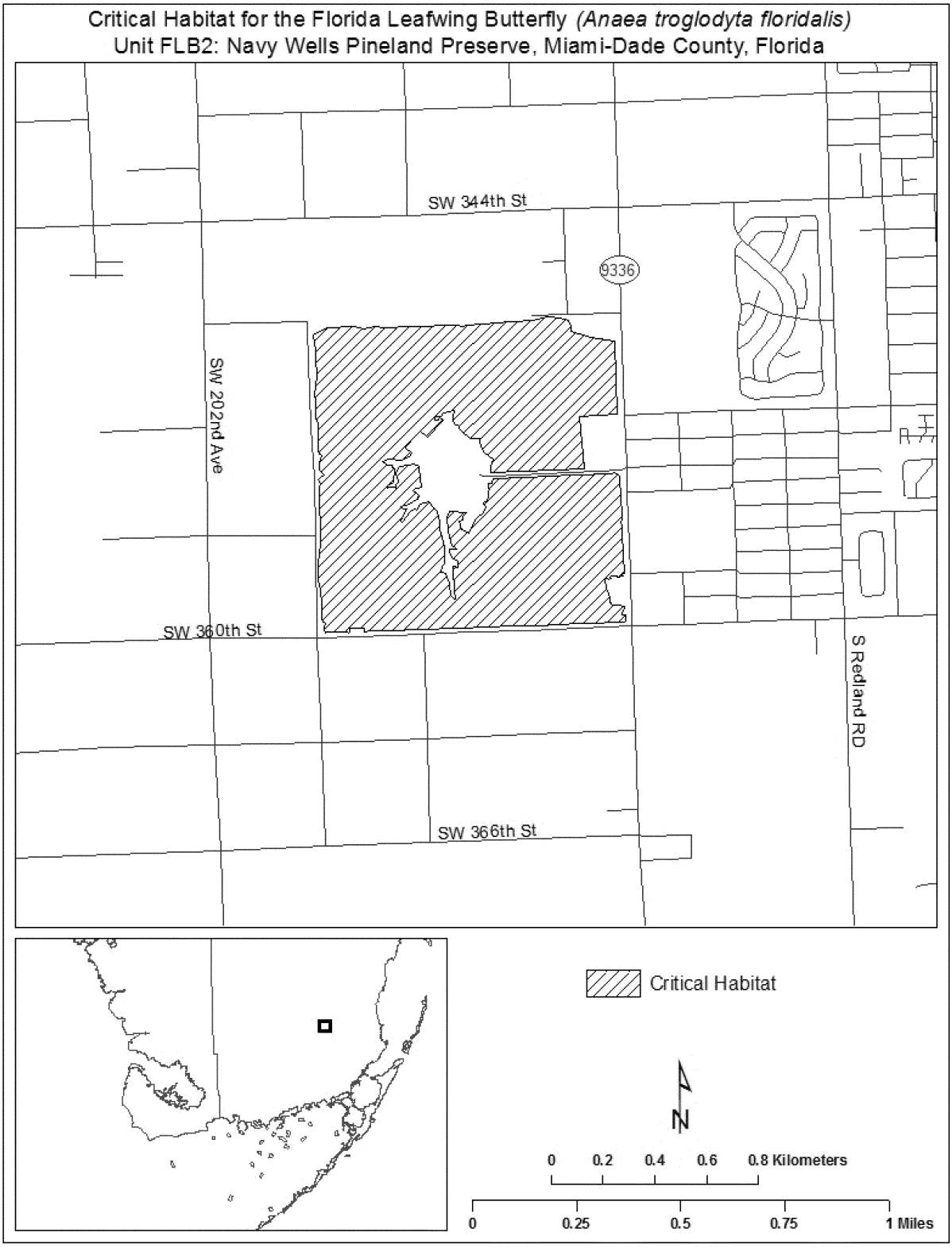
(ii) Map of Unit FLB1 follows:



(7) Unit FLB2: Navy Wells Pineland Preserve, Miami-Dade County, Florida.

(i) *General description:* Unit FLB2 consists of 120 ha (296 ac) in Miami-Dade County and is composed of lands in State (35 ha (85 ac)), and private or other ownership (85 ha (211 ac)).

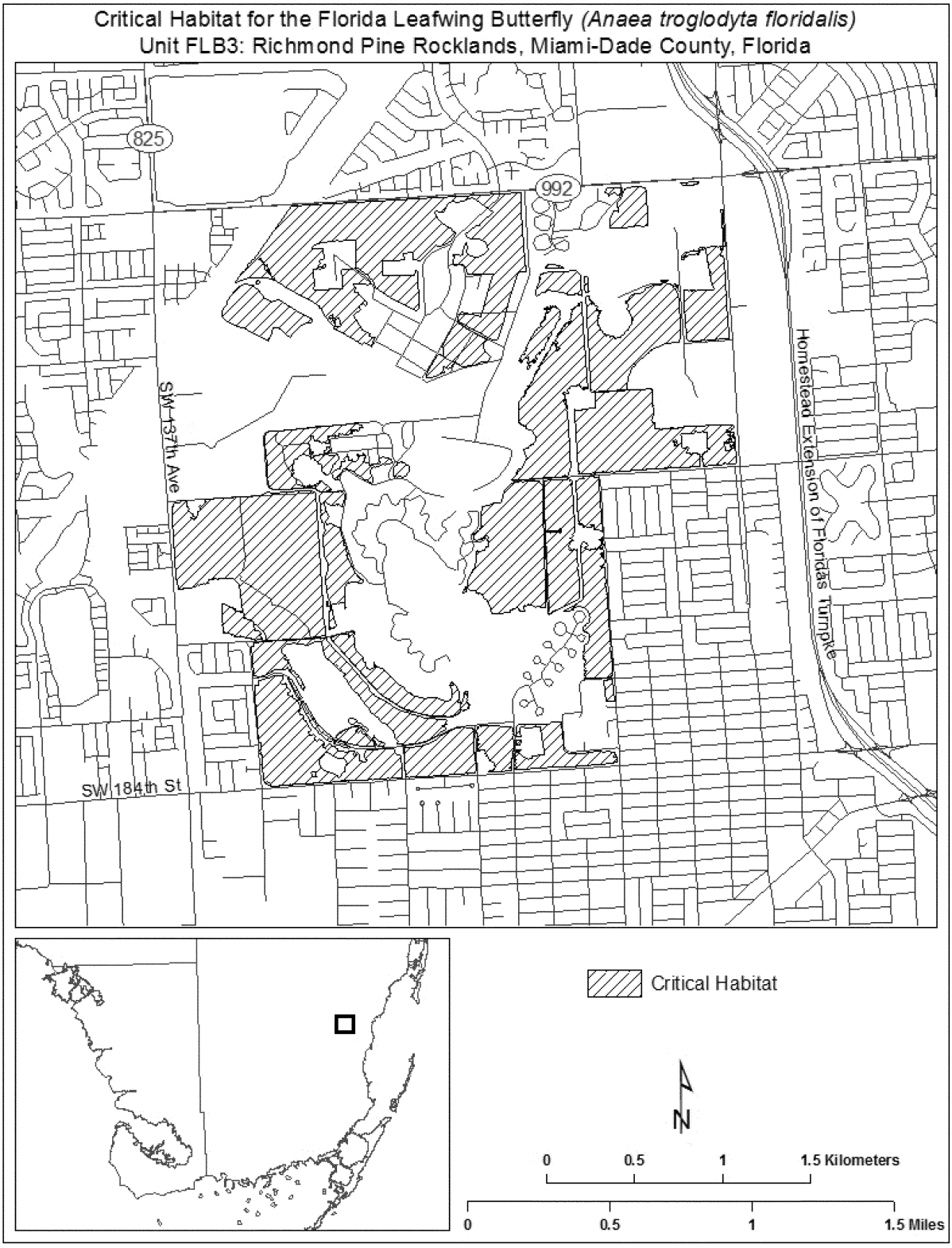
(ii) Map of Unit FLB2 follows:



(8) Unit FLB3: Richmond Pine Rocklands, Miami-Dade County, Florida.

(i) *General description:* Unit FLB3 consists of 359 ha (889 ac) in Miami-Dade County composed of lands in Federal (U.S. Coast Guard, U.S. Army Corps of Engineers, Federal Bureau of Prisons, and National Oceanic and Atmospheric Administration) (50 ha (122 ac)) and private or other (309 ha (767 ac)) ownership.

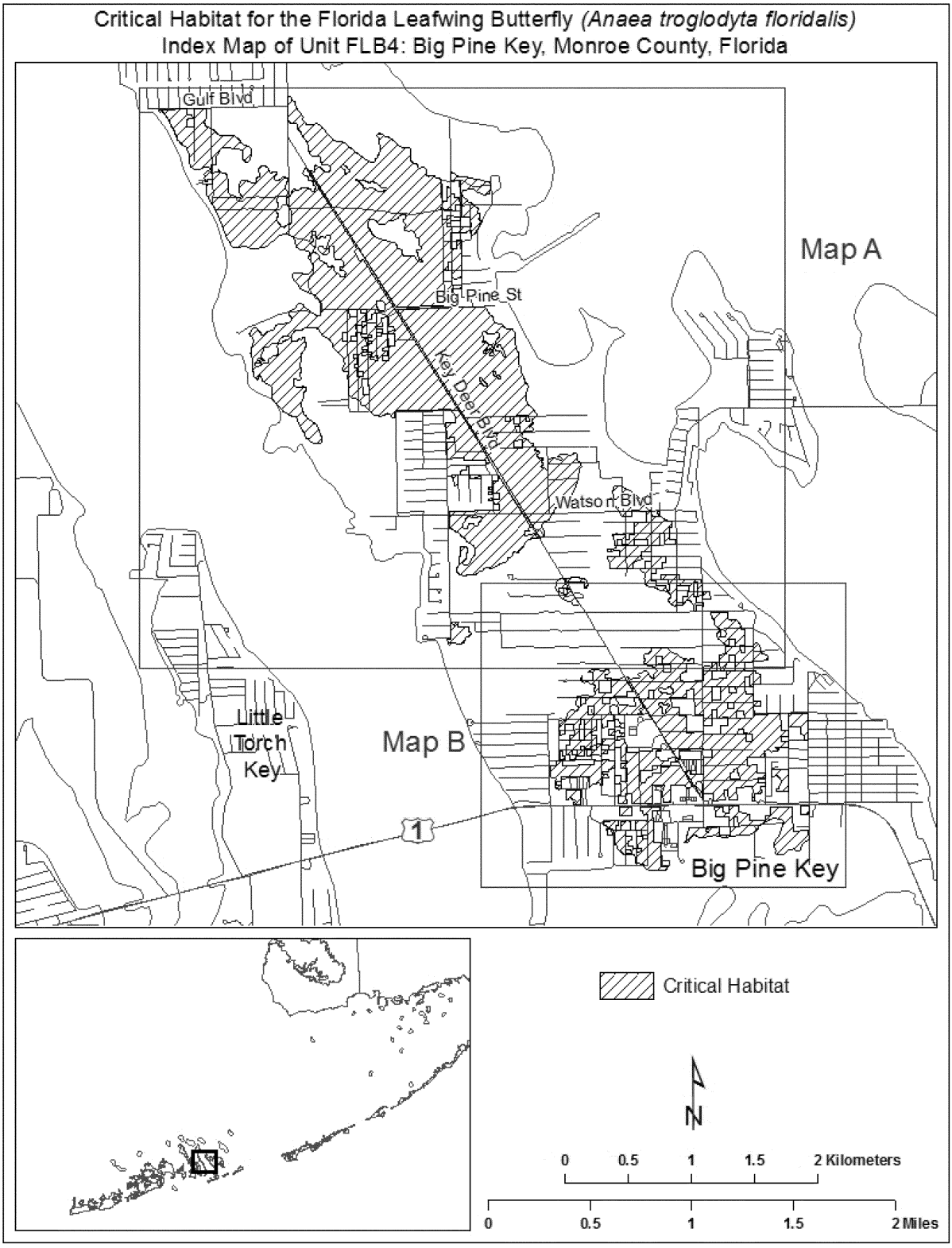
(ii) Map of Unit FLB3 follows:



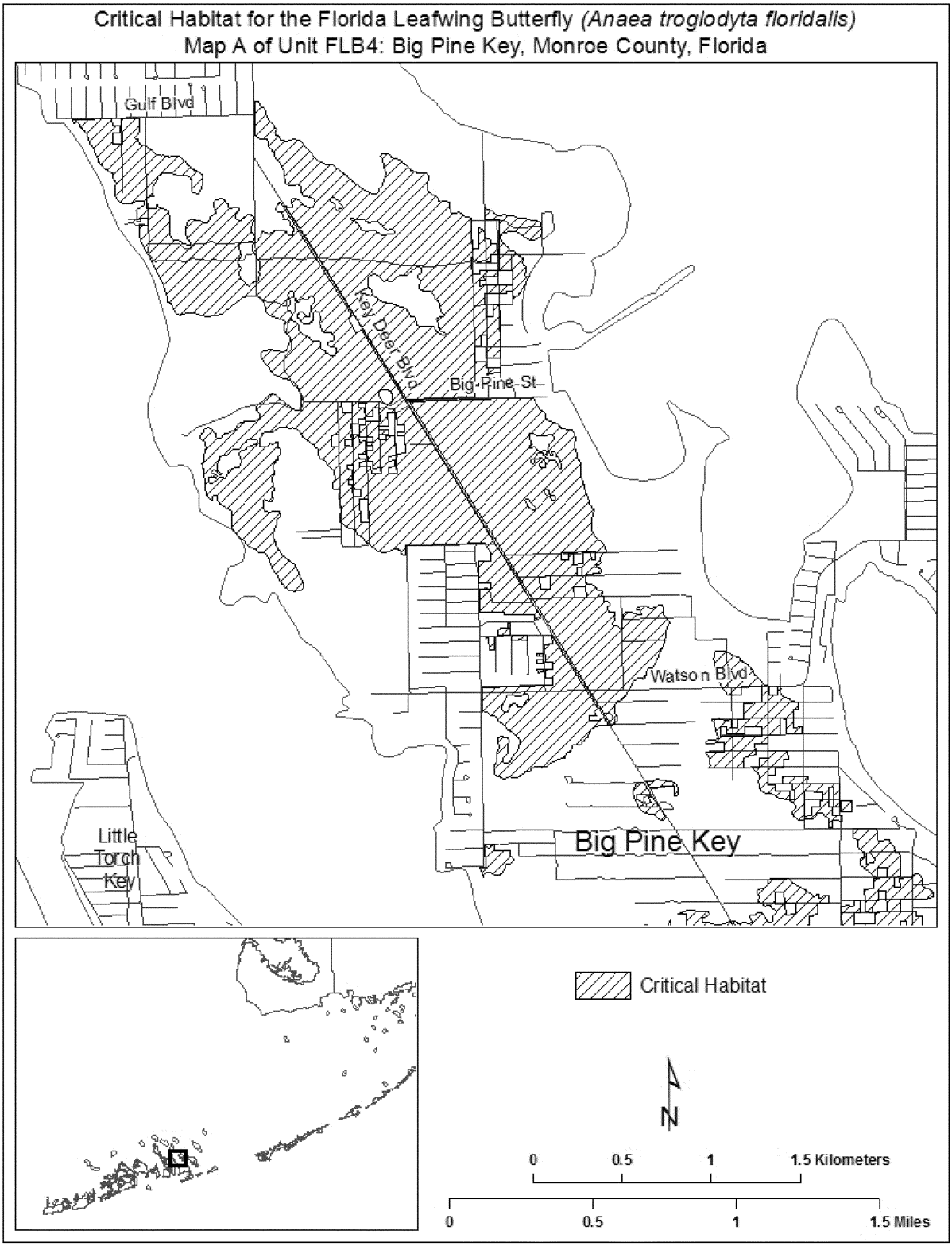
(9) Unit FLB4: Big Pine Key, Monroe County, Florida.

(i) *General description:* Unit FLB4 consists of 559 ha (1,382 ac) in Monroe County composed of National Key Deer Refuge (NKDR) (365 ha (901 ac)), State lands (90 ha (223 ac)), and property in private or other ownership (104 ha (258 ac)). State lands are interspersed within NKDR lands and managed as part of the Refuge.

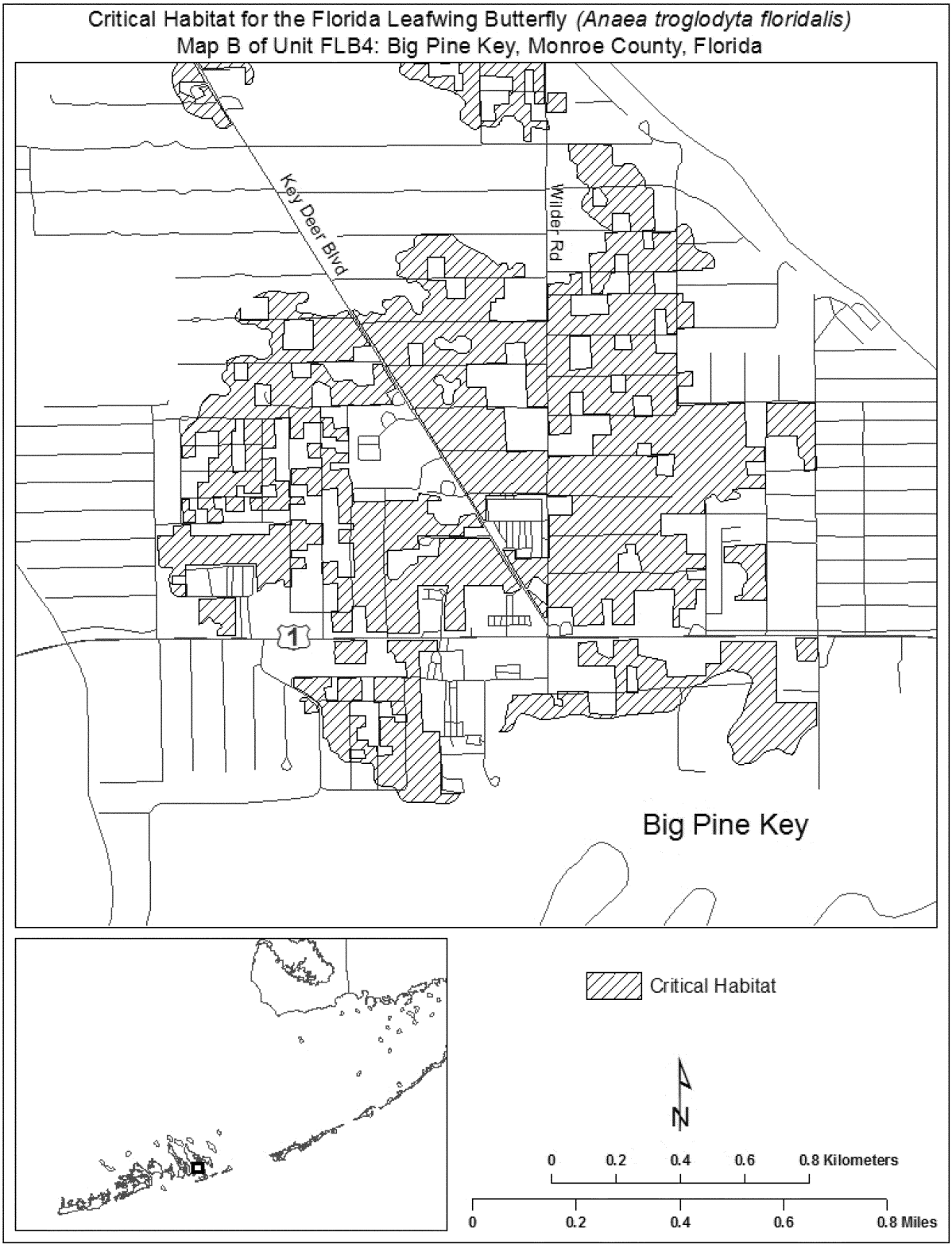
(ii) Index map of Unit FLB4 follows:



(A) Map A of Unit FLB4 follows:



(B) Map B of Unit FLB4 follows:



* * * * *

Dated: July 23, 2014.

Rachel Jacobson,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2014–18611 Filed 8–11–14; 8:45 am]

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FEDERAL REGISTER

Vol. 79 Tuesday,

No. 155 August 12, 2014

Part III

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Endangered Status for the Florida Leafwing and Bartram's Scrub-Hairstreak Butterflies; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2013–0084; 4500030113]

RIN 1018–AZ08

Endangered and Threatened Wildlife and Plants; Endangered Status for the Florida Leafwing and Bartram's Scrub-Hairstreak Butterflies

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, determine endangered species status under the Endangered Species Act of 1973, as amended, for the Florida leafwing (*Anaea troglodyta floridalis*) and Bartram's scrub-hairstreak (*Strymon acis bartrami*), two butterflies endemic to South Florida. This final rule implements the protections provided by the Act for these species. This regulation will result in the addition of these species to the List of Endangered and Threatened Wildlife.

DATES: This rule becomes effective September 11, 2014.

ADDRESSES: This final rule is available on the Internet at *http://www.regulations.gov* and at *http://www.fws.gov/verobeach/*. Comments and materials we received, as well as supporting documentation used in preparation of this rule, are available for public inspection at *http://www.regulations.gov*. All of the comments, materials, and documentation that we considered in this rulemaking are available by appointment, during normal business hours, at U.S. Fish and Wildlife Service, South Florida Ecological Services Office, 1339 20th Street, Vero Beach, FL 32960; telephone 772–562–3909; facsimile 772–562–4288.

FOR FURTHER INFORMATION CONTACT: Craig Aubrey, Field Supervisor, U.S. Fish and Wildlife Service, South Florida Ecological Services Office, 1339 20th Street, Vero Beach, FL 32960, by telephone 772–562–3909, or by facsimile 772–562–4288. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (Act), a species may warrant protection through listing if we find that it is an endangered or threatened species throughout all or a significant portion of its range. Listing a species as endangered or threatened can only be completed by issuing a rule. Elsewhere in today's **Federal Register**, we designate critical habitat for the Florida leafwing butterfly and the Bartram's scrub-hairstreak butterfly under the Act.

This rule will finalize the listing of the Florida leafwing butterfly and the Bartram's scrub-hairstreak butterfly as endangered species.

The basis for our action. Under the Act, the U.S. Fish and Wildlife Service (Service) can determine that a species is an endangered or threatened species based on any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. We have determined the Florida leafwing and Bartram's scrub-hairstreak butterflies meet the definition of an endangered species based on all five factors.

Peer review and public comment. We sought comments from eight independent experts to ensure that our action is based on scientifically sound data, assumptions, and analyses. We invited these peer reviewers to comment on our listing proposal. We also considered all other comments and information received during the comment period.

Previous Federal Actions

Please refer to the proposed listing rule for the Florida leafwing and Bartram's scrub-hairstreak butterflies (78 FR 49878; August 15, 2013) for a detailed description of previous Federal actions concerning these species.

Summary of Comments and Recommendations

In the proposed rule published on August 15, 2013 (78 FR 49878), we requested that all interested parties submit written comments on the proposal by October 15, 2013. We also contacted appropriate Federal and State agencies, scientific experts, and organizations, and other interested parties and invited them to comment on the proposal. Newspaper notices inviting general public comment were published in the Miami Herald and Key West Citizen.

We published proposed rules concurrently for both the proposed listing of the Florida leafwing and Bartram's scrub-hairstreak, as well as the proposed designation of critical habitat for these two butterflies. Although the proposed rules were published in separate **Federal Register** notices, we received combined comments from the public on both actions. However, in this final rule we address only those comments that apply to the listing of the Florida leafwing and Bartram's scrub-hairstreak. Comments on the proposed critical habitat are addressed in the final critical habitat rule. All substantive information provided during the comment period has either been incorporated directly into this final determination or addressed below.

Peer Reviewer Comments

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited expert opinions from eight knowledgeable individuals with scientific expertise that included familiarity with at least one of the two subspecies and its habitat, biological needs, and threats; the geographical region of South Florida in which these subspecies occur; and conservation biology principles. We received responses from seven of the peer reviewers we contacted.

We reviewed all comments we received from the peer reviewers for substantive issues and new information regarding the proposed listing of the Florida leafwing and Bartram's scrub-hairstreak butterflies. The peer reviewers generally concurred with our methods and conclusions, and provided additional information, clarifications, and suggestions to improve the final listing rule. Peer reviewer comments are addressed in the following summary and incorporated into this final rule as appropriate.

(1) *Comment:* One peer reviewer, as well as two public commenters, indicated that developing appropriate monitoring schemes to understand population biology, dynamics, dispersal abilities and various environmental variables will be critical to advancing recovery goals.

Our Response: We agree that more rigorous information regarding population monitoring, ecological studies, and other ongoing or future research and recovery efforts for the Florida leafwing and Bartram's scrub-hairstreak are needed, and we have updated the *Population Estimates and Status* sections, below.

(2) *Comment:* Two peer reviewers indicated the importance of disturbance

regimes, such as fire, to achieving conservation goals for these subspecies, and that active adaptive management should be implemented.

Our Response: We incorporated new information regarding fire management plans, as well as ongoing and future studies designed to measure the influence of prescribed burns and other management actions (such as mechanical clearing), into the *Factor A* discussion, below.

(3) *Comment:* One peer reviewer mentioned the importance of smaller parcels for conservation. The reviewer also asked for clarification regarding the amount of remaining pine rockland habitat.

Our Response: We agree that even small parcels of extant pine rocklands have important conservation value to imperiled butterflies. One of the analyses we cite in this rule (Institute for Regional Conservation 2006) pertained only to pineland croton occurrence on parcels greater than a single hectare. However, all extant pine rockland, with or without hostplant populations, were reviewed, both for the proposed listing rule and the proposed rule to designate critical habitat. The reference to 1,780 hectares (ha) (4,400 acres (ac)) of remaining pine rockland habitat refers only to 375 parcels of extant pine rockland within Miami-Dade County, outside of Everglades National Park (ENP). We have revised the information on extant pine rockland habitat and known hostplant distribution under the *Habitat* section, below.

(4) *Comment:* One peer reviewer provided a link to research findings on the potential impact of sea-level rise on south Florida butterflies.

Our Response: We incorporated this new information into the *Factor A* discussion, below.

(5) *Comment:* One peer reviewer indicated that, based on the threat of habitat loss from climate change, development, and other factors, it may be important to consider appropriate habitat at the fringes of the subspecies' historical ranges (Martin and Palm Beach Counties) in conservation planning.

Our Response: Although the Florida leafwing and Bartram's hairstreak are only known to have occurred sporadically outside of Monroe and Miami-Dade Counties, Florida, future recovery actions may include efforts within the more northern parts of their historical ranges that retain hostplant populations. We incorporated information regarding this potential recovery option into the *Factor A* discussion, below.

(6) *Comment:* One peer reviewer indicated that pineland croton (*Croton linearis*) has sometimes been referred to by the common name of woolly croton. In addition, *C. linearis* and *C. cascarilla* are synonymous in the literature.

Our Response: We incorporated this new information into the *General Biology* section of the Florida leafwing.

(7) *Comment:* One peer reviewer indicated that the high level of parasitism on immature Florida leafwing is not something that can be controlled. As a result, recovery efforts should focus on the adult stages.

Our Response: We agree and have incorporated this new information into the *Factor C* discussion, below.

(8) *Comment:* One peer reviewer provided a correction indicating that the Florida leafwing had not been included throughout the *Determination* section of the proposed rule.

Our Response: We have incorporated the Florida leafwing throughout the *Determination* section of the final rule, below.

(9) *Comment:* One peer reviewer indicated that existing evidence supports the recognition of *floridalis* as a subspecies of *Anaea troglodyta* and referenced several articles in the literature.

Our Response: We appreciate the information provided and have incorporated it into the *Taxonomy* section for the Florida leafwing.

(10) *Comment:* One peer reviewer provided additional references in the literature pertaining to life histories of the Florida leafwing and Bartram's scrub-hairstreak. This reviewer also provided additional references pertaining to the historical ranges of the butterflies.

Our Response: We appreciate the information provided and have incorporated it into the *Life History* and *Historical Ranges* sections for the Florida leafwing and Bartram's scrub-hairstreak.

(11) *Comment:* One peer reviewer indicated that the rarity of the Florida leafwing and Bartram's scrub-hairstreak and difficulty in collecting the leafwing, in particular, makes it unlikely that collecting could impact the population.

Our Response: We appreciate the information; however, based on the small localized nature of extant Florida leafwing and Bartram's scrub-hairstreak populations, any removal of individuals at this time may have an adverse impact to those populations. Based on information on collecting pressures, small population sizes, and limited law enforcement targeting butterfly collection, outlined in the proposed rule and in our decision record, we believe there is sound scientific information to conclude that collection poses a threat to these butterflies.

(12) *Comment:* One peer reviewer suggests that many specimens of the Florida leafwing and Bartram's scrub-hairstreak offered for sale online may come from older collections, as opposed to poaching activities on conservation lands.

Our Response: We appreciate the information provided and have incorporated it into the *Factor C* discussion, below.

(13) *Comment:* Two peer reviewers support the proposed listing of the Florida leafwing and Bartram's scrub-hairstreak as endangered, but are skeptical as to what would be done to recover them. These reviewers indicate recovery efforts have not been successful for the endangered Schaus swallowtail or Miami blue butterflies and wonder what would be done differently for the proposed butterflies, if listed.

Our Response: In accordance with section 4(f)(1) of the Act, we are required to develop and implement a recovery plan for any species listed as endangered or threatened under the Act unless ''such a plan will not promote the conservation of the species.'' We believe a recovery plan will promote the conservation of these species and would address many of the factors outlined in the Summary of Factors Affecting the Species, below.

(14) *Comment:* One peer reviewer suggested the phrase ''Collection, which is prohibited on conservation lands, could occur (e.g., ENP, National Key Deer Refuge [NKDR], State or County owned lands) without being detected, because these areas are all not actively patrolled . . .'' could attract poachers to these areas.

Our Response: We appreciate the information provided, but feel the language, as written, emphasizes the threat of collection and where additional conservation actions may be warranted.

(15) *Comment:* One peer reviewer indicates that, while he agrees that mark-release-recapture techniques may be harmful to small lycaenids, it is important to emphasize the potential downsides of not using such a technique, namely possible recounting, etc.

Our Response: We appreciate the information provided and have incorporated it into the *Factor B* discussion, below.

(16) *Comment:* One peer reviewer indicates that research on symbiosis between lycaenids and ants for the Miami blue should be included for the

immature stages of the Bartram's scrub-hairstreak.

Our Response: Although a symbiotic relationship between Bartram's scrub-hairstreak larvae and ants has not been documented, we appreciate the information provided and have incorporated it into the *Factor C* discussion for the hairstreak, below.

(17) *Comment:* One peer reviewer indicates that adult Bartram's scrub-hairstreak have been observed within Zoo Miami in recent years and that it should be mentioned within the summary of known extant population.

Our Response: We appreciate the information provided and have incorporated it into the *Current Range* section of the Bartram's scrub-hairstreak.

(18) *Comment:* One peer reviewer indicated that existing data do not support the necessity of indicating a specified return interval for disturbance (i.e., 3 to 5 years for fire) for Long Pine Key. The commenter indicated that the butterflies have been observed at varying densities within pine rocklands in Long Pine Key that have burned at intervals of up to 10 years.

Our Response: We agree that, while the literature (Florida Natural Areas Inventory (FNAI) 2010a, p. 3) indicates a fire-return interval of approximately 3 to 7 years is appropriate for maintaining the pine rockland ecosystem, there is considerable variability in population numbers of the Florida leafwing and Bartram's scrub-hairstreak from year to year. Observations of the Florida leafwing and Bartram's scrub-hairstreak within portions of Long Pine Key that have experienced fire or other disturbance regimes at intervals of up to 10 years (Salvato and Salvato 2010a, p. 91; 2010b, p. 154; Sadle 2013c, pers. comm.) suggest further studies are required on the influence of these factors on butterfly ecologies. We appreciate the information provided and have incorporated it into the *Factor A* discussion, below.

(19) *Comment:* One peer reviewer, as well as one public comment, indicated that it may not be accurate to call Bartram's scrub-hairstreak a sedentary butterfly.

Our Response: We agree that, although the Bartram's scrub-hairstreak is often described as sedentary, the need to evade natural disturbance (fires, storms) and subsequently recolonize suggests that adult hairstreaks, perhaps as a function of age, sex, or density, are adapted for effective dispersal throughout the pine rockland and associated ecosystems. We appreciate the information provided and have incorporated it into the *Life History* discussion for the hairstreak, below.

(20) *Comment:* One peer reviewer indicated that an additional habitat, hydric pine flatwoods, is often used during dispersal by the Florida leafwing and Bartram's scrub-hairstreak, when it is adjacent or interspersed within pine rocklands.

Our Response: We appreciate the information provided and have included a description of hydric pine flatwoods in the *Habitat* section, below.

Comments From States

Section 4(b)(5)(A)(ii) of the Act requires the Secretary, not less than 90 days before publication of a final listing rule, to give actual notice of the rule to the State agency in each State in which the species is believed to occur, and invite the comment of such agency on the proposal. The two subspecies only occur in Florida, and we received comment letters from two entities from the State of Florida regarding the listing proposal. The Florida Fish and Wildlife Conservation Commission (FWC) found the document to be comprehensive, with conclusions that are well-documented and justified, but otherwise did not provide substantive comments requiring a response. The Florida Department of Agriculture and Consumer Services (FDACS) neither supported nor opposed the proposed listing, but indicated their intent to work with the Service and other stakeholders in protecting imperiled species, as well as determining ways to mitigate potential risks of pesticide use and mosquito control toward imperiled species in Florida.

(21) *Comment:* FDACS indicated that, given the current mosquito control district cooperation, any future considerations concerning research addressing potential for and magnitude of impact of mosquito control practices on imperiled butterflies, including the Florida leafwing and Bartram's hairstreak, should continue to be discussed in this forum where mosquito control districts can actively participate.

Our Response: We agree and appreciate the mosquito control districts' cooperation and willingness to help support and direct research to minimize potential pesticide impacts on imperiled butterflies.

Public Comments

During the comment period for the proposed listing rule, we received a total of 18 comment letters regarding the proposed listing: 2 from Florida State agencies (addressed above) and 16 from local governments, nongovernmental organizations, and private citizens. Of the 16 non-State letters, 12 indicated support of the proposed listing, but otherwise did not provide specific comments on the rule. Four of the comment letters provided substantive comments regarding two general issues. We did not receive any requests for a public hearing.

Issue 1: Mosquito Control

(22) *Comment:* One commenter questioned the inclusion of mosquito control activities as a factor affecting the species and suggested that habitat loss is the primary factor impacting the butterflies. The commenter also stated that ''it is reasonable and prudent to coordinate control measures to minimize risk in the remaining limited habitat areas'' and that ''protecting and preserving the species habitat through acquisition seems to be the most reasonable means of preserving the species.''

Our Response: We agree that habitat loss has been a major factor leading to the current status of the Florida leafwing and Bartram's scrub-hairstreak. However, as discussed in *Factor E—Other Natural or Manmade Factors Affecting Its Continued Existence,* below, we believe mosquito control activities are also a factor affecting these butterflies. We agree that protecting and preserving remaining habitat will be critical in the conservation and recovery of the butterflies and that mosquito control efforts should be coordinated between the Service and mosquito control districts in areas where suitable or occupied habitats exist.

(23) *Comment:* Three counties (Lee, Manatee, and Lake) and another commenter recommended that mosquito control activities not be included as a factor affecting the species. The commenters state that this inclusion would lead to restrictions on mosquito control operations that would be detrimental to public health and the economy of south Florida.

Our Response: The use of broad spectrum insecticides in and around Florida leafwing and Bartram's scrub-hairstreak habitat during mosquito control operations is a factor that must be considered when assessing threats to the species. The Act requires us to base our determination for listing a species ''solely on the basis of the best scientific and commercial data available'' (section 4(b)(1)(A)). The Service has worked proactively in the past with mosquito control districts within habitat of the endangered Schaus' swallowtail (*Papilio aristodemus ponceanus*) (Hennessey *et al.* 1992, p. 715; Salvato 2001, p. 8) in order to coordinate mosquito control activities in such a way that public

health is adequately protected while still promoting conservation and recovery of the species. As a result, we believe similar cooperation between the Service and mosquito control districts will occur in suitable or occupied habitat of the Florida leafwing and Bartram's scrub-hairstreak. Under public health emergency conditions, the Service would not impose restrictions that would jeopardize the safety or well-being of the public.

(24) *Comment:* Lee County contends that Salvato's (2001) suggestion that butterflies roosting in the canopy would be vulnerable to aerial mosquito control spray is incorrect, and that roosting under leaves would actually provide protection to the butterflies. Lee and Manatee Counties also state that using caged, nontarget insects to examine pesticide effects in the field following application events is not realistic and has a high level of bias in favor of an adverse effect. Specifically, Lee County mentions the work of Zhong *et al.* (2010) where larval and adult butterflies were exposed without the ability to seek refuge after dark, while Manatee County mentions the work of Bargar (2011) where caged species were placed in open field areas.

Our Response: The Service agrees that refugia, including vegetation, may help to ameliorate pesticide effects on some field-exposed organisms. The extent to which such refugia may protect against pesticide exposure is unknown. However, with no data to support the assertion that vegetative refugia prevents impacts to butterflies from mosquito control application, the Service must rely on the best available data, which suggests that impacts to butterflies are a possibility.

(25) *Comment:* Lee County states that the risk assessment presented in Hoang *et al.* (2011) inappropriately uses the residue data from Pierce (2009). The commenter contends that pesticide residues quantified on surfaces in the environment would not be equivalent to residues on cryptic insects and that Hoang *et al.* (2011) assigns risk without considering actual insect contact with pesticides in the field.

Our Response: The Service considers the risk analysis presented in Hoang *et al.* (2011, pp. 997–1005) to be a screening-level evaluation that examined worst-case scenarios, evidenced by the fact that the highest quantified deposition values from Pierce (2009, pp. 1–20) were used to determine risk. Actual insect exposures may vary from the deposition observed on leaves and filter pads, but no relevant field-derived insect pesticide body load analysis has been conducted. With no supporting data to the contrary, the Service cannot assume insect exposure values are below a level of concern.

(26) *Comment:* Lee County states that the Environmental Protection Agency (EPA) labels pesticides for uses that do not pose unacceptable risk to individuals and the environment and that ''the EPA has successfully assessed the risk for mosquito control practices since no connection between pesticide residues and insect mortality outside of target zone is cited'' by the Service. Manatee County also states that the EPA's registration of aerial adulticides implies that the EPA has determined that this practice does not harm butterfly populations.

Our Response: The Service acknowledges that more information is needed to better quantify the drift, and subsequent effects, of mosquito control chemicals outside of target zones. Registration of a pesticide by the EPA does not imply that there are no nontarget species potentially at risk from label-approved uses. When registering pesticides, the EPA does not conduct exhaustive testing on terrestrial invertebrates. Honeybees are the only species subject to acute toxicity testing. The results of such testing using naled and permethrin determined that both pesticides are highly toxic to honeybees (EPA 2006a, p. 32; EPA 2006b, p. 81). Impacts of pesticides on butterfly species are not currently considered during EPA's registration process.

(27) *Comment:* Manatee County states that the Service failed to report that naled application rates were higher than expected due to inaccurate GPS-guided flight patterns during the Zhong *et al.* (2010) study, where a 73.9 percent survival rate of Miami blue butterfly larvae was observed. The reviewer also states that Zhong had conducted previous research on the same topic that showed no effects of aerial naled application on Miami blue butterfly larvae.

Our Response: The data cited from Zhong *et al.* (2010, pp. 1967–1970) came from a peer-reviewed journal article. No mention was made in the journal article of any GPS-related impacts on the results of the study; therefore, the Service has no such information to report. The Service is also not aware of any additional work by Zhong that examined naled impacts on the Miami blue butterfly, but would welcome any such information.

(28) *Comment:* Manatee County suggests that mosquito control spraying may be beneficial to butterfly populations. The County references the work of Marc Minno, a lepidopterist who has conducted butterfly population assessments in south Florida and has documented significant butterfly populations in areas such as Miami and Key West that receive mosquito control applications.

Our Response: The Service is open to considering all potential aspects of the interaction between mosquito control practices and the success of the Florida leafwing and Bartram's scrub-hairstreak. In-depth analysis, beyond anecdotal observations of various species, would be required to support the assertion that mosquito control practices are beneficial to any species of interest.

(29) *Comment:* Lake County states that, if the two butterfly species of interest are imperiled because of mosquito control practices, then all other nontarget organisms with similar habitat needs and behaviors would be in jeopardy. The reviewer also states that no impacts on butterfly populations have occurred in Lake County despite more than 32 years of mosquito control activity.

Our Response: The Service believes that the individual life histories of the butterfly species of interest, and their susceptibilities to pesticide impacts, must be considered independently, and that the status of other nontarget organisms cannot be used as a surrogate during such consideration. The Service is also not aware of any comprehensive assessment on the population status of butterflies in Lake County, but would welcome such information.

(30) *Comment:* Lee County indicates that the Florida leafwing and Bartram's scrub-hairstreak butterflies continue to exist in areas that meet their environmental requirements, including those that have been sprayed for 40 years.

Our Response: We agree that these butterflies have retained populations in appropriate extant pine rockland habitat within Monroe and Miami-Dade, including within areas actively treated with mosquito control pesticides. However, we present evidence under the *Factor E* discussion, below, that suggests pesticide application administered for mosquito control may also have a collateral influence on the ecologies of the Florida leafwing and Bartram's scrub-hairstreak. On the other hand, at no point in the proposed or final listing rules is the role of pesticide application considered as the sole contributor to the decline in populations of these taxa, but merely one potential factor. The purpose of the Summary of Factors Affecting the Species section indicates all known or suspected factors, biological or anthropogenic, and this does include pesticide applications.

Issue 2: Population Dynamics

(31) *Comment:* One commenter indicates that pineland croton may not be the only larval hostplant used by the Bartram's scrub-hairstreak. The commenter indicates other scrub-hairstreaks are generally known to use a variety of larval hostplants, and that more field observation might reveal additional hostplants for the Bartram's scrub-hairstreak.

Our Response: Extensive field studies have been conducted on the Bartram's scrub-hairstreak over the past several decades; to date this research has documented oviposition only on pineland croton. However, we agree that ongoing ecological studies may indicate the hairstreak occasionally uses other pine rockland plants for larval development. We appreciate the information provided and have incorporated it into the *General Biology* discussion for the hairstreak, below.

(32) *Comment:* Lee County indicates that the Florida leafwing shows annual mortality of up to 70 percent based on increased predation from exotic and native predators or parasites.

Our Response: There are a number of factors which influence the populations of the Florida leafwing and Bartram's scrub-hairstreak. However, the mortality mentioned by this reviewer is part of the Florida leafwing's natural history. We have no evidence that natural mortality, from predation or parasitism, of Florida leafwing populations within the Long Pine Key portion of ENP is any different now than it was historically.

(33) *Comment:* Lee County indicates that lack of burning on public lands by the Service and its partners is correlated with the loss of habitat for the Florida leafwing and Bartram's scrub-hairstreak. In addition, these butterflies have shown increased population numbers in response to an appropriate fire-return interval.

Our Response: As discussed in the previous comment, we agree that a number of factors influence the populations of the Florida leafwing and Bartram's scrub-hairstreak; this includes a lack of adequate fire management within the pine rocklands on conservation lands.

(34) *Comment:* Lee County indicates that the Service desires to expand the present range of the Florida leafwing and Bartram's scrub-hairstreak to elsewhere in their historical ranges.

Our Response: We have proposed the listing of the Florida leafwing and Bartram's scrub-hairstreak as endangered, as a first of many steps designed to recover these butterflies. Implementing conservation measures for populations of these butterflies within their extant or recent historical distributions will be a primary goal of the recovery plan, when drafted.

Summary of Changes From Proposed Rule

In the Background section, we made the following changes:

(1) We incorporated new information regarding population monitoring, ecological studies, and other ongoing or future research and recovery efforts for the Florida leafwing and Bartram's scrub-hairstreak.

(2) We clarified our discussion on extant pine rockland habitat, including smaller parcels, and known hostplant distribution.

(3) We indicated throughout the document that adult butterflies will also make use of hydric pine flatwood vegetation when interspersed within the pine rockland habitat.

(4) We included a full description of the hydric pine flatwoods forest community.

(5) We indicated that additional studies are needed to understand varying butterfly densities in response to pine rockland fire-return intervals.

(6) We included additional information on the scientific and common names of pineland croton.

(7) We included additional references that recognize *floridalis* as a subspecies of *Anaea troglodyte.*

(8) We included additional references on the life histories of the Florida leafwing and Bartram's scrub-hairstreak.

(9) We included additional references on the historical ranges of the Florida leafwing and Bartram's scrub-hairstreak.

(10) We incorporated additional information on the current range of the Bartram's scrub-hairstreak.

(11) We included additional information on larval hostplants used by the Bartram's scrub-hairstreak.

(12) We included additional information regarding Bartram's scrub-hairstreak dispersal abilities.

In the Summary of Factors Affecting the Species section, we made the following changes:

(1) We incorporated new information regarding fire management plans, as well as ongoing and future studies designed to measure the influence of prescribed burns and other management actions (such as mechanical clearing).

(2) We included new information on the potential impact of sea-level rise on south Florida butterflies.

(3) We incorporated information regarding potential recovery options based on the threat of habitat loss from climate change, development, and other factors.

(4) We added that it may be important to consider appropriate habitat at the fringes of the subspecies' historical ranges.

(5) We included the Florida leafwing in the Determination section.

(6) We included additional information regarding the potential provenance of butterfly specimens offered for sale online.

(7) We corrected the title of the Imperiled Butterflies of Florida Workgroup.

(8) We corrected the title of CERP to read as the Comprehensive Everglades Restoration Plan.

(9) We incorporated information to emphasize the potential downsides of not using mark-release-recapture techniques for butterfly monitoring.

(10) We incorporated information on symbiosis between lycaenids and ants under the discussion of Bartram's scrub-hairstreak predation.

Background

Please refer to the proposed listing rule for the Florida leafwing and Bartram's scrub-hairstreak butterflies (78 FR 49878; August 15, 2013) for species information. The sections below represent summaries of that information, and incorporate additions and edits based on peer review and public comments.

Florida Leafwing

General Biology

The Florida leafwing butterfly is a medium-sized butterfly approximately 76 to 78 millimeters (mm) (2.75 to 3.00 inches (in)) in length with a forewing length of 34 to 38 mm (1.3 to 1.5 in) and an appearance characteristic of its genus (Comstock 1961, p. 44; Pyle 1981, p. 651; Opler and Krizek 1984, p. 172; Minno and Emmel 1993, p. 153). The upper-wing (or open wing) surface color is red to red-brown. The underside (closed wings) is gray to tan, with a tapered outline, cryptically looking like a dead leaf or the bark of South Florida slash pine trees (*Pinus elliottii* var. *densa*) when the butterfly is at rest. The Florida leafwing exhibits sexual dimorphism (male and female are different from each other), with females being slightly larger and with darker coloring along the wing margins than the males.

The Florida leafwing has only one known hostplant, the pineland croton (or woolly croton) (*Croton linearis,* formerly referred to as *C. cascarilla*) (Euphorbiaceae).

Taxonomy

The Florida leafwing butterfly (*Anaea troglodyta floridalis*) was first described

by Johnson and Comstock in 1941. *Anaea troglodyta floridalis* is a taxon considered to be both endemic to south Florida and clearly derived from Antillean stock (the islands of the West Indies except for the Bahamas, separating the Caribbean Sea from the Atlantic Ocean) (Comstock 1961, p. 45; Brown and Heineman 1972, p. 124; Minno and Emmel 1993, p. 153; Smith *et al.* 1994, p. 67; Salvato 1999, p. 117; Hernandez 2004, p. 39; Pelham 2008, p. 393). Some authors (Comstock 1961, p. 44; Miller and Brown 1981, p. 164; Smith *et al.* 1994, p. 67; Hernandez 2004, p. 39) placed the Florida leafwing as a distinct species, *A. floridalis.* Others (Brown and Heineman 1972, p. 124; Minno and Emmel 1993, p. 153; Salvato 1999, p. 117; Opler and Warren 2003, p. 40) considered the Florida leafwing as a subspecies of *Anaea troglodyta* Fabricius. Smith *et al.* (1994, p. 67) suggested that further comparison between immature stages of the Florida leafwing and its Antillean relatives may aid in determining whether or not the Florida leafwing is distinct at the species or subspecies level. Calhoun (1997, p. 47), Opler and Warren (2003, p. 40), Lamas (2004, p. 225) and Pelham (2008, p. 393) considered *Anaea troglodyta floridalis,* not *A. floridalis,* as the scientific name for the Florida leafwing.

The Integrated Taxonomic Information System (ITIS) (2013, p. 1) uses the name *Anaea troglodyta floridalis* (F. Johnson and W. Comstock) and indicates that this subspecies' taxonomic standing is valid. The FNAI (2012, p. 19) uses the name *A. t. floridalis.*

Life History

Numerous authors have observed and documented the behavior and natural history of the Florida leafwing (Matteson 1930, pp. 1–9; Lenczewski 1980, p. 17; Pyle 1981, p. 651; Baggett 1982, pp. 78–79; Opler and Krizek 1984, p. 172; Schwartz 1987, p. 22; Hennessey and Habeck 1991, pp. 13–17; Smith *et al.* 1994, p. 67; Worth *et al.* 1996, pp. 4–6; Salvato 1999, pp. 116–122; Salvato and Hennessey 2003, pp. 243–249; Salvato and Salvato 2008, pp. 323–329; 2010a, pp. 91–97). Adults are rapid, wary fliers and have strong flight abilities and are able to disperse over large areas. The Florida leafwing is multivoltine (i.e., produces multiple generations per year), with an entire life cycle of about 2 to 3 months (Hennessey and Habeck 1991, p. 17) and maintains continuous broods throughout the year (Salvato 1999, p. 121).

The immature stages of this butterfly feed on pineland croton for larval development. Eggs are spherical and light cream-yellow in color (Worth *et al.* 1996, p. 64). Females lay eggs singly on both the upper and lower surface of the host (croton plant) leaves, normally on developing racemes (flowers) (Baggett 1982, p. 78; Hennessey and Habeck 1991, p. 16; Worth *et al.* 1996, p. 64; Salvato 1999, p. 120, Minno *et al.* 2005, p. 115). Worth *et al.* (1996, p. 64) and Salvato (1999, p. 120) visually estimated that females may fly more than 30 meters (m) (98 feet (ft)) in search of a suitable host plant.

Bartram's Scrub-Hairstreak

General Biology

The Bartram's scrub-hairstreak is a small butterfly approximately 25 mm (1 in) in length with a forewing length of 10.0 to 12.5 mm (0.4 to 0.5 in) and has an appearance characteristic of the genus (i.e., dark gray-colored on the upper (open) wings, light gray-colored under (closed) wings, small size, body shape, distinctive white barring or dots on underwings, and tailed hindwings) (Pyle 1981, p. 480; Opler and Krizek 1984, pp. 107–108; Minno and Emmel 1993, p. 129). As with the Florida leafwing, pineland croton is the only known hostplant for the Bartram's scrub-hairstreak (Minno and Emmel 1993, p. 129; Smith *et al.* 1994, p. 118). However, other related scrub-hairstreak species, such as the Martial scrub-hairstreak (*Strymon martialis*), while having preference for bay cedar as a larval hostplant, have recently been documented using nickerbean (*Caesalpinia spp.)* in the Florida Keys (Daniels *et al.* 2005, pp. 174–175). Similarly, the mallow scrub-hairstreak (*Strymon istapa*) has also been shown to use a variety of host sources in southern Florida. While the Bartram's scrub-hairstreak has been consistently documented to use pineland croton, further natural history studies may indicate the subspecies' use of additional pine rockland plants for larval development.

Taxonomy

The Bartram's scrub-hairstreak butterfly (*Strymon acis bartrami*) was first described by Comstock and Huntington in 1943. Seven subspecies of *Strymon acis* have been described (Smith *et al.* 1994, p. 118).

The ITIS (2013, p. 1) uses the name *Strymon acis bartrami* and indicates that this subspecies' taxonomic standing is valid. FNAI (2012, p. 21) uses the name *S. a. bartrami.*

Life History

The Bartram's scrub-hairstreak is rarely encountered more than 5 m (16.4 ft) from its host plant-pine rockland interface (Schwartz 1987, p. 16; Worth *et al.* 1996, p. 65; Salvato and Salvato 2008, p. 324). Worth *et al.* (1996, p. 63) and Salvato and Hennessey (2004, p. 223) indicate that the hairstreak may have limited dispersal abilities. However, while the hairstreak is often described as sedentary, the need to evade natural disturbance (fires, storms) and subsequently recolonize suggests that adult hairstreaks—perhaps as a function of age, sex, or density—are adapted for effective dispersal throughout the pine rockland and associated ecosystems. Eggs are laid singly on the flowering racemes of pineland croton (Worth *et al.,* 1996, p. 62; Salvato and Hennessey 2004, p. 225). First and second instars remain well camouflaged amongst the white croton flowers, while the greenish later stages occur more on the leaves.

The Bartram's scrub-hairstreak has been observed during every month on Big Pine Key and in ENP; however, the exact number of broods appears to vary sporadically from year to year (Salvato and Hennessey 2004, p. 226; Salvato and Salvato 2010b, p. 156).

Florida Leafwing and Bartram's Scrub-Hairstreak

Habitat

The Florida leafwing and Bartram's scrub-hairstreak occur only within pine rocklands, specifically those that retain their mutual and sole hostplant, pineland croton. Adult butterflies will also make use of rockland hammock and hydric pine flatwood vegetation when interspersed within the pine rockland habitat.

Detailed descriptions of pine rockland and rockland hammock habitats are presented in the proposed listing rule for the Florida leafwing and Bartram's scrub-hairstreak (78 FR 49882; August 15, 2013). The hydric pine flatwoods community, interspersed within pine rocklands, also supports Florida leafwing and Bartram's scrub-hairstreak within the Long Pine Key region of ENP (Sadle 2013c, pers. comm.). We include a full description of the hydric pine flatwoods forest community below.

Hydric Pine Flatwoods—Hydric pine flatwoods (Service 1999, pp. 231–238; FNAI 2010b, pp. 1–2) are open pine forests with a sparse or absent midstory and a dense groundcover of hydrophytic grasses, herbs, and low shrubs. The pine canopy typically consists of South Florida slash pine. Other pines may include longleaf pine (*P. palustris*),

pond pine (*P. serotina*), and loblolly pine (*P. taeda*). The subcanopy, if present, consists of scattered sweetbay (*Magnolia virginiana*), swamp bay (*Persea palustris*), loblolly bay (*Gordonia lasianthus*), pond cypress (*Taxodium ascendens*), dahoon (*Ilex cassine*), titi (*Cyrilla racemiflora*), and/or wax myrtle (*Myrica cerifera*). Shrubs include large gallberry (*Ilex coriacea*), fetterbush (*Lyonia lucida*), titi, black titi (*Cliftonia monophylla*), sweet pepperbush (*Clethra alnifolia*), red chokeberry (*Photinia pyrifolia*), and azaleas *(Rhododendron canescens, R. viscosum*). Saw palmetto (*Serenoa repens*) and gallberry *(I. glabra*), species characteristic of mesic flatwoods sites, may be present. On calcareous sites, cabbage palm (*Sabal palmetto*) is common both in the subcanopy and shrub layers. Herbs include wiregrass (*Aristida stricta var. beyrichiana*), blue maidencane (*Amphicarpum muhlenbergianum*), and/or hydrophytic species such as toothache grass (*Ctenium aromaticum*), cutover muhly (*Muhlenbergia expansa*), coastalplain yellow-eyed grass (*Xyris ambigua*), Carolina redroot (*Lachnanthes caroliana*), beaksedges (*Rhynchospora chapmanii, R. latifolia, R. compressa*), and pitcherplants (*Sarracenia* spp.), among others. Hydric pine flatwoods occur in the ecotones between the drier pine rocklands and rockland hammock habitats (FNAI 2010b, pp. 1–2).

The relative density of shrubs and herbs varies greatly in hydric pine flatwoods. Shrubs tend to dominate where fire has been absent for a long period or where cool-season fires predominate; herbs are more common in locations that are frequently burned. Soils and hydrology also may influence relative density of shrubs and herbs. Soils of shrubby hydric pine flatwoods are generally poorly to very poorly drained sands and include such series as Rutledge/Osier; these soils generally have a mucky texture in the uppermost horizon (FNAI 2010b, p. 2).

The general historical fire-return interval in pinelands across the southeastern U.S. coastal plain is estimated to be every 1–3 years (FNAI 2010b, p. 3). This interval is frequent enough to maintain grassy hydric pine flatwoods and inhibit invasion by shrubs (Drewa *et al.* 2002). Hydric pine flatwoods that are naturally shrubbier and dominated by slash pine may have had longer fire-return intervals, or perhaps a few periods of longer intervals, on the order of 5–7 years (Landers 1991), or up to 5–10 years (Grelen 1980), in order to allow the pines to establish and shrubs to proliferate.

Historical Ranges

The Florida leafwing and Bartram's scrub-hairstreak are endemic to south Florida including the lower Florida Keys. The butterflies were locally common within pine rockland habitat that once occurred within Miami-Dade and Monroe Counties and were less common and sporadic within croton-bearing pinelands in Collier, Martin (leafwing only), Palm Beach, and Broward Counties (Skinner 1884, p. 180; Slosson 1895, p. 134; Comstock and Huntington 1943, p. 65; Kimball 1965, pp. 45–46; Baggett 1982, p. 78; Minno and Emmel 1994, pp. 626–627; 1994b, pp. 649–651; Smith *et al.* 1994, p. 67; Salvato 1999, p. 117; Salvato and Hennessey 2003, p. 243; 2004, p. 223).

Current Ranges

Populations of Florida leafwing and Bartram's scrub-hairstreak have become increasingly localized as pine rockland habitat has been lost or altered through anthropogenic activity (Lenczewski 1980, p. 43; Baggett 1982, p. 78; Hennessey and Habeck 1991, p. 4; Schwarz *et al.* 1996, p. 59; Salvato and Hennessey 2003, p. 243; Salvato and Hennessey 2004, p. 223; Salvato and Salvato 2010a, p. 91; 2010b, p. 154).

Destruction of pine rocklands for economic development has reduced this habitat in Miami-Dade County, including ENP, to about 11 percent of its natural extent, from approximately 74,000 hectares (ha) (183,000 acres (ac)) to only 8,140 ha (20,100 ac) in 1996 (Kernan and Bradley 1996, p. 2). Outside of ENP, only about 1 percent of the Miami Rock Ridge pinelands have escaped clearing, and much of what is left is in small remnant fragments isolated from other natural areas (Herndon 1998, p. 1). Several of these fragments, particularly those adjacent to ENP, such as Navy Wells and Richmond Pine Rocklands (a mixture of publically and privately owned lands), maintain localized populations of pineland croton as well as small or sporadic occurrences of Bartram's scrub-hairstreak (Salvato 1999, p. 123; Salvato and Hennessey 2004, p. 223; Salvato and Salvato 2010b, p. 154; Salvato 2013, pers. comm.; Maschinski *et al.* 2013, p. 14; Cook 2013, pers. comm.).

Breeding Florida leafwing populations have not been documented in pine rockland fragments adjacent to ENP for the past 25 years. The hairstreak retains breeding populations on Big Pine Key, on Long Pine Key in ENP, and within a number of pine rockland fragments adjacent to ENP.

The current distribution and abundance of pineland croton across all extant pine rockland fragments within Miami-Dade County is not known. However, a geographic information system analysis conducted by the Service using data collected by The Institute for Regional Conservation (IRC) in 2004, indicated that 77 pine rockland fragments (totaling 516 ha (370 ac)) in Miami-Dade County, contained pineland croton (IRC 2006, no page numbers). More recently, in 2012, the Service funded Fairchild Tropical Botanic Gardens (FTBG) to conduct extensive surveys of Miami-Dade pine rockland fragments to determine current pineland croton abundance and distribution. Pineland croton populations were encountered at 11 of the 13 locations surveyed, the largest occurring at Navy Wells Pineland Preserve and the Richmond Pine Rocklands, with each site retaining more than 21,000 individual plants (Maschinski *et al.* 2013, pp. 11–12).

In the lower Florida Keys, Big Pine Key retains the largest undisturbed tracts of pine rockland habitat (Zhang *et al.* 2010, p. 15; Roberts 2012, pers. comm.). At present, within the Florida Keys, pineland croton is known to occur only on Big Pine Key. Although the Bartram's scrub-hairstreak is extant on Big Pine Key, the Florida leafwing is believed to be extirpated from Big Pine Key since it has not been seen on the island since 2006 (Minno and Minno 2009, pp. v, 9; Salvato and Salvato 2010c, p. 139).

Population Estimates and Status

Florida Leafwing—Based on results of all historical (Baggett 1982, p. 78; Schwartz 1987, p. 22; Hennessey and Habeck 1991, p. 17; Worth *et al.* 1996, p. 62; Schwarz *et al.* 1996, p. 59) and recent surveys and natural history studies (Salvato 1999, p. 1; 2001, p. 8; 2003, p. 53; Salvato and Hennessey 2003, p. 243; Salvato and Salvato 2010a, p. 91), the Florida leafwing is extant in ENP and, until recently, had occurred on Big Pine Key and historically in pineland fragments in mainland Miami-Dade County (Smith *et al.* 1994, p. 67; Salvato and Salvato 2010a, p. 91; 2010c, p. 139). Results from all known historical surveys are provided in Table 1. More recent studies are discussed below.

TABLE 1—SUMMARY OF HISTORICAL FLORIDA LEAFWING SURVEYS

Population	Ownership*	Years	Size or density numbers of adult butterflies	Source
National Key Deer Refuge—Big Pine Key.	Federal—USFWS.	1985–1986	34 observed or collected	Schwartz (1987, p. 25).
National Key Deer Refuge—Watson Hammock.	Federal—USFWS.	1988–1989	3.7 per ha (1.5 per acre)	Hennessey and Habeck (1991, pp. 1–75).
Everglades National Park—Long Pine Key.	Federal—NPS	1988–1989	3.7 per ha (1.5 per acre)	Hennessey and Habeck (1991, pp. 1–75).
Everglades National Park—Long Pine Key.	Federal—NPS	1994–1995	22 observed	Emmel *et al.* (1995, p. 14).
National Key Deer Refuge—Big Pine Key.	Federal—USFWS.	1994–1995	19 observed	Emmel *et al.* (1995, p. 14).
National Key Deer Refuge—Watson Hammock.	Federal—USFWS.	1997–1998	3.1 per ha (1.2 per acre)	Salvato (1999, p. 52).
Everglades National Park—Long Pine Key.	Federal—NPS	1997–1998	2.4 per ha (1 per acre)	Salvato (1999, p. 52).

* USFWS—U.S. Fish and Wildlife Service; NPS—National Park Service.

Ongoing surveys conducted by Salvato (2014, pers. comm.) from 2009 to 2013 have recorded an average abundance of 2.7 adult Florida leafwings per ha (1 per ac), in Long Pine Key in ENP. In addition, surveys conducted by ENP staff from 2005 to present have encountered a total of approximately 34 and 216 leafwing adults and larvae, respectively, throughout Long Pine Key (Land 2012, pers. comm.; Sadle 2013b, pers. comm.).

No leafwings have been documented on Big Pine Key in the Florida Keys since 2006 (Salvato and Salvato 2010c, p. 139). On the mainland, Salvato (2012, pers. comm.) has found that the extant leafwing population within ENP is maintained at several hundred individuals or fewer, although numbers vary greatly depending upon season and other factors. However, Minno (2009, pers. comm.) estimated the extant leafwing population size at less than 100 at any given period.

Ongoing natural history studies of the leafwing by Salvato and Salvato (Salvato 2012, pers. comm.) and Sadle (2013d, pers. comm.) designed to evaluate mortality factors amongst the butterfly's immature stages have identified a suite of predators, parasitoids, and pathogens that may substantially influence annual variability.

Bartram's Scrub-Hairstreak—Based on the results of historical (Baggett 1982, p. 80; Schwartz 1987, p. 16; Hennessey and Habeck 1991, pp. 117–119; Smith *et al.* 1994, p. 118; Emmel *et al.* 1995, pp. 1–24; Worth *et al.* 1996, pp. 62–65; Schwarz *et al.* 1996, pp. 59–61) and recent (Salvato 1999, p. 1; 2001, p. 8; 2003, p. 53; Salvato and Hennessey 2004, p. 223; Minno and Minno 2009, p. 76; Salvato and Salvato 2010b, p. 154; Anderson 2012a, pers. comm.; Land 2012, pers. comm.) surveys and natural history studies, there are extant Bartram's scrub-hairstreak populations in ENP and locally within pineland fragments in mainland Miami-Dade County, and on Big Pine Key in Monroe County. Results from all known historical surveys are provided in Table 2. More recent studies are discussed below.

TABLE 2—SUMMARY OF HISTORICAL BARTRAM'S SCRUB-HAIRSTREAK SURVEYS

Population	Ownership*	Years	Size or density numbers of adult butterflies	Source
National Key Deer Refuge—Big Pine Key.	Federal—USFWS.	1985–1986	20 observed or collected	Schwartz (1987, p. 16).
National Key Deer Refuge—Big Pine Key.	Federal—USFWS.	1988–1989	3.9 per ha (1.6 per ac)	Hennessey and Habeck (1991, pp. 49–50).
Everglades National Park—Long Pine Key.	Federal—NPS	1988–1989	0.5 per ha (0.2 per ac)	Hennessey and Habeck (1991, pp. 49–50).
Everglades National Park—Long Pine Key.	Federal—NPS	1994–1995	7 observed	Emmel *et al.* (1995, p. 14).
National Key Deer Refuge—Big Pine Key.	Federal—USFWS.	1994–1995	9 observed	Emmel *et al.* (1995, p. 14).
National Key Deer Refuge—Big Pine Key.	Federal—USFWS.	1997–1998	4.3 per ha (1.7 per ac)	Salvato (1999, p. 52).
Everglades National Park—Long Pine Key.	Federal—NPS	1997–1998	0 per ha (0 per ac)	Salvato (1999, p. 60).

* USFWS—U.S. Fish and Wildlife Service; NPS—National Park Service.

Ongoing surveys by Salvato and Salvato (unpublished data) indicate the average number of adult Bartram's scrub-hairstreaks recorded annually on Big Pine Key has declined considerably, from a high of 19.3 per ha (7.7 per ac) in 1999, to a low of less than 1 per ha (0.3 per ac) in 2011, based on monthly (1999–2006) or quarterly (2007 to 2012) surveys.

Hairstreaks often occur at low densities, fly erratically and are small, making them inherently difficult to monitor (Henry 2013, pers. comm.). Since early 2012, North Carolina State University personnel have collaborated with the Service on techniques to improve detection probabilities, estimate abundances, and measure vegetation characteristics associated with butterfly populations on the NKDR

(Henry and Haddad 2013, p. 1). These studies have documented a mean monthly count across sites ranging from 0.0 to 2.8 (with a standard error of ± 0.33) adult hairstreaks per ha (Anderson 2012a, pers. comm.). During 2013, using these survey techniques, NKDR documented a peak abundance of 159 adults in the early summer months (Anderson 2014, pers. comm.). Future monitoring efforts on NKDR will include counts in both currently and historically occupied areas.

Salvato and Salvato (2010b, p. 159) and Salvato (2014, pers. comm.) have encountered as many as 6.3 adult Bartram's scrub-hairstreaks per ha (2.5 per ac) annually from 1999 to 2013, based on monthly surveys in Long Pine Key. Ongoing surveys conducted by ENP staff from 2005 to present have encountered a total of approximately 24 and 30 hairstreak adults and larvae, respectively, throughout Long Pine Key (Land 2012, pers. comm.; Sadle 2013b, pers. comm.).

Additional pine rockland fragments within Miami-Dade County that are known to maintain small, localized populations of pineland croton and sporadic occurrences of Bartram's scrub-hairstreak, based on limited survey work, include: Navy Wells (120 ha (297 acres)), Camp Owaissa Bauer (39 ha (99 ac)) (owned and managed by Miami-Dade County), and several parcels within the Richmond Pine Rocklands, including: Larry and Penny Thompson Memorial Park (109 ha (270 ac)), Zoo Miami Preserve (300 ha (740 ac)), Martinez Pineland Park (53 ha (132 ac)), and U.S. Coast Guard lands in Homestead (29 ha (72 ac)) (Minno and Minno 2009, pp. 70–76; Possley 2010, pers. comm.). Adult butterflies have also been observed within Zoo Miami (Cook 2013, pers. comm.).

Summary of Factors Affecting the Species

Section 4 of the Act (16 U.S.C. 1533), and its implementing regulations at 50 CFR part 424, set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, we may list a species based on any of the following five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. Listing actions may be warranted based on any of the above threat factors, singly or in combination. Each of these factors is discussed below.

Factor A—The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

Habitat Loss

The Florida leafwing and Bartram's scrub-hairstreak have experienced substantial destruction, modification, and curtailment of their habitat and range (see Status Assessment section). The pine rockland community of south Florida, on which both butterflies and their hostplant depend, is critically imperiled globally (FNAI 2012, p. 27). Destruction of the pinelands for economic development has reduced this habitat community by 90 percent on mainland south Florida (including within ENP) (O'Brien 1998, p. 208). All known mainland populations of the Florida leafwing and Bartram's scrub-hairstreak occur on publicly or privately owned lands that are managed for conservation (Table 3). However, any unknown extant populations of these butterflies or suitable habitat that may occur on private land or nonconservation public land, such as within the Richmond Pine Rocklands, are vulnerable to habitat loss.

TABLE 3—LAND OWNERSHIP OF EXTANT FLORIDA LEAFWING AND BARTRAM'S SCRUB-HAIRSTREAK POPULATIONS

Location	Ownership	Size
Bartram's scrub-hairstreak		
Big Pine Key	Public—Fish and Wildlife Service Public—Monroe County. Public—FDEP *, FWC *. Private.	559 ha (1,382 ac).
Everglades National Park—Long Pine Key.	Federal—National Park Service	8,029 ha (19,840 ac).
Navy Wells Pineland Preserve	Public—Miami-Dade County	120 ha (296 ac).
Camp Owaissa Bauer	Public—Miami-Dade County	40 ha (99 ac).
Richmond Pine Rocklands	Public—Federal (U.S. Coast Guard)	359 ha (889 acres).
	Public—Miami-Dade County (Larry and Penny Thompson Memorial Park, Martinez Pineland Park, Miami Metro Zoo Preserve). Private—University of Miami.	
Florida Leafwing		
Everglades National Park—Long Pine Key.	Federal—National Park Service	8,029 ha (19,840 ac).

* FDEP—Florida Department of Environmental Protection; FWC—Florida Fish and Wildlife Conservation Commission.

Similarly, most of the ecosystems on the Florida Keys have been impacted by humans, through widespread clearing of habitat in the 19th century for farming, or building of homes and businesses; extensive areas of pine rocklands have been lost (Hodges and Bradley 2006, p. 6). Overall, the human population in Monroe County is expected to increase from 79,589 to more than 92,287 people by 2060 (Zwick and Carr 2006, p. 21). All vacant land in the Florida Keys is projected to be developed by then, including lands currently inaccessible for development, such as islands not attached to the Overseas Highway (US 1) (Zwick and Carr 2006, p. 14). However, during 2006, Monroe County implemented a Habitat Conservation Plan (HCP) for Big Pine and No Name Keys. Subsequently, development on these islands has to meet the requirements of the HCP with the resulting pace of development changed

accordingly. Furthermore, in order to fulfill the HCP's mitigation requirements, the County has been actively acquiring parcels of high-quality pine rockland, such as The Nature Conservancy's 20-acre Terrestris Tract on Big Pine Key, and managing them for conservation. However, land development pressure and habitat losses may resume when the HCP expires in 2023. If the HCP is not renewed, residential or commercial development could increase to pre-HCP levels. Consequently, remaining suitable habitat for Bartram's scrub-hairstreak and potential habitat for the Florida leafwing could be at significant risk to habitat loss and modification. Further losses will seriously affect the hairstreak's ability to persist in the wild and decrease the possibility of recovery or recolonization by the leafwing.

Fire Management

The threat of habitat destruction or modification is further exacerbated by a lack of adequate fire management (Salvato and Salvato 2010a, p. 91; 2010b, p. 154; 2010c, p. 139). Historically, lightning-induced fires were a vital component in maintaining native vegetation within the pine rockland ecosystem, including pineland croton (Loope and Dunevitz 1981, p. 5; Slocum *et al.* 2003, p. 93; Snyder *et al.* 2005, p. 1; Salvato and Salvato 2010b, p. 154). Resprouting after burns is the primary mechanism allowing for the persistence of perennial shrubs, including pineland croton, in pine habitat (Olson and Platt 1995, p. 101). Without fire, successional climax from tropical pineland to hardwood hammock is rapid, and displacement of native species by invasive nonnative plants often occurs.

Cyclic and alternating treatment of burn units may have benefited the Florida leafwing throughout Long Pine Key (Salvato and Salvato 2010a, pp. 91–97). The leafwing, with its strong flight abilities, can disperse to make use of adjacent patches of hostplant and then quickly recolonize burned areas following hostplant resurgence (Salvato 1999, p. 5; 2003, p. 53; Salvato and Salvato 2010a, p. 95). Salvato and Salvato (2010a, p. 95) encountered similar adult leafwing densities pre- and post-burn throughout their 10-year study within Long Pine Key, suggesting the leafwing can quickly recolonize pine rocklands following a fire. Surveys conducted shortly after burns often found adult leafwings actively exploring the recently burned locations in search of new hostplant growth (Land 2009, pers. comm.; Salvato and Salvato 2008, p. 326; 2010a, p. 95). In most instances croton returned to the burned parts of Long Pine Key within 1 to 3 months post-burn; however, it may take up to 6 months before the leafwing will use the new growth for oviposition (Lenczewski 1980, p. 35; Land 2009, pers. comm.; Salvato and Salvato 2010a, p. 95). Land (2009, pers. comm.) indicated that 96 percent of pineland croton burned during prescribed burns on Long Pine Key had resprouted within a few months. Although Salvato and Salvato (2010a, p. 96) occasionally encountered signs of leafwing reproduction within recently burned Long Pine Key locations at approximately 6 weeks post-burn, the majority of their observations indicated that oviposition and larval activity increased at about 3 to 6 months post-burn. Similarly, Land (2009, pers. comm.) reported finding leafwing larval activity on resprouting croton at 6 months post-burn. This finding suggests there may be some lag time between hostplant resurgence and compatibility with recolonization. However, observations of the Florida leafwing and Bartram's scrub-hairstreak within portions of Long Pine Key that have experienced fire or other disturbance regimes at intervals of up to 10 years (Salvato and Salvato 2010a; 2010b; Sadle 2013c, pers. comm.) suggest further studies are required on the influence of disturbance regime on butterfly ecologies.

The influence of prescribed burns on the status and distribution of the hairstreak and croton is being evaluated by ENP throughout Long Pine Key. The effects of new burn techniques on the Bartram's scrub-hairstreak within Long Pine Key were not immediately obvious (Salvato and Salvato 2010b, p. 159). The hairstreak is rarely encountered more than 5 m (16.4 ft) from its hostplant (Schwartz 1987, p. 16; Worth *et al.* 1996, p. 65; Salvato and Salvato 2008, p. 324). Although further studies may be required to determine how the hairstreak responds to natural disturbances, Salvato and Hennessey (2004, p. 224) and Salvato and Salvato (2010b, p. 159) indicate that, if the hairstreak is unable to disperse adequately during fire events, then only adults at the periphery of burned areas are likely to escape to adjacent pine rocklands. Ideally, as a result of cyclic burns and multiyear treatment intervals, the hairstreaks will move from the burned location to adjacent refugia (i.e., unburned areas of croton hostplant) and then back to the burned area in numbers equal to or greater than before the fire. Starting in the fall of 2004 and continuing into early 2006, the hairstreak appeared to have benefited from prescribed burns with population densities greater than those recorded in any previous studies (Salvato and Salvato 2010b, p. 159), and this trend has continued subsequently (Land 2011, 2012a, pers. comm.; Salvato 2012, pers. comm.).

ENP is actively coordinating with the Service, as well as other members of the Imperiled Butterflies of Florida Workgroup, to review and adjust the prescribed burn practices outlined in ENP's Fire Management Plan (FMP) to help maintain or increase Florida leafwing and Bartram's scrub-hairstreak population sizes, protect pine rocklands, expand or restore remnant patches of hostplants and ensure that short-term negative effects from fire (i.e., loss of hostplants, loss of eggs and larvae) can be avoided or minimized. Revisions to the FMP are expected to be completed in early 2014, with prescribed burn activities resuming at that time.

Outside of ENP, Miami-Dade County has implemented various conservation measures, such as burning in a mosaic pattern and on a small scale, during prescribed burns in order to protect the butterflies (Maguire 2010, pers. comm.). Miami-Dade County Parks and Recreation staff has burned several of their conservation lands on a fire-return interval of approximately 3 to 7 years. In addition, prescribed burns on large conservation areas, such as Navy Wells, have been conducted in a cyclic and systematic pattern, which has provided refugia within or adjacent to treatment areas. As a result, the Bartram's scrub-hairstreak has retained populations within many of these County-managed conservation lands.

Recent natural or prescribed burn activity on Big Pine Key and adjacent islands within NKDR appears to be insufficient to prevent loss of pine rockland habitat (Carlson *et al.* 1993, p. 914; Bergh and Wisby 1996, pp. 1–2; O'Brien 1998, p. 209; Snyder *et al.* 2005; Bradley and Saha 2009, pp. 28–29; Saha *et al.* 2011, pp. 169–184). As a result, many of the pine rocklands, across NKDR are being compromised by succession to hardwood hammock (Bradley and Saha 2009, pp. 28–29; Saha *et al.* 2011, pp. 169–184). Pineland croton, which was historically documented from No Name and Little Pine Keys (Dickson 1955, p. 98; Hennessey and Habeck 1991, p. 4; Carlson *et al.* 1993, p. 923), is now absent from these locations (Emmel *et al.* 1995, p. 6; Salvato and Salvato 2010c, p. 139).

Fire management of pine rocklands in NKDR is hampered by the pattern of land ownership and development;

residential and commercial properties are embedded within or in close proximity to pineland habitat (Snyder *et al.* 2005, p. 2; Anderson 2012a, pers. comm.). As a result, hand or mechanical vegetation management may be necessary at select locations on Big Pine Key (Emmel *et al.* 1995, p. 11; Minno 2009, pers. comm.; Service 2010, pp. 1–68) to maintain or restore pine rocklands. Clearing, such as that used to create firebreaks, can result in high croton densities. Anderson *et al.* (2012, page numbers not applicable) showed that croton densities were significantly higher in a fire break with annual mechanical treatments than adjacent areas with no management. However, even within fire breaks, hostplant density across NKDR has declined considerably in some areas over the past decade. Salvato and Salvato (unpublished data) have noted as much as a 100 percent loss of pineland croton from several of their long-term survey transects, which occur within both firebreaks and forested pine rocklands. These losses are believed to be due to a combination of mowing activity, habitat modification, and a lack of adequate fire management. Ongoing and future studies on NKDR will be designed to measure the influence of prescribed burns and other management actions, such as mechanical clearing. Mechanical treatments may be less beneficial than fire because they do not quickly convert debris to nutrients, and remaining leaf litter may suppress croton seedling development; fire has also been found to stimulate seedling germination (Anderson 2010, pers. comm.). Because mechanical treatments may not provide the same ecological benefits as fire, NKDR continues to focus efforts on conducting prescribed burns where possible (Anderson 2012a, pers. comm.). Additional proposed experimental techniques that will be designed to simulate disturbance include complete vegetation removal (or scarping), fertilization (simulating the release of nutrients after fire), or other treatments that mimic fire influence (Haddad 2013, pers. comm., Anderson 2014, pers. comm.).

The NKDR is attempting to increase the density of hostplants within their pine rockland habitat through the use of prescribed burns. However, the majority of pine rocklands within NKDR are several years departed from the ideal fire-return interval (5–7 years) suggested for this ecosystem (Synder *et al.* 2005, p. 2, Saha *et al.* 2011, pp. 169–184). Tree ring and sediment data show that pine rocklands in the lower Keys have burned at least every 5 years and sometimes up to three times per decade historically (Albritton 2009, p. 123, Horn *et.al.,* 2013, pp. 1–67, Harley 2012, pp. 1–246). Prescribed burn implementation in the lower Keys has been hampered largely due to a shortage of resources, technical challenges, and expense of conducting prescribed burns in a matrix of public and private ownership. However, NKDR is taking steps to monitor croton before and after fire, provide refugia during treatments, and ensure that appropriate corridors are maintained during burns (Anderson 2010, pers. comm.). Given the difficulties in prescribed burn implementation on Big Pine Key, other options have been explored to increase the amount of available hostplant for extant Bartram's scrub-hairstreak populations, as well as to restore formerly occupied Florida leafwing habitat on Big Pine Key. For example, NKDR currently is growing pineland croton for use in habitat enhancement activities across the Refuge (more than a thousand have been planted to date) (Anderson 2012b, pers. comm.).

Climate Change and Sea Level Rise Related to Habitat Loss and Alteration

Climatic changes, including sea level rise, are major threats to south Florida, and to the Florida leafwing and Bartram's scrub-hairstreak. Our analyses under the Act include consideration of ongoing and projected changes in climate. The terms ''climate'' and ''climate change'' are defined by the Intergovernmental Panel on Climate Change (IPCC). The term ''climate'' refers to the mean and variability of different types of weather conditions over time, with 30 years being a typical period for such measurements, although shorter or longer periods also may be used (IPCC 2007a, p. 78). The term ''climate change'' thus refers to a change in the mean or variability of one or more measures of climate (e.g., temperature or precipitation) that persists for an extended period, typically decades or longer, whether the change is due to natural variability, human activity, or both (IPCC 2007a, p. 78).

Scientific measurements spanning several decades demonstrate that changes in climate are occurring, and that the rate of change has been faster since the 1950s. Examples include warming of the global climate system, and substantial increases in precipitation in some regions of the world and decreases in other regions. For these and other examples, see IPCC 2007a, p. 30; and Solomon *et al.* 2007, pp. 35–54, 82–85. Results of scientific analyses presented by the IPCC show that most of the observed increase in global average temperature since the mid-20th century cannot be explained by natural variability in climate, and is ''very likely'' (defined by the IPCC as 90 percent or higher probability) due to the observed increase in greenhouse gas (GHG) concentrations in the atmosphere as a result of human activities, particularly carbon dioxide emissions from use of fossil fuels (IPCC 2007a, pp. 5–6 and figures SPM.3 and SPM.4; Solomon *et al.* 2007, pp. 21–35). Further confirmation of the role of GHGs comes from analyses by Huber and Knutti (2011, p. 4), who concluded it is extremely likely that approximately 75 percent of global warming since 1950 has been caused by human activities.

Scientists use a variety of climate models, which include consideration of natural processes and variability, as well as various scenarios of potential levels and timing of GHG emissions, to evaluate the causes of changes already observed and to project future changes in temperature and other climate conditions (e.g., Meehl *et al.* 2007, entire; Ganguly *et al.* 2009, pp. 11555, 15558; Prinn *et al.* 2011, pp. 527, 529). All combinations of models and emissions scenarios yield very similar projections of increases in the most common measure of climate change, average global surface temperature (commonly known as global warming), until about 2030. Although projections of the magnitude and rate of warming differ after about 2030, the overall trajectory of all the projections is one of increased global warming through the end of this century, even for the projections based on scenarios that assume that GHG emissions will stabilize or decline. Thus, there is strong scientific support for projections that warming will continue through the 21st century, and that the magnitude and rate of change will be influenced substantially by the extent of GHG emissions (IPCC 2007a, pp. 44–45; Meehl *et al.* 2007, pp. 760–764 and 797–811; Ganguly *et al.* 2009, pp. 15555–15558; Prinn *et al.* 2011, pp. 527, 529). See IPCC (2007b, p. 8), for a summary of other global projections of climate-related changes, such as frequency of heat waves and changes in precipitation. Also see IPCC 2011 (entire) for a summary of observations and projections of extreme climate events.

Various changes in climate may have direct or indirect effects on species. These effects may be positive, neutral, or negative, and they may change over time, depending on the species and other relevant considerations, such as interactions of climate with other variables (e.g., habitat fragmentation)

(IPCC 2007, pp. 8–14, 18–19). Identifying likely effects often involves aspects of climate change vulnerability analysis. Vulnerability refers to the degree to which a species (or system) is susceptible to, and unable to cope with, adverse effects of climate change, including climate variability and extremes. Vulnerability is a function of the type, magnitude, and rate of climate change and variation to which a species is exposed, its sensitivity, and its adaptive capacity (IPCC 2007a, p. 89; see also Glick *et al.* 2011, pp. 19–22). There is no single method for conducting such analyses that applies to all situations (Glick *et al.* 2011, p. 3). We use our expert judgment and appropriate analytical approaches to weigh relevant information, including uncertainty, in our consideration of various aspects of climate change.

Global climate projections are informative, and, in some cases, the only or the best scientific information available for us to use. However, projected changes in climate and related impacts can vary substantially across and within different regions of the world (e.g., IPCC 2007a, pp. 8–12). Therefore, we use ''downscaled'' projections when they are available and have been developed through appropriate scientific procedures, because such projections provide higher resolution information that is more relevant to spatial scales used for analyses of a given species (see Glick *et al.* 2011, pp. 58–61, for a discussion of downscaling).

With regard to our analysis for the Florida leafwing and Bartram's scrub-hairstreak, downscaled projections suggest that sea level rise is the largest climate-driven challenge to low-lying coastal areas and refuges in the subtropical ecoregion of southern Florida (U.S. Climate Change Science Program (CCSP) 2008, pp. 5–31, 5–32). The long-term record at Key West shows that sea level rose on average 0.224 centimeters (cm) (0.088 in) annually between 1913 and 2006 (National Oceanographic and Atmospheric Administration (NOAA) 2008, p. 1). This equates to approximately 22.3 cm (8.76 in) over the last 100 years (NOAA 2008, p. 1). IPCC (2008, p. 28) emphasized it is very likely that the average rate of sea level rise during the 21st century will exceed that rate, although it was projected to have substantial geographical variability.

Other processes to be affected by projected warming include temperatures, rainfall (amount, seasonal timing, and distribution), and storms (frequency and intensity). The Massachusetts Institute of Technology (MIT) modeled several scenarios combining various levels of sea level rise, temperature change, and precipitation differences with population, policy assumptions, and conservation funding changes. All of the scenarios, from small climate change shifts to major changes, indicate significant effects on the Florida Keys.

The Nature Conservancy (TNC) modeled several scenarios for the Florida Keys, and predicted that sea level rise will first result in the conversion of habitat, and eventually the complete inundation of habitat. In the best-case scenario, by the year 2100, a rise of 18 cm (7 in) would result in the inundation of 745 ha (1,840 ac) (34 percent) of Big Pine Key and the loss of 11 percent of the island's upland habitat (TNC 2010, p. 1). In the worst-case scenario, a rise of 140 cm (4.6 ft) would result in the inundation of about 2,409 ha (5,950 ac) (96 percent) and the loss of all upland habitat on the Key (TNC 2010, p. 1). Extant populations of Bartram's scrub-hairstreak in the pine rocklands on Big Pine Key are located just slightly above mean sea level, and saturation or increase in salinity of the soil would correspondingly change the vegetation and habitat structure making the butterfly's survival at this location in the Keys very unlikely (Minno 2013, page numbers not applicable). In addition, the Florida leafwing also occurred on Big Pine Key until 2006, within the same locations as extant Bartram's scrub-hairstreak populations. Reestablishment of the Florida leafwing to this island will be a major component in recovering the butterfly. The loss of this portion of the Florida leafwing's range will further reduce their overall resiliency to threats and limit their capacity for survival and recovery.

Hydrology has a strong influence on plant distribution in these and other coastal areas (IPCC 2008, p. 57). Such communities typically grade from salt to brackish to freshwater species. From the 1930s to 1950s, increased salinity of coastal waters contributed to the decline of cabbage palm forests in southwest Florida (Williams *et al.* 1999, pp. 2056–2059), expansion of mangroves into adjacent marshes in the Everglades (Ross *et al.* 2000, pp. 9, 12–13), and loss of pine rockland in the Keys (Ross *et al.* 1994, pp. 144, 151–155). Furthermore, Ross *et al.* (2009, pp. 471–478) suggested that interactions between sea level rise and pulse disturbances (e.g., storm surges) can cause vegetation to change sooner than projected based on sea level alone. Alexander (1953, pp. 133–138) attributed the demise of pinelands on northern Key Largo to salinization of the groundwater in response to sea level rise. Patterns of human development will also likely be significant factors influencing whether natural communities can move and persist (IPCC 2008, p. 57; CCSP 2008, p. 7–6).

Drier conditions and increased variability in precipitation associated with climate change are expected to hamper successful regeneration of forests and cause shifts in vegetation types through time (Wear and Greis 2011, p. 58). Climate changes are forecasted to extend fire seasons and the frequency of large fire events throughout the Coastal Plain (Wear and Greis 2011, p. 65). Increases in the scale, frequency, or severity of wildfires could also have severe ramifications on the Florida leafwing and Bartram's scrub-hairstreak, considering their dependence on pine rocklands and general vulnerability due to their reduced population size, restricted range, few colonies, low fecundity, and relative isolation (see *Factor E*).

The ranges of recent projections of global sea level rise (Pfeffer *et al.* 2008, p. 1340; Vermeer and Rahmstorf 2009, p. 21530; Grinsted *et al.* 2010, pp. 469–470; Jevrejeva *et al.* 2010, Global Climate Change Impacts in the United States 2009, pp. 25–26) all indicate substantially higher levels than the projection by the IPCC in 2007, suggesting that the impact of sea level rise on south Florida could be even greater than indicated above. These recent studies also show a much larger difference (approximately 0.9 to 1.2 m (3 to 4 ft)) from the low to the high ends of the ranges, which indicates that the magnitude of global mean sea level rise at the end of this century is still quite uncertain.

Alternative Future Landscape Models

Various model scenarios developed at MIT have projected possible trajectories of future transformation of the south Florida landscape by 2060 based upon four main drivers: Climate change, shifts in planning approaches and regulations, human population change, and variations in financial resources for conservation (Vargas-Moreno and Flaxman 2010, pp. 1–6). The Service used various MIT scenarios in combination with extant and historical Florida leafwing and Bartram's scrub-hairstreak occurrences and remaining hostplant-bearing pine rocklands to predict what may occur to the butterflies and their habitat.

In the best-case scenario, which assumes low sea level rise, high financial resources, proactive planning, and only trending population growth, analyses suggest that the Big Pine Key

population of the Bartram's scrub-hairstreak may be lost or greatly reduced. Based upon the above assumptions, extant butterfly populations on Big Pine Key (Bartram's scrub-hairstreak) and Long Pine Key (Florida leafwing and Bartram's scrub-hairstreak) appear to be most susceptible for future losses, with losses attributed to increases in sea level and human population. In the worst-case scenario, which assumes high sea level rise, low financial resources, a 'business as usual' approach to planning, and a doubling of human population, the habitat at Big Pine Key and Long Pine Key may be lost, with the loss of habitat at Long Pine Key resulting in the complete extirpation of the Florida leafwing. Under the worst-case scenario, pine rockland habitat would remain within both Navy Wells and the Richmond Pine Rocklands, both of which currently retain Bartram's scrub-hairstreak populations. Actual impacts may be greater or less than anticipated based upon high variability of factors involved (e.g., sea level rise, human population growth) and assumptions made.

Everglades Restoration

Projects designed to restore the historical hydrology of the Everglades and other natural systems in southern Florida (collectively known as the Comprehensive Everglades Restoration Plan (CERP)) may produce collateral impacts to extant pine rockland within Long Pine Key. Salvato (2012, pers. comm.) noted substantial flooding of pine rocklands at the gate 11 nature trail in Long Pine Key following Hurricane Isaac (August 2012) and subsequent above-average rainfall in the region. Although Long Pine Key has experienced storm damages in the recent past (Salvato and Salvato 2010a, p. 96), none of the prior activity produced the level (several feet) or duration (more than 2 months) of inundation noted in the aftermath of Isaac. However, by mid-December 2012, Salvato noted no apparent lasting influence on croton health or abundance from the inundation. Sadle (2012, pers. comm.) suggests various CERP projects (C–111 spreader canal; L–31N seepage barrier), specifically the operation of pumps and associated detention areas along the ENP boundary, may influence select portions of eastern Long Pine Key, including pineland croton populations at gate 11. However, Pace (2013, pers. comm.) attributed the pine rockland flooding event of late 2012 more to localized and above-average rainfall patterns than to a change in water management practices. Analysis of the hydrology associated with operation of these CERP-related structures along the Everglades boundary will be conducted following the initial years of operation. However, Service and National Park Service (NPS) biologists realize the need to assess this potential threat.

Conservation Efforts To Reduce the Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

The National Wildlife Refuge System Improvement Act of 1997 and the Fish and Wildlife Service Manual (601 FW 3, 602 FW 3) require maintaining biological integrity and diversity, comprehensive conservation planning for each refuge, and set standards to ensure that all uses of refuges are compatible with their purposes and the Refuge System's wildlife conservation mission. The comprehensive conservation plans (CCP) address conservation of fish, wildlife, and plant resources and their related habitats, while providing opportunities for compatible wildlife-dependent recreation uses. An overriding consideration reflected in these plans is that fish and wildlife conservation has first priority in refuge management, and that public use be allowed and encouraged as long as it is compatible with, or does not detract from, the Refuge System mission and refuge purpose(s). The CCP for the Lower Florida Keys National Wildlife Refuges (NKDR, Key West National Wildlife Refuge, and Great White Heron National Wildlife Refuge) provides a description of the environment and priority resource issues that were considered in developing the objectives and strategies that guide management over the next 15 years. The CCP promotes the enhancement of wildlife populations by maintaining and enhancing a diversity and abundance of habitats for native plants and animals, especially imperiled species that are found only in the Florida Keys. The CCP also provides for obtaining baseline data and monitoring indicator species to detect changes in ecosystem diversity and integrity related to climate change. In the Lower Key Refuges, CCP management objective 11 provides specifically for maintaining and restoring butterfly populations of special conservation concern, including the Bartram's scrub-hairstreak and Florida leafwing butterflies.

As Federal candidates, the Florida leafwing and Bartram's scrub-hairstreak are afforded some protection through sections 7 and 10 of the Act and associated policies and guidelines. Service policy requires candidate species be treated as proposed species for purposes of intra-Service consultations and conferences where the Service's actions on National Wildlife Refuges may affect candidate species. Federal action agencies (e.g., the Service, NPS) are to consider the potential effects of their activities (e.g., prescribed burning, pesticide treatments) to these butterflies and their habitat during the consultation and conference process. Applicants and action agencies are encouraged to consider candidate species when seeking incidental take for other listed species and when developing habitat conservation plans. However, candidate species do not receive the same level of protection that a listed species would under the Act.

The NPS is also currently preparing a revised General Management Plan (GMP) for ENP (Sadle 2013a, pers. comm.). ENP's current Management Plan (initiated in 1979) serves to protect, restore, and maintain natural and cultural resources at the ecosystem level (NPS 2000, p. 10). The current GMP is not regulatory, and its implementation is not mandatory. In addition, this GMP does not specifically address either the Florida leafwing or Bartram's scrub-hairstreak.

Fairchild Tropical Botanic Gardens (FTBG), with the support of various Federal, State, local, and nonprofit organizations, has established the ''Connect to Protect Network.'' The objective of this program is to encourage widespread participation of citizens to create corridors of healthy pine rocklands by planting stepping-stone gardens and rights-of-way with native pine rockland species, and restoring isolated pine rockland fragments. By doing this, FTBG hopes to increase the probability that pollinators can find and transport seeds and pollen across developed areas that separate pine rocklands fragments to improve gene flow between fragmented plant populations and increase the likelihood that these species will persist over the long term. Although this project may serve as a valuable component toward the conservation of pine rockland species, it is dependent on continual funding, as well as participation from private landowners, both of which may vary through time.

Factor B—Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Collection

Rare butterflies and moths are highly prized by collectors, and an international trade exists in specimens for both live and decorative markets, as

well as the specialist trade that supplies hobbyists, collectors, and researchers (Collins and Morris 1985, pp. 155–179; Morris *et al.* 1991, pp. 332–334; Williams 1996, pp. 30–37). The specialist trade differs from both the live and decorative market in that it concentrates on rare and threatened species (U.S. Department of Justice (USDJ) 1993, pp. 1–3; *United States* v. *Skalski et al.,* Case No. CR9320137, U.S. District Court for the Northern District of California (USDC) 1993, pp. 1–86). In general, the rarer the species, the more valuable it is; prices can exceed $25,000 for exceedingly rare specimens. For example, during a 4-year investigation, special agents of the Service's Office of Law Enforcement executed warrants and seized more than 30,000 endangered and protected butterflies and beetles, with a total wholesale commercial market value of about $90,000 in the United States (USDJ 1995, pp. 1–4). In another case, special agents found at least 13 species protected under the Act, and another 130 species illegally taken from lands administered by the Department of the Interior and other State lands (USDC 1993, pp. 1–86; Service 1995, pp. 1–2). Law enforcement agents routinely see butterfly species protected under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) during port inspections in Florida, often without import declarations or the required CITES permits (McKissick 2011, pers. comm.).

In the past, when the Florida leafwing and Bartram's scrub-hairstreak were widespread on Big Pine Key and throughout southern Miami-Dade County, collecting likely exerted little pressure on these butterfly populations. At present, even limited collection from the small, remaining populations could have deleterious effects on reproductive and genetic viability and thus could contribute to their eventual extinction (see Factor E—Effects of Few, Small Populations and Isolation, below). Collection, which is prohibited on conservation lands, could occur (e.g., ENP, NKDR, State or County owned lands) without being detected, because these areas are all not actively patrolled (see *Factor D—The Inadequacy of Existing Regulatory Mechanisms,* below). Similarly, in some areas such as on Big Pine Key, where numerous pine rockland parcels within NKDR are interspersed among residential areas, there is no signage indicating that collection is prohibited (Salvato 2012, pers. comm.). Consequently, the potential for collection of eggs, larvae, pupae, and adult butterflies exists, and such collection could go undetected, despite the protection provided on Federal or other public lands.

We have direct evidence of interest in the collecting, as well as proposed commercial sale, of the Florida leafwing and Bartram's scrub-hairstreak. Salvato (2011, pers. comm.) has also been contacted by several individuals requesting specimens of the Florida leafwing, as well as information regarding locations where both butterflies may be collected in the field. Salvato (2012, pers. comm.) observed several individuals collecting butterflies at Navy Wells during 2005, including times when Bartram's scrub-hairstreak was present at this site.

We are also aware of multiple Web sites that offer or have offered specimens of south Florida butterflies for sale that are candidates for listing under the Act (Minno 2009, pers. comm.; Nagano 2011, pers. comm.; Olle 2011, pers. comm.). Until recently, one Web site offered male and female Florida leafwing specimens for €110.00 and €60.00 (euros), respectively (approximately $144 and $78). It is unclear from where the specimens originated or when they were collected, but this butterfly is now mainly restricted to ENP where collection is prohibited. The same Web site currently offers specimens of Bartram's scrub-hairstreak for €10.00 ($13). It is unclear from where these specimens originated or when they were collected. The hairstreak can be found on private lands on Big Pine Key and perhaps locally within Miami-Dade County. However, given that the majority of known populations of both butterflies now occur within protected Federal, State, and county lands, it is possible that some specimens are being poached. Alternatively, Calhoun (2013, pers. comm.) suggests that many specimens of the Florida leafwing and Bartram's scrub-hairstreak offered from sale online or elsewhere may come from older collections, as opposed to from poaching activities on conservation lands.

Scientific Research

Some techniques (e.g., capture, handling) used to understand or monitor the leafwing and hairstreak butterflies have the potential to cause harm to individuals or habitat. Visual surveys, transect counts, and netting for identification purposes have been performed during scientific research and conservation efforts with the potential to disturb or injure individuals or damage habitat. Mark-recapture, a common method used to determine population size, has been used by some researchers to monitor Florida leafwing and Bartram's scrub-hairstreak populations (Emmel *et al.* 1995, p. 4; Salvato 1999, p. 24). This method has received some criticism. While mark-recapture may be preferable to other sampling estimates (e.g., count-based transects) in obtaining demographic data when used in a proper design on appropriate species, such techniques may also result in deleterious impacts to captured butterflies (Mallet *et al.* 1987, pp. 377–386; Murphy 1988, pp. 236–239; Haddad *et al.* 2008, pp. 929–940).

Although effects may vary depending upon taxon, technique, or other factors, some studies suggest that marking may damage (wing damage) or kill butterflies or alter their behaviors (Mallet *et al.* 1987, pp. 377–386; Murphy 1988, pp. 236–239). Salvato (2012, pers. comm.) ceased using mark-recapture shortly after initiating his long-term leafwing studies when he realized how much the tagging altered from the butterflies' cryptic (camouflage) underside as individuals alit (rested) on pineland foliage. Murphy (1988, p. 236) and Mattoni *et al.* (2001, p. 198) indicated that studies on various lycaenids (small butterflies known as hairstreaks and blues) have demonstrated mortality and altered behavior as a result of marking. Conversely, other studies have found that marking did not harm individual butterflies or populations (Gall 1984, pp. 139–154; Orive and Baughman 1989, p. 246; Haddad *et al.* 2008, p. 938). Cook (2013, pers. comm.) suggests that marking individuals improves the accuracy of population estimates by reducing sampling error from recounting or extrapolation. Emmel *et al.* (1995, p. 4) conducted mark-recapture studies on the hairstreak and noted no detrimental effects. In addition several individuals were re-encountered (recaptured) during the days following marking. However, researchers currently studying the populations of the endangered Miami blue in the Florida Keys have opted not to use mark-release-recapture techniques due to the potential for damage to this small, fragile lycaenid (Haddad and Wilson 2011, p. 3).

Factor C—Disease or Predation

Florida Leafwing

A number of predators have been documented to impact Florida leafwings throughout their life cycle. One of the earliest natural history accounts of the leafwing (Matteson 1930, p. 8) reported ants as predators of leafwing eggs in Miami. On Big Pine Key, Hennessey and Habeck (1991, p. 17) encountered a pupa of the Florida leafwing being

consumed by ants. Land (2009, pers. comm.) observed a native twig ant (*Pseudomyrmex pallidus*) carrying a young leafwing larva in Long Pine Key. Salvato and Salvato (2012, p. 3) witnessed an older leafwing larva repelling *P. pallidus* attacks while attempting to pupate. Minno (2009, pers. comm.) noted that the larger nonnative graceful twig ant (*Pseudomyrmex gracilis*) is also known to consume immature butterflies and moths. Salvato and Salvato (2012, p. 3) have observed a graceful twig ant attempting to capture a young leafwing larva. Cannon (2006, pp. 7–8) reported high mortality of giant and Bahamian (*P. a. andraemon*) swallowtail eggs from a nonnative species of twig ant (*Pseudomyrmex* spp.) on Big Pine Key, within habitat formerly occupied by the Florida leafwing. Both native and nonnative *Pseudomyrmex* ants are abundant within Long Pine Key and are frequently encountered patrolling the racemes of pineland croton. Forys *et al.* (2001, p. 257) found high mortality among immature giant swallowtails (*Papilio cresphontes*) from imported red fire ant (*Solenopsis invicta*) predation in experimental trials and suggested other butterflies in southern Florida might also be influenced.

Additional predators of immature Florida leafwings include spiders (Rutkowski 1971, p. 137; Glassberg *et al.* 2000, p. 99; Salvato and Salvato 2010e, p. 6; 2011, p. 103; 2012c, p. 3), ambush bugs (Salvato and Salvato 2008, p. 324), and possibly mites (Salvato and Salvato 2010e, p. 6). Salvato and Salvato (unpublished data) have examined the bite marks on wings of numerous adults in the field suggesting a variety of birds and lizards are among the predators of this butterfly.

A number of parasites have been documented to impact Florida leafwings throughout their life cycle. Hennessey and Habeck (1991, p. 16) and Salvato and Hennessey (2004, p. 247) noted that leafwing egg mortality within ENP and Big Pine Key from trichogrammid wasp (*Trichogramma* sp.) parasitism ranged from 70 to 100 percent. Salvato and Salvato (2011, p. 2) continually encounter leafwing eggs that have been attacked by trichogrammid wasps, suggesting this wasp remains a consistent parasitoid for the leafwing within ENP.

Caldas (1996, p. 89), Muyshondt (1974, pp. 306–314), DeVries (1987, p. 21), and Salvato and Hennessey (2003, p. 247) each indicated high parasitism rates from tachinid flies for larvae of *Anaea* or similar genera. Hennessey and Habeck (1991, p. 17) and Salvato *et al.* (2009, p. 101) each encountered Florida leafwing larvae within ENP that had been parasitized by *Chetogena scutellaris* (Diptera: Tachinidae). Ongoing studies of leafwing larvae in Long Pine Key have indicated that *C. scutellaris* serves as a consistent mortality factor to the butterfly in this part of its range (Salvato *et al.* 2009, p. 101; Salvato and Salvato 2010a, p. 95). Current studies suggest that leafwing mortality from the fly can vary considerably from year to year, thereby also influencing overall population numbers of the butterfly. In 2011, nearly all leafwing larvae observed to be parasitized by *C. scutellaris,* died prior to pupation. Conversely, in winter of 2012, three of four leafwing larvae observed to be heavily parasitized by the fly were found to successfully pupate and emerge (Salvato and Salvato 2012, p. 3).

Salvato *et al.* (2008, p. 237) observed a biting-midge, *Forcipomyia* (*Microhelea*) *fuliginosa* (Diptera: Ceratopogonidae), feeding on a young Florida leafwing larva within ENP. Ongoing studies of *F.* (*M.*) *fuliginosa* and a second biting midge *F.* (*M.*) *eriophora* (Salvato *et al.* 2012a, p. 232) indicate they consistently parasitize leafwing larvae within Long Pine Key throughout their development.

Salvato and Salvato (2012, p. 1) and Sadle (2013d, pers. comm.) have monitored Florida leafwing immature development in the field for several years at Long Pine Key. To date these studies have measured mortality rates of more than 70 percent for immature leafwing, individuals dying from various parasites, predators, and other factors such as fungal pathogens (Salvato and Salvato 2012, p. 1; Sadle 2013d, pers. comm.). The majority of mortality noted thus far in these studies has occurred in the earliest, immature stages. Caldas (2013, pers. comm.) suggests that, based on the high mortality of immature leafwing, often from natural factors such as parasitism, recovery efforts for these butterflies should be focused on the adult stage, specifically establishing and maintaining additional breeding populations.

Bartram's Scrub-Hairstreak

Native parasites and predators have been documented to impact Bartram's scrub-hairstreaks. Hennessey and Habeck (1991, p. 19) collected an older hairstreak larva on Big Pine Key from which a single braconid wasp emerged during pupation. During 2010, Salvato *et al.* (2012b, p. 113) encountered a hairstreak larva within Long Pine Key that had been parasitized by *C. scutellaris.* These are the only known records for a larval parasitoid on this butterfly. Tracking the fate of hairstreak pupae is extremely difficult because they pupate in the ground litter (Worth *et al.* 1996, p. 63). Collection of other parasitized hairstreak larvae is needed to determine the influence of parasitism on its early stages (Salvato and Hennessey 2004, p. 225). Many immature lycaenids, including those of the endangered Miami blue, demonstrate a symbiotic relationship with ants (Saarinen and Daniels 2006, p. 69; Trager and Daniels 2009, p. 474; Daniels 2013, pers. comm.), as a strategy to ward off predation. However, no such symbiotic relationship between Bartram's scrub-hairstreak larvae and ants has been documented (Salvato 1999, p. 124).

Salvato and Salvato (2010d, p. 71) observed erythraeid larval mite parasites on an adult Bartram's scrub-hairstreak in Long Pine Key. Although mite predation on butterflies is rarely fatal (Treat 1975, pp. 1–362), the role of parasitism by mites in the natural history of the hairstreak requires further study. Salvato and Salvato (2008, p. 324) have observed dragonflies (Odonata) preying on adult hairstreaks. Crab spiders, orb weavers, ants, and a number of other predators discussed as mortality factors for the leafwing have also been frequently observed on croton during hairstreak surveys and may also prey on hairstreak adults and larvae (Salvato and Hennessey 2004, p. 225; Salvato 2012, pers. comm.). NKDR biologists have witnessed nonnative Cuban anoles (*Anolis equestris*) attempting to prey on adult Bartram's scrub-hairstreaks (Anderson 2013, pers. comm.). Minno and Minno (2009, p. 72) also cite nonnative predators such as ants as a major threat to both butterflies.

Factor D—The Inadequacy of Existing Regulatory Mechanisms

Under this factor, we examine whether existing regulatory mechanisms are inadequate to address the threats to the species discussed under the other factors. Section 4(b)(1)(A) of the Act requires the Service to take into account ''those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species. . . .'' In relation to Factor D, we interpret this language to require the Service to consider relevant Federal, State, and Tribal laws, plans, regulations, and other such mechanisms that may minimize any of the threats we describe in threat analyses under the other four factors, or otherwise enhance conservation of the species. We give strongest weight to statutes and their

implementing regulations and to management direction that stems from those laws and regulations. An example would be State governmental actions enforced under a State statute or constitution, or Federal action under statute.

Having evaluated the significance of the threat as mitigated by any such conservation efforts, we analyze under Factor D the extent to which existing regulatory mechanisms are inadequate to address the specific threats to the species. Regulatory mechanisms, if they exist, may reduce or eliminate the impacts from one or more identified threats. In this section, we review existing State and Federal regulatory mechanisms to determine whether they effectively reduce or remove threats to the Florida leafwing and Bartram's scrub-hairstreak butterflies.

Federal

Existing Federal regulatory mechanisms that could provide some protection for the Florida leafwing and Bartram's scrub-hairstreak butterflies include: (1) The National Park Service Organic Act and its implementing regulations; (2) the National Wildlife Refuge System Administration Act (16 U.S.C. 668dd–ee) as amended, and the Refuge Recreation Act (16 U.S.C. 460k–460k–4) and their implementing regulations.

National Park Service (NPS) regulations at 36 CFR 2.1 and 2.2 prohibit visitors from harming or removing wildlife, listed or otherwise, from ENP. In addition, NPS regulation 36 CFR 2.5 prohibits visitors from conducting research or collecting specimens without a permit. Although ENP was not able to provide specific information concerning poaching of butterflies or enforcement of NPS regulations protecting the butterflies and their habitats from harm, the apparent online sales of the butterflies suggests that poaching could be occurring. Insufficient implementation or enforcement could become a threat to the two butterflies in the future if they continue to decline in numbers.

Special Use Permits (SUPs) are issued by the Refuges as authorized by the National Wildlife Refuge System Administration Act (16 U.S.C. 668dd–ee) as amended, and the Refuge Recreation Act. The Service's South Florida Ecological Services Office and NKDR coordinate annually on potential impacts to the Florida leafwing and Bartram's scrub-hairstreak prior to issuance of an SUP to the Florida Keys Mosquito Control District (FKMCD) (see Factor E—Pesticides, below). In addition, as discussed above (Factor A—Conservation Efforts To Reduce the Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range), the CCP for the Lower Key Refuges provides specifically for maintaining and restoring butterfly populations within NKDR, including the Bartram's scrub-hairstreak and Florida leafwing butterflies.

State

Neither the Florida leafwing nor Bartram's scrub-hairstreak butterflies are currently listed by the State of Florida as a protected species under Chapter 68A–27, Rules Relating to Endangered or Threatened Species, so there are no existing State regulations designated to protect them. However, all State-owned property and resources are generally protected from harm in Chapter 62D–2.013(2), and animals are specifically protected from unauthorized collection in Chapter 62D–2.013(5) of the Florida Statutes.

Local

Under Miami-Dade County ordinance (Section 26–1), a permit is required to conduct scientific research (Rule 9) on county environmental lands. In addition, Rule 8 of this ordinance provides for the preservation of habitat within County parks or areas operated by the Parks and Recreation Department. We have no information to suggest that other counties within the range of the leafwing and hairstreak have regulatory mechanisms that provide any protections for these butterflies.

Factor E—Other Natural or Manmade Factors Affecting Its Continued Existence

Effects of Few, Small Populations and Isolation

The Florida leafwing and Bartram's scrub-hairstreak are vulnerable to extinction due to their severely reduced range, reduced population size, lack of metapopulation structure, few remaining populations, and relative isolation. Abundance of the Florida leafwing and Bartram's scrub-hairstreak is not known, but each butterfly is estimated to number in the hundreds, and at times, possibly much lower. Although highly dependent on individual species considered, a population of 1,000 has been suggested as marginally viable for an insect (Schweitzer 2003, pers. comm.). Schweitzer (2003, pers. comm.) has also suggested that butterfly populations of fewer than 200 adults per generation would have difficulty surviving over the long term. In comparison, in a review of 27 recovery plans for listed insect species, Schultz and Hammond (2003, p. 1377) found that 25 plans broadly specified metapopulation features in terms of requiring that recovery include multiple population areas (the average number of sites required was 8.2). The three plans that quantified minimum population sizes as part of their recovery criteria for butterflies ranged from 200 adults per site (Oregon silverspot (*Speyeria zerene hippolyta*)) to 100,000 adults (Bay checkerspot (*Euphydryas editha bayensis*)) (Schulz and Hammond 2003, pp. 1374–1375).

Schultz and Hammond (2003, pp. 1372–1385) used population viability analyses to develop quantitative recovery criteria for insects whose population sizes can be estimated and applied this framework in the context of the Fender's blue (*Icaricia icarioides fenderi*), a butterfly listed as endangered in 2000 due to the threats on the remaining reduced population and limited remaining habitat. They found the Fender's blue to be at high risk of extinction due to agriculture practices, development activities, forestry practices, grazing, roadside maintenance, and commercial Christmas tree farming.

Losses in diversity within populations of the Florida leafwing and Bartram's scrub-hairstreak may have already occurred (Salvato 2012, pers. comm.). The leafwing and hairstreak have been extirpated from several locations where they were previously recorded (Baggett 1982, pp. 78–81; Salvato and Hennessey 2003, p. 243; 2004, p. 223). Initially described from Brickell Hammock in Coral Gables, Florida (present day Vizcaya Museum and Gardens), in the 1940s (Salvato 2012, pers. comm.), mainland populations of the leafwing have subsequently retreated with the loss, fragmentation, and degradation of native pine rocklands throughout Miami-Dade County (Baggett 1982, pp. 78–81; Salvato and Hennessey 2003, p. 243). At present, the leafwing is extant only within ENP, and ongoing surveys suggest the butterfly actively disperses throughout the Long Pine Key region of the Park (Salvato and Salvato 2010a, p. 91; 2010c, p. 139). Once locally common at Navy Wells and the Richmond Pine Rocklands (which occur approximately 8 and 27 km (5 and 17 mi) to the northeast of ENP, respectively), leafwings are not known to have bred at either location in more than 25 years (Salvato and Hennessey 2003, p. 243; Salvato 2012, pers. comm.). In the lower Florida Keys, the leafwing had maintained a stronghold for many decades on Big Pine Key, within NKDR, until 2006 when that

population disappeared due to a variety of factors (Salvato and Salvato 2010c, pp. 139–140).

The Bartram's scrub-hairstreak is extant within ENP, Navy Wells, Camp Owaissa Bauer, Richmond Pine Rocklands, as well as on Big Pine Key (Baggett 1982, pp. 80–81; Smith *et al.* 1994, pp. 118–119; Salvato and Salvato 2010b, p. 154). However, given the possible limited dispersal abilities of this butterfly, the distance between these sites, (Worth *et al.* 1996, p. 63; Salvato and Hennessey 2004, p. 223) and their fragmentation, it is unlikely there is any genetic exchange between locations.

Another south Florida lycaenid, the Miami blue (*Cyclargus thomasi bethunebakeri*), also appears to have been impacted by relative isolation similar to that of the hairstreak. Over the past decade, this blue butterfly was known from only two contemporary populations, Bahia Honda Key and Key West National Wildlife Refuge. Saarinen (2009, p. 79) suggested that the separation of genetic exchange between these extant populations was only recent (within the past few decades). Despite fluctuations in annual and seasonal population sizes, the Bahia Honda blue population was thought to have retained an adequate amount of genetic diversity to maintain the butterfly. However, as of 2010, the Miami blue population on the island was extirpated.

Extant hairstreak populations are likely experiencing a similar lack of continuity in genetic exchange given their current fragmented distribution. Based upon modeling with a different butterfly species, Fleishman *et al.* (2002, pp. 706–716) argued that factors such as habitat quality may influence metapopulation dynamics, driving extinction and colonization processes, especially in systems that experience substantial natural and anthropogenic environmental variability (see *Environmental Stochasticity* below). If only one or a few metapopulations remain, it is absolutely critical that remaining genetic diversity and gene flow are retained. Conservation decisions to augment or reintroduce populations should not be made without careful consideration of habitat availability, genetic adaptability, the potential for the introduction of maladapted genotypes, and other factors (Frankham 2008, pp. 325–333; Saarinen *et al.* 2009, p. 36; See Factors A–D above).

In general, isolation, whether caused by geographic distance, ecological factors, or reproductive strategy, will likely prevent the influx of new genetic material and can result in a highly inbred population with low viability or fecundity (Chesser 1983, p. 68). Natural fluctuations in rainfall, hostplant vigor, or predation may weaken a population to such an extent that recovery to a viable level would be impossible. Isolation of habitat can prevent recolonization from other sites and result in extinction. The leafwing and hairstreak are restricted to one (leafwing) or a few small (hairstreak) localized populations. The extent of habitat fragmentation makes these butterflies vulnerable to extinction.

Environmental Stochasticity

The climate of southern Florida and the Florida Keys is driven by a combination of local, regional, and global events, regimes, and oscillations. There are three main ''seasons'': (1) The wet season, which is hot, rainy, and humid from June through October, (2) the official hurricane season that extends 1 month beyond the wet season (June 1 through November 30) with peak season being August and September, and (3) the dry season, which is drier and cooler from November through May. In the dry season, periodic surges of cool and dry continental air masses influence the weather with short-duration rain events followed by long periods of dry weather.

According to the Florida Climate Center, Florida is by far the most vulnerable State in the United States to hurricanes and tropical storms (*http://coaps.fsu.edu/climate_center/tropicalweather.shtml*). Based on data gathered from 1856 to 2008, Klotzbach and Gray (2009, p. 28) calculated the climatological and current-year probabilities for each State being impacted by a hurricane and major hurricane. Of the coastal States analyzed, Florida had the highest climatological probabilities, with a 51 percent probability of a hurricane and a 21 percent probability of a major hurricane over a 52-year time span. Florida had a 45 percent current-year probability of a hurricane and an 18 percent current-year probability of a major hurricane (Klotzbach and Gray 2009, p. 28). Given the Florida leafwing and Bartram's scrub-hairstreaks' low population sizes and few isolated occurrences within locations prone to storm influences, these butterflies are at substantial risk from hurricanes, storm surges, or other extreme weather. Depending on the location and intensity of a hurricane or other severe weather event, it is possible that the leafwing and hairstreak could become locally extirpated or extinct as a result of one event.

Other processes to be affected by climate change include temperatures, rainfall (amount, seasonal timing, and distribution), and storms (frequency and intensity). Temperatures are projected to rise from 2 °C to 5 °C (3.6 °F to 9 °F) for North America by the end of this century (IPCC 2007, pp. 7–9, 13). Based upon modeling, Atlantic hurricane and tropical storm frequencies are expected to decrease (Knutson *et al.* 2008, pp. 1–21). By 2100, hurricane frequency should decrease by 10 to 30 percent, with a 5 to 10 percent wind increase. This anticipated result is due to more hurricane energy available for intense hurricanes. However, hurricane frequency is expected to drop because more wind shear will impede initial hurricane development. In addition to climate change, weather variables are extremely influenced by other natural cycles, such as El Niño Southern Oscillation with a frequency of every 4 to 7 years, solar cycle (every 11 years), and the Atlantic Multi-decadal Oscillation. All of these cycles influence changes in Floridian weather. The exact magnitude, direction, and distribution of all of these changes at the regional level are difficult to project.

The Florida leafwing and Bartram's scrub-hairstreak have adapted over time to the influence of tropical storms and other forms of adverse weather conditions (Minno and Emmel 1994, p. 671; Salvato and Salvato 2007, p. 154). However, given the substantial reduction in the historical range of these butterflies in the past 50 years, the threat and impact of tropical storms and hurricanes on their remaining populations is much greater than when their distribution was more widespread (Salvato and Salvato 2010a, p. 96; 2010b, p. 157; 2010c, p. 139).

During late October 2005, Hurricane Wilma caused substantial damage to the pine rocklands of northwestern Big Pine Key (Salvato and Salvato 2010c, p. 139), specifically within the Watson Hammock region of NKDR, the historical stronghold for the Florida leafwing on the island. In historical instances when leafwing and hairstreak population numbers were larger on Big Pine, such as following Hurricane Georges in 1998, these butterflies appeared able to recover soon after a storm (Salvato and Salvato 2010c, p. 139). In ENP, where leafwing and hairstreak densities remained stable, these butterflies were minimally affected by the 2005 hurricane season (Salvato and Salvato 2010a, p. 96, 2010b, p. 157). However, for the leafwing, given its substantial decline on Big Pine Key prior to Wilma, it is possible that the impact of this storm

served to further hinder and reduce extant populations of the butterfly on the island (Salvato and Salvato 2010c, p. 139).

Environmental factors have likely impacted both butterflies and their habitat within their historical and current ranges. For example, unusually cold temperatures were encountered throughout southern Florida during the winters of 2009 and 2010. Sadle (2009, pers. comm.) noted frost damage on croton at ENP on Long Pine Key in late 2009, but observed living larvae earlier that year, when temperatures were at or barely above freezing (2.2 °C; 36 °F) and frost was on the ground. Frost in winter 2010 resulted in substantial dieback of native plants, including damage and widespread defoliation of the croton in Long Pine Key (Sadle 2010, pers. comm.; Land 2010, pers. comm.; Hallac *et al.* 2010, pp. 2–3). Fifty percent of the individual leafwing larvae were impacted by the cold and observed to be dead or without nearby food supplies within Long Pine Key (Hallac *et al.* 2010, p. 3). Although Salvato and Salvato (2011, p. 2) did not record increased butterfly larval mortality on their survey sites in ENP during early 2010, they did encounter larvae on frost-killed plants and indicated that those larvae unable to successfully reach healthier adjacent hostplants likely perished.

During late 2010, Salvato and Salvato (2011, p. 2) noted increased larval leafwing mortality on their survey sites due to a number of factors, including cold. Sadle (2011, pers. comm.) also observed significant leaf and stem damage to croton during the same time period. A single dead leafwing larva was observed on a frost-damaged croton plant, though it is unclear if the mortality was a direct or indirect consequence of the freezing temperatures (Sadle 2011, pers. comm.). Salvato and Salvato (2011, p. 2) examined several (n = 4) dark, apparently frozen leafwing larvae during this time period, but later determined these had likely been killed from tachinid fly parasitism prior to the freeze. Sadle (2011, pers. comm.) and Salvato and Salvato (2011, p. 2) noted living larvae following the late 2010 freeze, largely in areas unaffected by the frost. From these observations, Sadle (2011, pers. comm.) suggested that frost damage may produce similar effects to loss of aboveground plant parts that results from fire. It is not clear what the short- or long-term impacts of prolonged cold periods may be on leafwing or hairstreak populations; however, it is likely that prolonged cold periods have some negative impacts on both the butterflies and their hostplant (Sadle 2010, pers. comm.; Land 2010, pers. comm.).

As described above (see *Factor C*), ongoing natural history studies by Salvato and Salvato (2012, p. 1) indicate that the extant leafwing population within Long Pine Key experiences up to 80 percent mortality amongst immature larval stages. A similarly high mortality has been noted for the endangered Schaus swallowtail in southern Florida (Emmel 1997, p. 11). Such high levels of mortality may explain why leafwing population densities vary considerably from year to year. As with the influence of tropical storms, population-level recoveries from high rates of parasitism or other factors at a select location would historically be offset from less-affected adjacent populations. Opportunities for such population-level recovery are now severely restricted (see ''Effects of Few, Small Populations and Isolation'' in this section).

Pesticides

Efforts to control mosquitoes and other insect pests have increased as human activity and population have increased in south Florida. To control mosquito populations, organophosphate (naled) and pyrethroid (permethrin) adulticides are applied by mosquito control districts throughout south Florida. In a rare case in upper Key Largo, another organophosphate (malathion) was applied in 2011 when the number of permethrin applications reached its annual limit. All three of these compounds have been characterized as being highly toxic to nontarget insects by the U.S. Environmental Protection Agency (2002, p. 32; 2006a, p. 58; 2006b, p. 44). The use of such pesticides (applied using both aerial and ground-based methods) for mosquito control presents a potential risk to nontarget species, such as the Florida leafwing and Bartram's scrub-hairstreak.

The potential for mosquito control chemicals to drift into nontarget areas and persist for varying periods of time has been documented. Hennessey and Habeck (1989, pp. 1–22; 1991, pp. 1–68) and Hennessey *et al.* (1992, pp. 715–721) illustrated the presence of mosquito spray residues long after application in habitat of the federally endangered Schaus swallowtail (*Papilio aristodemus ponceanus*), as well as the Florida leafwing, Bartram's scrub-hairstreak, and other imperiled species in both the upper (Crocodile Lake National Wildlife Refuge, North Key Largo) and lower Keys (NKDR). Residues of aerially applied naled were found 6 hours after application in a pineland area that was 750 m (820 yards (yd)) from the target area; residues of fenthion (an adulticide no longer used in the Keys) applied via truck were found up to 50 m (55 yd) downwind in a hammock area 15 minutes after application in adjacent target areas (Hennessey *et al.* 1992, pp. 715–721).

More recently, Pierce (2009, pp. 1–17) monitored naled and permethrin deposition following application in and around NKDR from 2007 to 2009. Permethrin, applied by truck, was found to drift considerable distances from target areas with residues that persisted for weeks. Naled, applied by plane, was also found to drift into nontarget areas but was much less persistent, exhibiting a half-life of approximately 6 hours. To expand this work, Pierce (2011, pp. 6–11) conducted an additional deposition study in 2010 focusing on permethrin drift from truck spraying and again documented low but measurable amounts of permethrin in nontarget areas. In 2009, Bargar (2011, pers. comm.) conducted two field trials on NKDR that detected significant naled residues at locations within nontarget areas on the Refuge that were up to 402 m (440 yd) from the edge of zones targeted for aerial applications. After this discovery, the Florida Key Mosquito Control District recalibrated the on-board model (Wingman©). Naled deposition was reduced in some of the nontarget zones following recalibration (Bargar 2012b, p. 3).

In addition to mosquito control chemicals entering nontarget areas, the toxic effects of mosquito control chemicals to nontarget organisms have also been documented. Lethal effects on nontarget moths and butterflies have been attributed to fenthion and naled in both south Florida and the Florida Keys (Emmel 1991, pp. 12–13; Eliazar and Emmel 1991, pp. 18–19; Eliazar 1992, pp. 29–30). Zhong *et al.* (2010, pp. 1961–1972) investigated the impact of single aerial applications of naled on the endangered Miami blue butterfly larvae in the field. Survival of butterfly larvae in the target zone was 73.9 percent, which was significantly lower than in both the drift zone (90.6 percent) and the reference (control) zone (100 percent), indicating that direct exposure to naled poses significant risk to Miami blue larvae. Fifty percent of the samples in the drift zone also exhibited detectable concentrations, once again exhibiting the potential for mosquito control chemicals to drift into nontarget areas. Bargar (2011, pers. comm.) observed cholinesterase activity depression, to a level shown to cause mortality in the laboratory, in great southern white and Gulf fritillary

butterflies exposed to naled during an application on NKDR in both target and nontarget zones.

In the lower Keys, Salvato (2001, pp. 8–14) suggested that declines in populations of the Florida leafwing were also partly attributable to mosquito control chemical applications. Salvato (2001, p. 14; 2002, pp. 56–57) found relative populations of the Florida leafwing, when extant on Big Pine Key within NKDR, to increase during drier years when adulticide applications over the pinelands decreased, although Bartram's scrub-hairstreak did not follow this pattern. Salvato (2001, p. 14) suggested that butterflies, such as the leafwing, were particularly vulnerable to aerial applications based on their tendency to roost within the pineland canopy, an area with maximal exposure to aerial treatments. Because roosting sites for the Bartram's hairstreak are not well documented, more study is needed to assess their potential exposure. The role of vegetation in limiting exposure is unknown, but could be important when considering that spraying operations are conducted during early morning and late evening hours when, presumably, nontarget butterflies would be occupying roost sites (Anderson 2013, pers. comm.).

Toxicity data on Florida native butterflies exposed to permethrin and naled in the laboratory (Hoang *et al.* 2011, pp. 997–1005) were used to calculate hazard quotients (concentrations in the environment—concentrations causing an adverse effect) in order to assess the risk that concentrations of naled and permethrin found in the field pose to butterflies. A hazard quotient where the environmental concentration is greater than the concentration known to cause an adverse effect (mortality in this case), indicates significant risk to the organism. Environmental exposures for naled and permethrin were taken from Zhong *et al.* (2010, pp. 1961–1972) and Pierce (2009, pp. 1–17), respectively, and represent the highest concentrations of each chemical that were quantified during field studies in the Florida Keys. When using the lowest median lethal concentrations from the laboratory study, the hazard quotients for permethrin and naled indicated potential acute hazards to butterflies. Bargar (2012a, pp. 5–6) also conducted a probabilistic risk assessment using naled deposition values from NKDR and estimated that field-measured naled concentrations did pose a risk to adult butterflies of some species, particularly for species with large surface area to weight ratios.

Based on these studies, it can be concluded that mosquito control activities that involve the use of both aerial and ground-based spraying methods have the potential to deliver pesticides in quantities sufficient to cause adverse effects to nontarget species in both target and nontarget areas. It should be noted that many of the studies referenced above dealt with single application scenarios and examined effects on only one to two butterfly life stages. Under a realistic scenario, the potential exists for exposure to all life stages to occur over multiple applications in a season. In the case of a persistent compound like permethrin where residues remain on vegetation for weeks, the potential exists for nontarget species to be exposed to multiple pesticides within a season (e.g., permethrin on vegetation coupled with aerial exposure to naled).

Spraying practices by the Florida Keys Mosquito Control District (FKMCD) at NKDR have changed to reduce pesticide use over the years. In addition, larvicide treatments to surrounding islands have significantly reduced adulticide use on Big Pine Key, No Name Key, and the Torch Keys since 2003 (FKMCD 2012, p. 11). According to the Special Use Permit issued by the Service, the number of aerially applied naled treatments allowed on NKDR has been limited since 2008 (FKMCD 2012, pp. 10–11).

The Service's Integrated Pest Management (IPM) Policy (569 FW 1) establishes procedures and responsibilities for pest management activities on and off Service lands. These may include (1) preparing pesticide use proposals (PUPs) for approval before applying pesticides; (2) entering pesticide usage information annually into the online IPM and Pesticide Use Proposal System (PUPS) database; (3) conducting Endangered Species Act consultations; and (4) following National Environmental Policy Act policies. Since these butterflies have been on the candidate list, the Service's South Florida Ecological Services Office and NKDR coordinate annually on potential impacts to the Florida leafwing and Bartram's scrub-hairstreak prior to issuance of a PUP to the FKMCD. Based on this consultation, 478 ha (1,180 ac) of the 705 ha (1,741 ac) of pine rockland in the NKDR have been designated no-spray zones by agreement (as of May 2012) between the Service and FKMCD that includes the core habitat used by pine rockland butterflies (Anderson 2012a, pers. comm.; Service 2012, p. 32). In addition, several linear miles of pine rockland habitat within the Refuge-neighborhood interface were excluded from truck spray applications in the most sensitive habitats. These exclusions and buffer zones encompass over 95 percent of extant croton distribution on Big Pine Key, and include the majority of known extant and historical Florida leafwing and Bartram's scrub-hairstreak population centers on the island (Salvato 2012, pers. comm.). However, some areas of pine rocklands within NKDR are still sprayed with naled (aerially applied adulticide), and buffer zones remain at risk from drift. Additionally, private residential areas and roadsides across Big Pine Key are treated with permethrin (ground-based applied adulticide) (Salvato 2001, p. 10). Therefore, the hairstreak and, if extant, the leafwing and their habitat on Big Pine Key may be directly or indirectly (via drift) exposed to adulticides used for mosquito control at some unknown level. Although there is evidence that mosquito control practices may influence butterfly species, limited information currently exists about population-level impacts. Actual impacts to the Florida leafwing and Bartram's scrub-hairstreak from mosquito control are unknown at this time; however, additional research is under way to quantify risk.

In general Long Pine Key in ENP does not appear to be regularly impacted by mosquito control practices, except for the use of adulticides (e.g., Sumithrin (Anvil)) in Park residential areas and campgrounds. Housing areas, maintenance areas, outside work areas for park maintenance staff and contractors, and areas near buildings have been sprayed in the past (Perry 2007, pers. comm.). Spraying occurred within ENP following hurricanes in 2005 (Perry 2008, pers. comm.). Subsequently, however, no spraying has been conducted in or near Long Pine Key. Populations of these butterflies occurring adjacent to and outside ENP in suitable and potential habitat within Miami-Dade County are also vulnerable to the lethal and sublethal effects of adulticide applications. However, mosquito control pesticide use within Miami-Dade County pine rockland areas is limited (approximately 2 to 4 times per year, and only within a portion of proposed critical habitat) (Vasquez 2013, pers. comm.)

In summary, although substantial progress has been made in reducing impacts, the potential effects of mosquito control applications and drift residues remain a threat to both butterflies.

Cumulative Effects From Factors A Through E

The limited distributions and small population sizes of the Florida leafwing and Bartram's scrub-hairstreak make them extremely susceptible to habitat loss, degradation, and modification and other anthropogenic threats. Mechanisms leading to the decline of the Florida leafwing and Bartram's scrub-hairstreak, as discussed above, range from local (e.g., a lack of adequate fire management, fragmentation, poaching), to regional (e.g., development, pesticides), to global influences (e.g., climate change, sea level rise). The synergistic (interaction of two or more components) effects of threats (such as hurricane effects on a species with a limited distribution consisting of just a few small populations) make it difficult to predict population viability. While these stressors may act in isolation, it is more probable that many stressors are acting simultaneously (or in combination) on Florida leafwing and Bartram's scrub-hairstreak populations.

Summary of Biological Status and Threats

Florida Leafwing

The Florida leafwing has been extirpated (no longer in existence) from nearly 96 percent of its historical range; the only known extant population occurs within ENP in Miami-Dade County. Threats of habitat loss and fragmentation, including climatic change (*Factor A*), poaching (*Factor B*), parasitism and predation (*Factor C*), and small population size, restricted range, and influence of chemical pesticides used for mosquito control *(Factor E*), still exist for the only remaining population. Because there is only one small extant population of this butterfly, and limited law enforcement, collection has and continues to be a significant threat to this butterfly. Existing regulatory mechanisms (*Factor D*) are inadequate to reduce these threats. The leafwing may be impacted when pine rocklands are converted to other uses or when lack of fire causes the conversion to habitats that are unsuitable for this butterfly. Because the remaining population is isolated and the butterfly has a limited ability to recolonize historically occupied habitats that are now highly fragmented, it is vulnerable to natural or human-caused changes in its habitats. As a result, impacts from increasing threats, singly or in combination, are likely to result in the extinction of the butterfly as there is no redundancy of populations.

Bartram's Scrub-Hairstreak

The Bartram's scrub-hairstreak has been extirpated from nearly 93 percent of its historical range; only five isolated populations remain on Big Pine Key in Monroe County, Long Pine Key in ENP, and relict pine rocklands adjacent to the Park in Miami-Dade County. All five of these populations are, in part, on protected lands. Threats of habitat loss and fragmentation from lack of fire (*Factor A*), poaching (*Factor B*), disease and predation (*Factor C*), and small population size, restricted range, and influence of chemical pesticides used for mosquito control (*Factor E*) still exist for the remaining populations. Because there are only five small populations of the hairstreak, and limited law enforcement, collection has and continues to be a significant threat to this butterfly. Existing regulatory mechanisms (*Factor D*) are inadequate to protect this butterfly from poaching. Because populations are isolated and the butterfly has a limited ability to recolonize historically occupied habitats that are now highly fragmented, it is vulnerable to natural or human-caused changes in its habitats. The remaining populations become less resilient and are not capable of recovering from the threats. As a result, impacts from increasing threats, singly or in combination, are likely to result in the extinction of the hairstreak.

Both Species

Habitat loss, fragmentation, and degradation, and associated pressures from increased human population are major threats; these threats are expected to continue, placing these butterflies at greater risk. Although efforts are being made to conserve natural areas and apply prescribed burns, the long-term effects of large-scale and wide-ranging habitat modification, destruction, and curtailment will last into the future. Based on our analysis of the best available information, there is no evidence to suggest that vulnerability to collection and risks associated with scientific or conservation efforts will change and, instead, are likely to continue into the future. At this time, we consider predation, parasitism, and disease to be threats to both butterflies due to their current tenuous statuses. We have no information to suggest that vulnerability to these threats will change in the future. Based on our analysis of the best available information, we find that existing regulatory mechanisms, due to their inherent limitations and constraints, are inadequate to address threats to these butterflies throughout their ranges. We have no information to indicate that poaching, inconsistent fires, pesticide use, or habitat loss will be ameliorated in the future by enforcement of existing regulatory mechanisms.

Therefore, we find it reasonably likely that the effects on the Florida leafwing and Bartram's scrub-hairstreak will continue at current levels or potentially increase in the future. Effects of small population size, isolation, and loss of genetic diversity are likely significant threats as well as natural changes to habitat and anthropogenic factors (e.g., pesticides, fire, processes affected by climate change). Collectively, these threats have impacted the butterflies in the past, are impacting these butterflies now, and will continue to impact these butterflies in the future.

Determinations

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the Florida leafwing and Bartram's scrub-hairstreak butterflies. As described in detail above, both butterflies are currently at risk throughout all of their respective ranges due to the immediacy, severity, and scope of threats from habitat destruction and fragmentation, including climatic change and lack of adequate fire management (*Factor A*); poaching (*Factor B*); parasitism and predation (*Factor C*); the inadequacy of existing regulatory mechanisms, including limited enforcement (*Factor D*); and small population size, restricted range, and influence of chemical pesticides used for mosquito control (*Factor E*). These stressors have had profound adverse effects on Florida leafwing and Bartram's scrub-hairstreak populations and the pine rockland habitat. As a result, impacts from increasing threats, singly or in combination, are likely to result in the extinction of these butterflies.

The Act defines an endangered species as any species that is ''in danger of extinction throughout all or a significant portion of its range'' and a threatened species as any species ''that is likely to become endangered throughout all or a significant portion of its range within the foreseeable future.'' We find that the Florida leafwing and Bartram's scrub-hairstreak butterflies are presently in danger of extinction throughout their entire ranges based on the severity and immediacy of threats currently impacting these subspecies. Their overall ranges have been significantly reduced; the remaining habitats and populations are threatened by a variety of factors acting in combination to reduce the overall

viability of these subspecies. The risk of extinction is high because the remaining populations are small and isolated and the potential for recolonization is limited. Therefore, on the basis of the best available scientific and commercial data available, we have determined that the Florida leafwing and Bartram's scrub-hairstreak butterflies meet the definition of endangered in accordance with sections 3(6) and 4(a)(1) of the Act.

Under the Act and our implementing regulations, a species may warrant listing if it is endangered or threatened throughout all or a significant portion of its range. The threats to the survival of these species occur throughout the species' ranges and are not restricted to any particular significant portion of those ranges. Accordingly, our assessment and proposed determination applies to both the species throughout their entire ranges.

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 results in public awareness and conservation by Federal, State, Tribal, and local agencies; private organizations; and individuals. The Act encourages cooperation with the States and requires that recovery actions be carried out for all listed species. The protection required by Federal agencies and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Subsection 4(f) of the Act requires the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The recovery planning process involves the identification of actions that are necessary to halt or reverse the species' decline by addressing the threats to its survival and recovery. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

Recovery planning includes the development of a recovery outline shortly after a species is listed and preparation of a draft and final recovery plan. The recovery outline guides the immediate implementation of urgent recovery actions and describes the process to be used to develop a recovery plan. Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery plan identifies site-specific management actions that set a trigger for review of the five factors that control whether a species remains endangered or may be reclassified to threatened or delisted, and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Recovery teams (comprising species experts, Federal and State agencies, nongovernmental organizations, and stakeholders) are often established to develop recovery plans. When completed, the recovery outline, draft recovery plan, and the final recovery plan will be available on our Web site (*http://www.fws.gov/endangered*), or from our South Florida Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribes, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (e.g., restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands.

Following publication of this final listing rule, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost-share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, under section 6 of the Act, the State of Florida would be eligible for Federal funds to implement management actions that promote the protection and recovery of Florida leafwing and Bartram's scrub-hairstreak butterflies. Information on our grant programs that are available to aid species recovery can be found at: *http://www.fws.gov/grants*.

Please let us know if you are interested in participating in recovery efforts for either or both of these butterflies. Additionally, we invite you to submit any new information on these butterflies whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. When a species is listed, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with the Service.

Federal agency actions within these butterflies' habitat that may require consultation as described in the preceding paragraph include but are not limited to, management and any other landscape-altering activities on Federal lands administered by the Department of Defense, National Park Service, and U.S. Fish and Wildlife Service; construction and maintenance of roads or highways by the Federal Highway Administration; flood insurance and disaster relief efforts conducted by the Federal Emergency Management Agency; and pesticide treatments required by the U.S. Department of Agriculture in the event of emergency pest outbreak.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all endangered wildlife. The prohibitions of section 9(a)(2) of the Act, codified at 50 CFR 17.21, make it illegal for any person subject to the jurisdiction of the United States to take (which includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or to attempt any of these) endangered wildlife within the United States or on the high seas. In addition, it is unlawful to import; export; deliver, receive, carry, transport, or ship in interstate commerce in the course of commercial activity; or sell or offer for sale in interstate or foreign commerce any listed species. It is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to agents of the Service, the National Marine Fisheries Service, other Federal land management agencies, and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered wildlife under certain circumstances. Regulations governing permits are codified at 50 CFR 17.22. With regard to endangered wildlife, a permit must be issued for the following purposes: For scientific purposes, to enhance the propagation or survival of the species, and for incidental take in connection with otherwise lawful activities. There are also certain statutory exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

Our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), is to identify to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. Based on the best available information, the following activities could potentially result in a violation of section 9 of the Act; this list is not comprehensive:

(1) Unauthorized possession, collecting, trapping, capturing, killing, harassing, sale, delivery, or movement, including interstate and foreign commerce, or harming or attempting any of these actions, of the Florida leafwing or Bartram's scrub-hairstreak butterflies (research activities where the Florida leafwing or Bartram's scrub-hairstreak are handled, captured (e.g., netted, trapped), marked, or collected will require authorization pursuant to the Act).

(2) Incidental take of the Florida leafwing or Bartram's scrub-hairstreak without authorization pursuant to section 7 or section 10(a)(1)(B) of the Act.

(3) Sale or purchase of specimens of these taxa, except for properly documented antique specimens at least 100 years old, as defined by section 10(h)(1) of the Act.

(4) Unauthorized destruction or alteration of the Florida leafwing or Bartram's scrub-hairstreak habitat (including unauthorized grading, leveling, plowing, mowing, burning, herbicide spraying, or pesticide application) in ways that kill or injure individuals by significantly impairing these butterflies' essential breeding, foraging, sheltering, or other essential life functions.

(5) Unauthorized use of pesticides or herbicides resulting in take of the Florida leafwing or Bartram's scrub-hairstreak butterflies.

(6) Unauthorized release of biological control agents that attack any life stages of these species.

(7) Unauthorized removal or destruction of pineland croton, the hostplant utilized by the Florida leafwing or Bartram's scrub-hairstreak butterflies, within areas used by the butterflies that result in harm to the butterflies.

(8) Release of nonnative species into occupied Florida leafwing and Bartram's scrub-hairstreak habitat that may displace the butterflies or their native host plants.

Questions regarding whether specific activities would constitute a violation of section 9 of the Act should be directed to the Field Supervisor of the Service's South Florida Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

Required Determinations

National Environmental Policy Act (NEPA; 42 U.S.C. 4321 et seq.)

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the NEPA, need not be prepared in connection with listing a species as an endangered or threatened species under the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes. Neither species occurs on any tribal lands or lands under tribal jurisdiction.

References Cited

A complete list of references cited in this rulemaking is available on the Internet at *http://www.regulations.gov* and upon request from the South Florida Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this proposed rule are the staff members of the South Florida Ecological Services Field Office).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as follows:

PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; 4201–4245; unless otherwise noted.

■ 2. Amend § 17.11(h) by adding entries for ''Butterfly, Bartram's scrub-hairstreak'' and ''Butterfly, Florida leafwing'' to the List of Endangered and Threatened Wildlife in alphabetical order under Insects to read as set forth below:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historical range	Vertebrate population where endangered or threatened	Status	Family	When listed	Critical habitat	Special rules
Common name	Scientific name							
*	*	*	*		*	*		*
INSECTS	.....	.....	.....		.....	.....	.....	.....

Species		Historical range	Vertebrate population where endangered or threatened	Status	Family	When listed	Critical habitat	Special rules
Common name	Scientific name							
*	*	*	*		*	*		*
Butterfly, Bartram's scrub-hairstreak.	Strymon acis bartrami.	U.S.A. (FL)	NA	E	Lycaenidae	843	17.95(i)	NA
*	*	*	*		*	*		*
Butterfly, Florida leafwing.	*Anaea troglodyta floridalis*.	U.S.A. (FL)	NA	E	Nymphalidae	843	17.95(i)	NA
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Dated: July 22, 2014.

Stephen Guertin,

Acting Director, U.S. Fish and Wildlife Service.

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26 CFR Part 301

Awards for Information Relating to Detecting Underpayments of Tax or Violations of the Internal Revenue Laws; Final Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[TD 9687]

RIN 1545–BL08

Awards for Information Relating to Detecting Underpayments of Tax or Violations of the Internal Revenue Laws

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: These regulations provide comprehensive guidance for the award program authorized under Internal Revenue Code (Code) section 7623. The regulations provide guidance on submitting information regarding underpayments of tax or violations of the internal revenue laws and filing claims for award, as well as on the administrative proceedings applicable to claims for award under section 7623. The regulations also provide guidance on the determination and payment of awards, and provide definitions of key terms used in section 7623. Finally, the regulations confirm that the Director, officers, and employees of the Whistleblower Office are authorized to disclose return information to the extent necessary to conduct whistleblower administrative proceedings. The regulations provide needed guidance to the general public as well as officers and employees of the IRS who review claims under section 7623.

DATES: *Effective Date:* These regulations are effective on August 12, 2014.

Applicability Date: Sections 301.7623–1, 301.7623–2, 301.7623–3, and 301.6103(h)(4)–1 apply to information submitted on or after August 12, 2014, and to claims for award under sections 7623(a) and 7623(b) that are open as of August 12, 2014. Section 301.7623–4 applies to information submitted on or after August 12, 2014, and to claims for award under section 7623(b) that are open as of August 12, 2014.

FOR FURTHER INFORMATION CONTACT: Melissa A. Jarboe at (202) 317–5437 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

Section 406 of the Tax Relief and Health Care Act of 2006 (the 2006 Act), Public Law 109–432 (120 Stat. 2922), enacted on December 20, 2006, amended section 7623 of the Code regarding the payment of awards to certain persons who provide information to the IRS relating to the detection of underpayments of tax or the detection and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same. In this preamble, the Treasury Department (Treasury) and the IRS use the phrase ''underpayments of tax and violations of the internal revenue laws'' as a shorthand reference for the range of civil and criminal matters to which information and, in turn, awards may relate under the statute. Section 406 redesignated the existing statutory authority to pay awards at the discretion of the Secretary of the Treasury as section 7623(a), and it added a new provision regarding awards to certain individuals as section 7623(b). Generally, section 7623(b) provides that qualifying whistleblowers will receive an award of at least 15 percent, but not more than 30 percent, of the collected proceeds resulting from the action with which the Secretary proceeded based on the information provided to the IRS by the whistleblower. In off-Code provisions, section 406 also addressed several award program administrative issues and established a Whistleblower Office within the IRS, which operates at the direction of the Commissioner, to analyze information received under section 7623, assign the investigation to the appropriate IRS office, and determine the amount of the award under section 7623(b).

In Notice 2008–4, 2008–1 CB 253 (January 14, 2008) (see § 601.601(d)(2)(ii)(*b*)), Treasury and the IRS provided guidance on filing claims for award under section 7623. In the notice, Treasury and the IRS recognized that the award program authorized by section 7623(a) had been previously implemented through regulations appearing at § 301.7623–1 of the Procedure and Administration Regulations. The Internal Revenue Manual (IRM) provided additional guidance to IRS officers and employees on the award program authorized by section 7623(a). The notice provided that the IRS would generally continue to follow § 301.7623–1 and the IRM provisions for claims for award within the scope of section 7623(a), subject to certain exceptions listed in the notice. The notice also provided, however, that the regulations would not apply to the new award program authorized under section 7623(b). Instead, the notice provided interim guidance applicable to claims for award submitted under section 7623(b).

On March 25, 2008, Treasury and the IRS published Temp. Treas. Reg. § 301.6103(n)–2T, and corresponding proposed regulations, describing the circumstances and process in and by which officers and employees of the Treasury may disclose return information to whistleblowers (and their legal representatives, if any) in connection with written contracts for services relating to the detection of violations of the internal revenue laws or related statutes. Whistleblowers and legal representatives that receive return information pursuant to these regulations are subject to the civil and criminal penalty provisions of sections 7431, 7213, and 7213A for the unauthorized inspection or disclosure of return information. Treasury and the IRS finalized the proposed regulations on March 15, 2011 (the 2011 regulations).

In December 2008, the IRS revised IRM Part 25.2.2, updating policies and procedures concerning the handling of information, processing of claims for awards, and payment of awards under section 7623. The IRS also redelegated the authority to approve section 7623(a) awards to the Director of the Whistleblower Office, thereby promoting consistency across the full range of award decisions. Delegation Order 25–07 (Rev.1) (2008). In July 2010, the IRS further revised IRM Part 25.2.2 to provide detailed instructions to IRS officials and employees on the computation and payment of awards under section 7623 and to describe the administrative procedures applicable to claims for award under section 7623(b). The revised IRM introduced many guidance elements that are developed in these regulations, including definitions of key terms, the whistleblower administrative proceedings, the fixed percentage award framework and criteria for making award determinations, and rules on handling multiple and joint claimants.

On January 18, 2011, Treasury and the IRS published proposed regulations (76 FR 2852) clarifying the definitions of the terms *proceeds of amounts collected* and *collected proceeds* for purposes of section 7623 and providing that the provisions of existing § 301.7623–1(a), concerning refund prevention claims, apply to claims under both section 7623(a) and section 7623(b). The proposed regulations further provided that the reduction of an overpayment credit balance constitutes proceeds of amounts collected and collected proceeds for purposes of section 7623. Treasury and the IRS finalized the proposed regulations on February 22, 2012 (the 2012 regulations).

On December 28, 2012, Treasury and the IRS published proposed regulations

in the **Federal Register** (77 FR 74798) providing comprehensive guidance with respect to section 7623 (the proposed regulations). The proposed regulations provided guidance on issues relating to the award program under section 7623 from the filing of a claim to the payment of an award, focusing on three major elements of the program: (i) The submission of information and filing of claims for award; (ii) the whistleblower administrative proceedings applicable to claims for award under section 7623; and (iii) the computational determination and payment of awards. The proposed regulations also provided definitions of key terms under section 7623 and confirmed that the Director, officers, and employees of the Whistleblower Office are authorized to disclose return information to the extent necessary to conduct whistleblower administrative proceedings. Treasury and the IRS received 859 comments in response to the proposed regulations. Commenters requested a public hearing, which was held on April 10, 2013. At the hearing, Treasury and the IRS received testimony from eight commenters. After consideration of the comments and hearing testimony, Treasury and the IRS made some modifications to the proposed regulations, which are discussed in detail later in this preamble. This Treasury decision adopts the proposed regulations, as modified. These final regulations provide comprehensive guidance for the award program authorized under section 7623.

Summary of Comments and Explanation of Revisions

Over 70 percent of the 859 written comments received were identical form letters. These one-page letters expressed support for the comments of Senator Charles Grassley, which were set out in a January 28, 2013, letter from Senator Grassley to Acting Treasury Secretary Neal Wolin, Acting IRS Commissioner Steven Miller, and Assistant Secretary (Tax Policy) Mark J. Mazur. Two other comments incorporated Senator Grassley's January 28, 2013, letter in its entirety, and several comments offered general support for Senator Grassley's views on the IRS Whistleblower Program. In addition to the comments referencing Senator Grassley's letter or views on the Whistleblower Program, Treasury and the IRS received several substantive comments containing specific recommendations for the final regulations. Treasury and the IRS also received over 30 nearly identical comments expressing concern that the proposed regulations restricted the scope of the Whistleblower Program and awards, prohibited whistleblowers from collecting awards on technical grounds, limited the size of whistleblower awards, and failed to require the IRS to act on whistleblower claims. The issues raised in these comments are addressed in greater detail in the discussion that follows.

Treasury and the IRS also received over a hundred comments that referred generally to a need to protect and support whistleblowers and the IRS's Whistleblower Program. These comments offered no further substantive discussion or specific recommendations with respect to the regulations. Treasury and the IRS, however, considered the general message behind these comments in considering whether changes should be made to the proposed regulations. A few of the comments received suggested that the Chief Counsel, himself, should not be involved in the process of finalizing the regulations due to his professional experience prior to becoming Chief Counsel. After considering these comments, Treasury and the IRS found that the concerns expressed in the comments were unfounded. Accordingly, the Chief Counsel did not recuse himself from the process. Finally, Treasury and the IRS received a few comments that were completely unrelated to the proposed regulations and the IRS Whistleblower Program. These unrelated comments were outside the scope of the regulations and therefore are not discussed further in this preamble or these final regulations.

Information Disclosures in Whistleblower Administrative Proceedings—§ 301.6103(h)(4)–1

Under section 6103(a), returns and return information are confidential, unless an exception applies. Section 6103(h)(4) authorizes the disclosure of returns and return information in administrative or judicial proceedings pertaining to tax administration in certain circumstances. A whistleblower administrative proceeding under section 7623 is an administrative proceeding under section 6103(h)(4). Section 301.6103(h)(4)–1 of the proposed regulations specifically confirmed the authority of the Director, officers, and employees of the Whistleblower Office to disclose return information to the extent necessary to conduct whistleblower administrative proceedings. To minimize the potentially adverse consequences of the disclosure, and possible redisclosure, of return information, the proposed regulation provided that the Whistleblower Office will use confidentiality agreements in section 7623(b) whistleblower award determination administrative proceedings, as well as other safeguards, while still providing meaningful opportunities for whistleblowers to participate in whistleblower administrative proceedings.

In general, the comments received viewed these provisions favorably. One commenter recommended that section 6103 and § 301.6103 be amended to permit greater communication between the IRS and whistleblowers. Treasury and the IRS lack the authority to amend section 6103. Accordingly, the final regulations do not adopt this comment. Instead, in the proposed regulations, Treasury and the IRS took steps to expand the opportunities for communication between the IRS and whistleblowers within the confines of the IRS's existing authority under section 6103. For example, Treasury and the IRS provided for whistleblower administrative proceedings, in part, to increase the IRS's ability to communicate with whistleblowers. Some comments suggested that whistleblower administrative proceedings should begin earlier, and these comments are more fully addressed in the discussion of § 301.7623–3. Treasury and the IRS determined that the proposed regulations struck an appropriate balance among minimizing possible redisclosures of confidential return information, providing meaningful opportunities for claimants to participate in the administrative process, and placing an undue burden on the Whistleblower Office. After consideration of the comments, the proposed regulation under section 6103 is adopted without substantive change.

Submitting Information and Filing Claims for Award—§ 301.7623–1

This final regulation provides guidance on submitting information to the IRS and filing claims for award with the Whistleblower Office. The regulation is intended to clarify the process whistleblowers should follow to be eligible to receive awards under section 7623. The final regulation, in large part, tracks the rules that Treasury and the IRS have previously provided, as set forth in the 2012 regulations, the proposed regulations, Notice 2008–4, and the IRM. The comments received and any changes to proposed § 301.7623–1 are discussed in the sections that follow.

Terminology for Individuals Who Submit Information and Claim an Award

Under section 7623(a), the Secretary possesses the discretionary authority to pay awards for information necessary to detect underpayments of tax or violations of the tax laws. Section 7623(b) further requires the payment of awards to individuals in certain circumstances. The proposed regulations used both the term ''individual'' and the term ''claimant'' in various respects. Generally, the terminology in the proposed regulations was designed to mimic the statute's use of the term ''individual(s).'' One commenter suggested that the final regulations should use the term ''claimant'' throughout and eliminate all references to the term ''individual.'' The final regulations recognize, however, that not all individuals who submit information to the IRS regarding tax non-compliance become award claimants. To achieve consistency with Treas. Reg. § 301.6103(n)–2 and reduce any confusion caused by the use of several terms, Treasury and the IRS changed almost all of the references to ''individual'' or ''claimant'' to ''whistleblower'' in the final regulations. In some instances, however, the final regulations still use the term ''individual'' to mimic the statute. These changes are not intended to be substantive in nature.

List of Ineligible Whistleblowers

Section 7623 does not specifically exclude any whistleblower from filing a claim for award, although awards under section 7623(b) are limited to individuals. Moreover, section 7623(b)(3) requires the Whistleblower Office to deny an award to a whistleblower convicted of a crime arising from the whistleblower's role in planning and initiating the actions that led to the underpayment of tax or violations of the internal revenue laws. The regulations in effect under section 7623 at the time of the 2006 amendments to the statute, however, restricted the eligibility of Federal employees to file claims for award. The 2006 amendments to section 7623 did not address, and thus did not seek to change, the rule of Federal employee ineligibility. In the proposed regulations, the IRS identified as ineligible certain categories of individuals that would have access to return information of third parties by virtue of their relationship with the Federal Government. These categories were identified in Notice 2008–4, and their exclusion was based upon the understanding that such individuals have a pre-existing legal or ethical obligation to disclose any violations of the internal revenue laws. For example, section 7214 of the Code requires ''[a]ny officer or employee of the United States acting in connection with any revenue law of the United States . . . who, having knowledge or information of the violation of any revenue law by any person, or of fraud committed by any person against the United States under any revenue law . . . to report, in writing, such knowledge or information to the Secretary.''

Treasury and the IRS received two comments suggesting that the list of ineligible or excluded claimants included in the proposed regulations was overbroad, and one comment recommending that the proposed regulations should be finalized without change. One commenter suggested that, with respect to State and local government employees, only those that have access to Federal tax return records related to State and local taxpayers should be ineligible. The other commenter suggested that the only whistleblowers excluded from receiving awards under the statute are those convicted of a crime for planning and initiating, and thus the IRS should not identify any ineligible whistleblowers. This commenter also expressed concern that the exclusion of individuals required to disclose (or to not disclose) information under Federal law was too vague and would discourage whistleblowers from submitting information. Finally, the commenter that suggested the proposed regulations should be adopted without change noted that individuals should not be eligible to receive awards after obtaining information in the course of their employment as a Federal employee.

The final regulations address the concerns raised by commenters that the categories of ineligible claimants in the proposed regulations were too broad. Treasury and the IRS agree with the commenters that the categories of ineligible whistleblowers should be narrowly defined. Accordingly, in finalizing the regulations, Treasury and the IRS removed State and local government employees and members of a Federal or State body or commission from the categories of ineligible whistleblowers. Treasury and the IRS determined that the final regulations should continue to reflect the longstanding statutory, regulatory, and contractual requirements that Federal employees and contractors have a duty to disclose information and are prohibited from seeking an award for the performance of such duty. Similarly, under the final regulations, an individual otherwise required to disclose information or precluded from disclosing information by Federal law or regulation is not eligible to claim an award for providing such information. This reflects Treasury and the IRS's determination that section 7623 does not incentivize conduct that is either already mandated by, or contrary to, Federal law.

Submission of Information

Any individual may submit information to the IRS regarding suspected underpayments of tax or violations of the internal revenue laws. The proposed regulations provided that the information submitted must be specific and credible if the individual intends to submit a claim for award based on the information submitted. In this regard, the proposed regulations provided that a whistleblower submitting a claim should identify a person and describe and document the facts supporting the whistleblower's belief that the person owes taxes or violated the tax laws.

One commenter suggested that the proposed regulations improperly required whistleblowers to identify a specific taxpayer in the submission of information. The proposed regulations did not, however, require that a whistleblower's information identify a taxpayer by name. The IRS and the Whistleblower Office must be able to identify a taxpayer in order to proceed with an action and, ultimately, to determine an award. The more identifying information that a whistleblower includes in the submission, the more likely it is that the submission will be considered to identify a taxpayer. Treasury and the IRS determined that the concerns raised in the comment are adequately addressed by the language in the proposed regulations. Accordingly, these regulations retain the rule from the proposed regulations.

Penalty of Perjury Requirement

To form the basis for an award under section 7623(b), section 7623(b)(6)(C) requires that information be submitted under penalty of perjury. The proposed regulations required any claim for award to be accompanied by an original signed declaration under penalty of perjury that the application is true, correct, and complete to the best of the applicant's knowledge. One commenter suggested that the final regulations should expressly address how the penalty of perjury declaration applies to information submitted by a whistleblower subsequent to the initial

claim for award. In general, the IRS requires a penalty of perjury declaration only as part of the initial claim for award. In most cases, the IRS does not require that a whistleblower reaffirm the original penalty of perjury declaration and, instead, the IRS deems the original declaration to cover any subsequent information submitted by the whistleblower. This is reflected in the Instructions to the Form 211, ''Application for Award for Original Information,'' which provide that supplemental submissions of information need not be submitted as a claim for award with the corresponding penalty of perjury declaration. In some cases, however, the IRS may ask a whistleblower to reaffirm the penalty of perjury declaration with respect to a subsequent information submission. In those cases, the whistleblower will be given an opportunity to—and must—reaffirm the penalty of perjury declaration for the information to be considered submitted under penalty of perjury. Treasury and the IRS anticipate that these cases will be rare, and additional information submitted after a claim for award may be addressed by the IRS on a case-by-case basis. Accordingly, these regulations retain the rule from the proposed regulations.

Request for Assistance

The 2006 Act provided that the IRS may ask for assistance from whistleblowers. As noted, in the 2011 regulations, Treasury and the IRS provided final rules under section 6103(n) describing the circumstances and process in and by which officers and employees of the Treasury may disclose return information to whistleblowers (and their legal representatives, if any) in connection with written contracts for services and assistance. The proposed regulations clarified that the Whistleblower Office, the IRS, or the IRS Office of Chief Counsel may request assistance from a whistleblower or the whistleblower's representative. The proposed regulations provided that such assistance shall be at the direction or control of the Whistleblower Office, the IRS, or the IRS Office of Chief Counsel. The proposed regulations also referred to Treas. Reg. § 301.6103(n)–2 for rules regarding written contracts between the IRS and whistleblowers or their representatives.

Several commenters suggested that the regulations should do more to improve and expand communications between the IRS and whistleblowers. Many commenters specifically addressed the IRS's use of section 6103(n) contracts. Commenters often expressed concern that the IRS does not effectively utilize section 6103(n) contracts and suggested that the IRS should make better use of its section 6103(n) contract authority to facilitate increased communication with, and participation by, whistleblowers. One commenter suggested that the regulations should clarify when the IRS will use its contract authority and establish protocols for its use. This commenter also suggested that the regulations could do more to clarify when and what type of information can be shared with the whistleblower so that he or she may assist the IRS. Another commenter suggested that the regulations should require the Whistleblower Office and the IRS Office of Chief Counsel to request assistance by conducting a debriefing of the whistleblower in all cases.

As noted, returns and return information are confidential pursuant to section 6103, unless an exception applies. In a 2012 memorandum to the IRS Operating Divisions, the IRS stressed the use of methods of communicating with whistleblowers within the framework of section 6103. IRS Whistleblower Program Memorandum (Deputy Commissioner for Services and Enforcement Steven T. Miller, June 20, 2012) (the 2012 memo). The 2012 memo recognized the value of whistleblower debriefings and stated the expectation that debriefings will be the rule, not the exception. The IRS routinely debriefs whistleblowers to clarify and develop the information provided. Although not discussed in the 2012 memo, the IRS has also relied, and will continue to rely, on section 6103(k)(6) to disclose information to whistleblowers when the disclosure is necessary to obtain information from the whistleblower. These investigatory disclosures are a routine element of the IRS's enforcement activities. The 2012 memo also noted that section 6103(n) contracts may be used when disclosure of taxpayer information is necessary to obtain a whistleblower's expertise into complex technical or factual issues. Although the IRS's need for this level of expertise into complex issues arises less commonly than the need for section 6103(k)(6) investigative disclosures, the IRS Operating Divisions will use this tool as needed. Specific issues regarding the use of section 6103(n) contracts by the IRS and whistleblowers are beyond the scope of these regulations. These regulations do not specifically address section 6103(n) contracts because they are already provided for in regulations under section 6103, as appropriately reflected by the cross reference contained in the proposed regulations and these regulations. Nevertheless, debriefings, section 6103(k)(6) disclosures, and section 6103(n) contracts are not the only methods by which the IRS communicates with whistleblowers. Later in the life cycle of the underlying tax matter, the IRS Office of Chief Counsel may, under section 6103(h)(4), seek assistance from a whistleblower in litigating a case. For example, the IRS Office of Chief Counsel has relied on, and will continue to rely on, whistleblowers as potential witnesses in Tax Court cases, but only as needed and only following appropriate consideration of whistleblower confidentiality concerns, as discussed later in this preamble. Finally, as discussed both earlier and later in this preamble, these regulations provide whistleblower administrative proceedings that will, in many cases, enable two-way communications with whistleblowers before the IRS makes the award determination.

Confidentiality of Whistleblowers

Section 7623 does not provide any protections regarding the identification of whistleblowers. Treasury and the IRS, however, are very sensitive to the legitimate concerns whistleblowers have with protecting their identities. In the Administration's Fiscal Year 2014 and 2015 Revenue Proposals, Treasury recommended amending section 7623 to explicitly protect whistleblowers from retaliatory actions, consistent with the protections currently available to whistleblowers under the False Claims Act. Moreover, existing Treas. Reg. § 301.7623–1(e) provides that ''[n]o unauthorized person will be advised of the identity of an informant.'' The proposed regulations reaffirmed the commitment of Treasury and the IRS to safeguard the identity of whistleblowers who submit information under section 7623. Under the proposed rules, the IRS reaffirmed that it will use its best efforts to: (i) Prevent the disclosure of a whistleblower's identity; and (ii) notify a whistleblower prior to any disclosure. One commenter suggested that the final regulations should go further and require notification to a whistleblower prior to any disclosure. Another commenter suggested that whistleblowers should be allowed to opt out of the informant privilege. This commenter suggested that allowing the whistleblower to opt out of the informant's privilege would decrease the amount of time for an administrative action because it would allow the IRS to use and rely upon documents provided by the whistleblower, rather than

seeking to independently gather the documents.

The informant privilege allows the Government to withhold the identity of a person that provides information about violations of law to those charged with enforcing the law. The informant privilege is held by the Government, not the informant, and is not an absolute privilege. There may be instances when, after careful deliberation and high-level IRS approval, the disclosure of the identity of a whistleblower may be determined to be in the best interests of the Government. Nonetheless, in such cases, the IRS first carefully considers and weighs the potential risks to the whistleblower and the Government's need for the disclosure, and looks for alternative solutions.

The final regulations reflect the determination of Treasury and the IRS that preventing the disclosure of whistleblower information is of critical importance not only to whistleblowers, but also to the IRS's whistleblower program. The IRS has implemented a multi-level review process to ensure that the identities of whistleblowers are disclosed only after careful consideration. The IRS will continue to use its best efforts to prevent disclosures and to provide notification prior to any disclosure. The IRS recognizes, however, that despite its best efforts, it may not always be possible to provide such notification.

In some instances, whistleblowers have consented to the disclosure of their identities in the hope that the IRS will proceed with a tax case more quickly. Even when a whistleblower consents to disclosure, however, disclosing the whistleblower's identity may not be in the Government's best interest. Moreover, a whistleblower cannot unilaterally opt out of the informant privilege because the privilege is held by the Government. Finally, it is the longstanding practice of the IRS to justify tax adjustments through information obtained independently of the whistleblower. This enables the IRS to better defend tax adjustments in court and supports the IRS's sound administration of the tax case. As such, the IRS will act on specific and credible information regarding tax compliance issues when that information can be corroborated, as part of a balanced tax enforcement program, and will not forgo this process at the whistleblower's request to expedite a potential award. Accordingly, these regulations retain the rule from the proposed regulations.

Electronic Claim Filing

Section 7623 do not require the submission of information or claims for an award to be in a particular format. To claim an award for information provided to the IRS, the proposed regulations provided that a whistleblower must file a formal claim for award by completing and sending Form 211, ''Application for Award for Original Information,'' to the Internal Revenue Service, Whistleblower Office, at the address provided on the form, or by complying with other claim filing procedures as may be prescribed by the IRS in other published guidance. Currently, a whistleblower cannot file a Form 211 electronically. The proposed regulations solicited comments on whether electronic claim filing would be appropriate and beneficial to whistleblowers, and if so, what features should be included in an electronic claim filing system.

Treasury and the IRS received several comments suggesting that such procedures would be beneficial, but some commenters expressed concern with how an electronic claim filing system would be implemented. Based upon the varied comments received, Treasury and the IRS have decided not to include specific guidance on electronic claim filing in the final regulations. The final regulations adopt the proposed rule and require whistleblowers to file a formal claim for award by completing and sending a Form 211 to the IRS. The language in the final regulations does, however, allow for the IRS to specify an alternative submission method pursuant to additional guidance. If Treasury and the IRS implement electronic claim filing, the comments received on the proposed regulations regarding implementation will be considered and addressed in future guidance.

Definitions of Key Terms—§ 301.7623–2

These final regulations define several key terms for purposes of determining awards under section 7623 and the corresponding regulations. These terms include: *action, administrative action, judicial action, proceeds based on, related action, collected proceeds, amount in dispute,* and *gross income.* Two other key terms, *planned and initiated* and *final determination of tax,* are described and defined in § 301.7623–4 of these regulations. The definitions are intended to facilitate the IRS's administration of the whistleblower award program in a manner that is consistent with the statutory language. As described later in this preamble, several of the definitions, including the definition of the terms *proceeds based on, related action,* and *collected proceeds,* build on definitions contained in Notice 2008–4, the 2012 regulations, and the IRM. The comments received and any changes to the definitions of these terms are addressed in the sections that follow.

Administrative Action

The application of section 7623(b) hinges on whether the IRS proceeds with an action, and more specifically, an administrative or judicial action, against a taxpayer. Section 7623 does not, however, define the terms *action, judicial action,* or *administrative action.* The proposed regulations defined an administrative action as all, or a portion of, an IRS civil or criminal proceeding against a person that may result in collected proceeds. Examples of an administrative action include an examination, a collection proceeding, a status determination proceeding, or a criminal investigation. And, as noted, under the proposed regulations, an administrative action can be a discrete portion of an IRS civil proceeding. For example, the examination of a single issue, within a multi-issue examination, can constitute an administrative action. In such a case, determinations such as whether the IRS proceeded with the action based on the whistleblower's information or the extent of the whistleblower's substantial contribution to the action will be made by reference to just the discrete and relevant portion of the examination to which the information provided relates.

One commenter suggested that an administrative action should begin with the filing of a claim for an award. Although the commenter made this suggestion in the context of the definition of ''administrative action,'' Treasury and the IRS believe that it relates to the whistleblower award administrative proceedings discussed later in this preamble. Some commenters suggested that the definition of the term ''administrative action'' should be broader. More specifically, one commenter suggested that the list of examples should include making an assessment and another commenter suggested that the term ''administrative action'' should encompass all actions taken by the IRS to initiate taxpayer compliance by any means. Finally, commenters expressed concern that a whistleblower would not be entitled to an award when the whistleblower's information related to an issue that was already being examined, but resulted in the IRS making a greater assessment than the IRS would have made without the whistleblower's information. Commenters raised a similar concern in discussing the proposed regulations' definition of the term *proceeds based*

on. This concern is addressed in that section of this preamble.

Off-code provisions of the 2006 Act explicitly provide that the IRS will analyze information received under section 7623 and investigate the matter. Given that this requirement must be satisfied by the IRS with respect to all information provided, it follows that the techniques and tools used by the IRS to do the analysis and investigation of the whistleblower's claim cannot in and of themselves provide a basis—they cannot be the administrative action—that supports an award determination. Nonetheless, if a whistleblower's information contributes to the IRS's use of these techniques and tools, for example, the issuance of a summons or Information Document Request, and these intermediate steps result in an administrative action, as defined in the regulations, then the IRS will determine whether it proceeded with that resulting administrative action based on the information, as described further in the discussion of the definition of *proceeds based on.* Similarly, an assessment is a bookkeeping entry employed by the IRS to reflect a determination that results from an administrative action within the meaning of section 7623. Because an assessment merely reflects the determination that results from an administrative action, it is not appropriate to include the making of an assessment in the definition of the term administrative action. Essentially, the definition of administrative action is broadly analogous to the definition of judicial action, as each term focuses on a case against a taxpayer that may result in collected proceeds, rather than on any particular tools or techniques used to conduct the case. After considering the comments on the definition of *administrative action,* the definition in the proposed regulations is adopted without change. Treasury and the IRS did, however, address some of the concerns raised by the comments on this definition through changes to the definition of *proceeds based on,* as described in the discussion that follows.

Proceeds Based On

Section 7623(b) provides that if the Secretary proceeds with an administrative or judicial action based on the information provided by a whistleblower, then the whistleblower will receive an award from the collected proceeds resulting from the action (including any related actions). Under the proposed regulations the IRS *proceeds based on* information provided by an individual only when the IRS: (i) Initiates a new action; (ii) expands the scope of an ongoing action; or (iii) continues to pursue an ongoing action, that the IRS would not have initiated, expanded the scope of, or continued to pursue, respectively, but for the information provided by the individual. The IRS does not proceed based on when the IRS merely analyzes the information provided by the individual and investigates the matter.

Commenters to the proposed regulations generally expressed concern that the regulatory language narrowed the scope of the statute by limiting the instances in which the Whistleblower Office will determine that the IRS proceeded based on a whistleblower's information. Some commenters disagreed with the use of the words ''only'' and ''but for'' in the proposed regulations' definition and suggested removing this language. One commenter recommended removing the last sentence in the proposed regulations' definition—''The IRS does not proceed based on when the IRS merely analyzes the information provided by the individual and investigates the matter.'' Some commenters suggested that the IRS should be considered to proceed based on information anytime that the IRS ''uses'' the information, or more specifically, anytime the information is transmitted by the Whistleblower Office to an IRS field office for further investigation. Some commenters suggested that the definition needed to specifically include instances when a whistleblower's information materially or substantially assists in or significantly contributes to the IRS's detection and recovery of tax. As noted in the discussion of the definition of *administrative action,* some commenters expressed concern that a whistleblower would not be entitled to an award when the whistleblower's information related to an issue that was already being examined or was included in a general audit plan, but resulted in the IRS making a greater assessment than the IRS would have made without the whistleblower's information. Similarly, some commenters expressed concern that under the proposed regulations' definition, the IRS could use a whistleblower's information but assert that it would have acted without the information and therefore determine that the IRS did not proceed based on the information.

As noted, the off-Code provisions of the 2006 Act require the IRS to analyze the information provided by the whistleblower (in the Form 211 and otherwise, such as through debriefs) and investigate the matter. As a result, it follows that for the IRS to proceed based on the information provided, the IRS must do more than this analysis or investigation. Therefore, Treasury and the IRS retained this explanatory language in the final regulations. Treasury and the IRS recognize, however, that, by listing exclusive actions taken by the IRS, the proposed regulations created the appearance that individuals who provide information that is not only used by the IRS, but is in fact critical to sustaining tax adjustments, might not receive awards. Accordingly, these final regulations adopt a general standard for when the IRS proceeds based on information provided—when the information substantially contributes to the action—and the list of exclusive actions are cited as examples of when the information provided may substantially contribute to an action. In addition, the final regulations remove the word ''only'' from the definition. Accordingly, under the final regulations, the Whistleblower Office must determine when the information provided substantially contributed to the underlying action, and this determination will depend on the facts and circumstances of each individual case. Nevertheless, the final regulations provide additional examples to clarify the operation of the rule. These examples illustrate that the whistleblower's information substantially contributes to the underlying action if it leads to an examination, an expansion of an issue already being examined, an expansion of the examination to another year, or an additional adjustment. The examples also illustrate that the whistleblower's information does not substantially contribute to the underlying action if that information merely supports information obtained independently by the IRS.

Related Action

Under section 7623(b), when the IRS proceeds with an action based on a whistleblower's information, the whistleblower receives an award from the collected proceeds resulting from the action (including any related actions). Under the proposed regulations the term *related action* was limited to: (i) A second or subsequent action against the person(s) identified in the information provided and subject to the original action if, in the second or subsequent action, the IRS proceeds based on the specific facts described and documented in the information provided; and (ii) an action against a person other than the person(s) identified in the information provided and subject to the original action if: (A) The other, unidentified person is directly related to the person identified

in the information provided; (B) the facts relating to the underpayment of tax or violations of the internal revenue laws by the other person are substantially the same as the facts described and documented in the information provided (with respect to the person(s) subject to the original action); and (C) the IRS proceeds with the action against the other person based on the specific facts described and documented in the information provided. Under the proposed regulations an unidentified person was directly related to the person identified in the information provided if the IRS can identify the unidentified person using only the information provided (without first having to use the information provided to identify any other person or having to independently obtain additional information).

The definition of the term *related action* contained in the proposed regulations defined which actions may be included for purposes of computing collected proceeds by requiring a clear link between the original action and the other, related action(s). This clear link required: (i) A direct relationship between the person identified in the information provided and subject to the original action and the person(s) subject to the other action(s); and (ii) a substantial similarity between the specific facts contained in the information provided and the relevant facts of the other action(s).

In general, comments received on the definition of *related action* in the proposed regulations, including the form letters, suggested that the definition was too restrictive. The commenters suggested that instead of requiring a direct relationship, the IRS should conduct a proximate cause analysis, under which related actions are those actions with which the IRS proceeds in a natural and continuous sequence from the actions first taken in response to a whistleblower's information. One commenter suggested that a direct relationship or one-step rule is inconsistent with the ordinary meaning given to the term ''related.'' Another commenter suggested that a related action should be any issue that is related to the whistleblower's submission with respect to the tax year, the taxpayer, or the tax issue. This commenter expressed concern that the definition of related action would exclude subsequent years of the same taxpayer for which the same issue exists, unless the information provided contained specific facts and documentation from those subsequent years. Two other commenters suggested that the language at Prop. Reg. § 301.7623–2(c)(i) describes an original action rather than a related action. These commenters suggested that when the IRS initiates a second or subsequent action against a person identified in the information provided by the whistleblower based on the specific facts described and documented in the information provided, then the IRS has proceeded based on the information and there is therefore no need to look to the definition of related action to determine the whistleblower's eligibility for an award.

After considering the comments, Treasury and the IRS determined that the concern that whistleblowers would not be given full credit for the information provided was partially addressed through the changes made to the definition of the term *proceeds based on* in the final regulations and described earlier in this preamble. Moreover, the broadened language of the definition of the term *proceeds based on* in the final regulations encompassed and made redundant the language in Prop. Reg. § 301.7623–2(c)(i) that focused on actions involving subsequent tax years and, thus, it was removed from the final regulations. The corresponding example illustrating the application of the rules to actions involving subsequent tax years moved with the rule to the definition of *proceeds based on.* Finally, Treasury and the IRS made several non-substantive revisions to the language of the definition of related action.

The final regulations retain the proposed regulations' requirement of a clear link between the original action and any other, related action(s), which requires: (i) A substantial similarity between the specific facts contained in the information provided and the relevant facts of the other action(s); and (ii) a relationship between the person identified in the information provided and subject to the original action and the person(s) subject to the other action(s). This conjunctive test excludes from the definition of related action actions that are merely factually similar to the original action, for example, actions against unidentified taxpayers that merely engaged in substantially similar transactions to the transaction identified in the information provided. The relationship test in the second prong thus retains a one-step rule: The taxpayer subject to the related action can be no more than one step removed—in terms of identification by the IRS—from a taxpayer identified in the information provided. In addition, the final regulations at § 301.7623–1(c)(1) provide that certain information submissions relating to pass-through entities and firms will be considered to have identified certain persons who were not explicitly identified in the information provided.

Despite commenters' requests that the definition should be even broader and more subjective, Treasury and the IRS determined that the clear link approach is a reasonable interpretation and application of the language contained in section 7623. Treasury and the IRS determined that the final regulations' definition of the term *related action* finds a reasonable middle ground between overly narrow and overly broad interpretations. For example, the term could be given a narrow application, encompassing only actions that follow from the action with which the IRS proceeded based on the information and actually produce collected proceeds. Given that many administrative and judicial actions produce no collected proceeds, this interpretation would give effect to the statutory language in such cases by ensuring that whistleblowers would receive awards when any related actions produce collected proceeds. Treasury and the IRS have concluded that such a definition would be too narrow because, under this interpretation, a related action (such as a collection action) would be required in almost every case. At the other end of the spectrum, the term related action could be broadly interpreted to include every similar fact pattern entered into by any taxpayer at any time. Such an interpretation is overly broad and would be impossible for the IRS to administer because it would require the IRS to keep whistleblower claims open and search for similar fact patterns in perpetuity.

Instead, these final regulations adopt a definition that finds a reasonable middle ground. The definition encompasses a finite group of actions that, while likely unknown to the whistleblower, are objectively connected to the information provided. Treasury and the IRS adopt the one-step approach of the proposed regulations because, by setting a clear standard for the Whistleblower Office to apply, the one-step approach is administrable. Tort law concepts, on the other hand, are rarely applied to tax, and the appropriate application of such concepts is unclear. Finally, based on the IRS's experience administering whistleblower claims, Treasury and the IRS believe that, in most cases, the results of a proximate cause analysis and a one-step approach are likely to be the same. Ultimately, Treasury and the IRS determined that the definition in the final regulations provides an administrable, objective test that strikes an appropriate balance between the

IRS's and the whistleblower's substantial contributions.

Collected Proceeds

Section 7623(a) provides the Secretary with the authority to pay such sums as he deems necessary from proceeds of amounts collected based on information provided to the Secretary when the information relates to the detection of underpayments of tax or the detection and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same. Section 7623(b) requires the Secretary to pay awards to whistleblowers if the Secretary proceeds with an administrative or judicial action that results in collected proceeds based on information provided by the whistleblower. The definition of *collected proceeds* contained in the proposed regulations built on the definition contained in the 2012 regulations. The definition in the proposed regulations restated the rule from those final regulations that collected proceeds include: Tax, penalties, interest, additions to tax, and additional amounts collected because of the information provided; amounts collected prior to receipt of the information provided if the information results in the denial of a claim for refund that otherwise would have been paid; and a reduction of an overpayment credit balance used to satisfy a tax liability incurred because of the information provided. The definition also addressed refund netting, criminal fines that must be deposited into the Victims of Crime Fund, and a computational rule for determining collected proceeds. Finally, consistent with provisions in the IRM, the proposed regulations provided that amounts recovered under the provisions of non-Title 26 laws do not constitute collected proceeds, because the language of section 7623 authorizes awards for detecting underpayments of tax and violations of the internal revenue laws. Several commenters addressed various aspects of the definition of collected proceeds contained in the proposed regulations. The substance of these comments and the determinations of Treasury and the IRS are set out in detail in the preamble discussion that follows.

Timing Issues and Treatment of Tax Attributes Including Net Operating Losses (NOLs)

Section 7623 provides for the payment of awards from collected proceeds, but it does not specifically address the treatment of claims that involve tax attributes that do not result in collected proceeds for many years, if ever. The proposed regulations provided a computational rule that reflects the discussion contained in the preamble to the 2012 regulations. There, Treasury and the IRS noted that tax attributes such as NOLs do not represent amounts credited to the taxpayer's account that are directly available to satisfy current or future tax liabilities or that can be refunded. Rather, tax attributes such as NOLs are component elements of a taxpayer's liability. The disallowance of an NOL claimed by a taxpayer may affect the taxpayer's liability and, in the context of a whistleblower claim, may result in collected proceeds or it may be carried forward 20 years and expire, thus never resulting in collected proceeds. To enable the IRS to administer the Whistleblower Program, the proposed regulations' computational rule provided that, after there has been a final determination of tax, the IRS would compute the amount of collected proceeds taking into account all information known with respect to the taxpayer's account (including all tax attributes such as NOLs). Under the proposed regulations, any tax attributes that have been used at the time of the final determination of tax may affect the award amount. The proposed regulations reflected Treasury and the IRS's attempt to make an award determination and pay any resulting award as soon as possible after proceeds are collected. The proposed regulations also reflected Treasury and the IRS's determination that tracking tax attributes into the future after payment of an award would impose significant costs and a heavy administrative burden. Thus, the proposed rule attempted to balance the whistleblower's interest in receiving a timely award determination and payout with the Government's interest in maintaining an administrable program.

Several commenters suggested that the proposed regulations did not strike the appropriate balance and recommended that tax attributes, specifically NOLs, should be included in the definition of collected proceeds. The commenters generally expressed concern that under the proposed regulations, a whistleblower might not receive credit for proceeds collected after the final determination of tax, as a result of tax attributes being carried forward to reduce a later liability. Some commenters suggested that the IRS should attempt to calculate and apply a present value to determine an award amount for any unused tax attributes. Other commenters recommended that, in the final regulations, the IRS should agree to track tax attributes for a specific period of time, for example, ten years. One commenter suggested that after the period of time that the IRS had agreed to track, the whistleblower and the IRS could enter into a settlement agreement wherein the whistleblower could agree to the amounts computed as of that date and waive any rights to a future appeal. Finally, one commenter recommended that the IRS should allow whistleblowers to submit a new claim for award when the whistleblower was aware of subsequently collected proceeds.

In light of the comments received, Treasury and the IRS have reconsidered the approach in the proposed regulations. These final regulations provide that the Whistleblower Office will monitor the relevant taxpayer account or accounts until the IRS receives collected proceeds as a result of a reduction in the tax attribute, or the taxpayer's ability to apply the tax attribute expires unused. For example, if a NOL is reduced as a result of actions taken based on whistleblower information, the Whistleblower Office will periodically review the taxpayer account to determine whether future year tax payments are made that would not have been made if the NOL had not been reduced. Under the approach in the final regulations, awards will be paid on any such post-determination collected proceeds. If the NOL carry-forward period expires before the reduced NOL results in a tax payment, no award will be payable.

The decision to monitor future year activities for impact on the amount of collected proceeds will apply to all claims, not just claims involving NOLs. As a result, in some cases, the Whistleblower Office may defer action on an award claim. For example, whistleblower information may result in IRS action to disallow a taxpayer's treatment of the purchase of an asset as an expense in Year 1, because the asset should be capitalized and depreciated in accordance with the applicable depreciation schedule. As a result, taxable income in Year 1 is increased by the purchase price of the asset, less allowable Year 1 depreciation. Taxable income in future years would be reduced by the allowable depreciation for each year, until the asset is fully depreciated (or sold or otherwise disposed of). When this occurs, the Whistleblower Office will monitor the taxpayer's account to determine whether future year offsetting reductions in liability related to the Year 1 tax liability occur, and will reduce the amount of collected proceeds accordingly.

The adoption of a monitoring approach in the final regulations, however, is only intended to explicitly enable the IRS to make an additional award payment when a tax attribute produces collected proceeds after an award has been determined, as described in the preceding paragraphs. It is not intended to, and does not in any way, limit the Whistleblower Office's discretion to aggregate or disaggregate claims, nor does it provide a basis for, or enable the IRS to make, mandatory, partial, or ongoing award determinations and payments every time the IRS collects some amount of proceeds. In other words, monitoring does not alter the general rule that no award will be paid until there has been a final determination of tax, as defined in the final regulations.

Amounts Collected Under Title 26

Section 7623 of Title 26 provides for awards for information leading to detection of underpayments of tax or violations of the internal revenue laws. The proposed regulations provided that amounts recovered under the provisions of non-Title 26 laws do not constitute collected proceeds for award purposes. The majority of comments, including the form letters, suggested that such amounts, specifically amounts collected under Title 18 and Title 31, should be included in collected proceeds. Many of the comments suggested that not including amounts collected under Title 18 and Title 31 eliminates a whistleblower's incentive to provide information on violations under those titles and could reduce the number of whistleblowers willing to provide such information to the IRS. The comments generally suggested that collected proceeds should include any amounts that are collected by the IRS. A few comments also suggested that the statutory language ''collected proceeds (including penalties, interest, additions to tax, and additional amounts)'' means that Congress intended for collected proceeds to be a broad and inclusive concept consisting of any amounts collected by the IRS and any amounts to be collected by the IRS in the future. Similarly, one commenter suggested that the use of the word ''any'' throughout the statute was another reason that the statute and Congress' intent with respect to the statute should be interpreted broadly.

Like section 7623, the internal revenue laws are contained in Title 26 and implementing guidance is issued under that title. Although the IRS may collect penalties for violations of Title 31, Money and Finance, and seize property under Title 18, Crimes and Criminal Procedure, those penalties and seizures do not relate to ''underpayments of tax,'' may be imposed independently of whether a tax underpayment occurs, and are not related to violations of the internal revenue laws under Title 26. Moreover, administrative actions under Title 26 and Title 31 entail separate administrative proceedings, and administrative distinctions persist even when the actions proceed at the same time. In some cases, the IRS may collect penalties for failure to file Form 114, ''Report of Foreign Bank and Financial Accounts'' (FBAR), which is an information reporting requirement under Title 31 the violation of which does not necessarily result in an underpayment of tax. As a result, FBAR penalties do not constitute *collected proceeds*. Moreover, sections 5323(a) and 9703(a) of Title 31 provide independent authority, separate and apart from section 7623, for the payment of rewards for information relating to certain violations of Title 31 or Title 18. Finally, the terms ''additions to tax'' and ''additional amounts'' have long been used to encompass the penalties under Subchapter A of Chapter 68 of Subtitle F of the Code and they are routinely used in forms issued by the IRS pursuant to Title 26 to refer to those penalties. They do not provide any support for treating non-Title 26 amounts as collected proceeds. The comments received did not change the view of Treasury and the IRS that section 7623 only authorizes awards for amounts collected under the internal revenue laws, which are contained in Title 26, the Internal Revenue Code. Treasury and the IRS recognize the commenters' concern that the statute may reduce the incentive to provide information to the IRS regarding non-Title 26 violations. The language of the statute does not, however, support a broader, more-inclusive definition of *collected proceeds.* Treasury and the IRS instead emphasize that when the IRS collects amounts based on information related to non-Title 26 violations and also collects related proceeds under Title 26, the Title 26 collected proceeds may form the basis for an award under section 7623. Moreover, depending on the facts and circumstances, the non-Title 26 proceeds may form the basis for an award under a whistleblower award program other than the one authorized by section 7623.

Amounts Deposited in the Victims of Crime Fund

Under the Victims of Crimes Act of 1984, criminal fines that are imposed on a defendant by a district court shall be deposited into the Victims of Crime Fund. See 42 U.S.C. 10601(b)(1). Although the Victims of Crime Act does except certain specified amounts that are payable to other sources pursuant to other statutory mandates, amounts payable under section 7623 are not included in the exceptions. The proposed regulations provided that criminal fines that must be deposited into the Victims of Crime Fund do not constitute collected proceeds. One commenter suggested that such criminal fines are collected proceeds and that the award amount should be paid before the rest of the proceeds are transferred to the Victims of Crime Fund. As noted above, the Victims of Crime Act of 1984 mandates that the entire amount of fines imposed in criminal tax cases be deposited into the Victims of Crime Fund, meaning that the IRS lacks the authority to deposit only a portion of the fines into the Victims of Crime Fund, and these funds cannot be available to the Secretary to pay awards under section 7623. As a result, these regulations retain the rule from the proposed regulations, reflecting the determination that amounts deposited in the Victims of Crime Fund do not constitute collected proceeds. Criminal restitution, however, may be collected by the IRS as a tax under section 6201(a)(4)(A), and in such instances, the amounts collected as restitution are included in the definition of collected proceeds.

Amended Returns

The proposed regulations did not address whether amounts collected based on a taxpayer's future compliance were included in collected proceeds. Commenters requested clarification on whether a whistleblower could receive an award based on amounts collected due to amended returns. Some commenters suggested that the definitions of *administrative action* or *proceeds based on* should be interpreted as providing for an award in cases when a taxpayer files an amended return in response to a whistleblower's information. Similarly, these commenters suggested that the final regulations should encourage and reward whistleblowers who report internally and cause taxpayers to self-report to the IRS.

In the proposed regulations, Treasury and the IRS intended to include certain amounts collected based on amended returns as collected proceeds. The final regulations are modified to explicitly provide for this outcome. Section 7623(b) requires that the IRS proceed with an administrative or judicial action

based on the information provided. Once the IRS proceeds with an action, however, the amounts collected based on amended returns may constitute collected proceeds. Specifically, if a whistleblower files a claim, the IRS begins an administrative or judicial action, and the taxpayer subsequently files an amended return, any proceeds collected based on that amended return, and related to the information provided, will constitute collected proceeds under the final regulations' general definition of the term collected proceeds. But if the IRS does not proceed with an action, for example if a taxpayer files amended returns, preemptively self-assessing and paying the liability before the IRS initiates any action, then, consistent with the plain language of the statute, there can be no collected proceeds.

While Treasury and the IRS certainly encourage internal reporting and preemptive action to correct incorrect returns, the plain language of the statute does not provide for a determination of awards in such cases. Moreover, it would be nearly impossible for the Service to connect amended returns to internally-reported whistleblower claims. Ultimately, if the amounts paid based on amended returns can be linked to any action with which the IRS proceeded based on the whistleblower's information, then the amounts will be included as collected proceeds. In such instances, the proceeds can be attributed to IRS action, as required by section 7623, and the proceeds collected may be determined by reference to the difference between the original amount reported as tax and the amount of tax assessed and collected based on the amended return. Treasury and the IRS believe that the changes to the final regulations reflect the statutory requirement that awards stem from IRS action and provide an administrable rule without discouraging whistleblowers from engaging in internal reporting and taxpayers to self-police.

The final regulations do not incorporate the comments suggesting that the IRS should also look to future years in which a taxpayer is compliant and determine collected proceeds in those years based on previous noncompliance. Unlike cases in which the taxpayer has already filed an original return, in these cases, the IRS would have no way to determine with any reasonable certainty what the taxpayer's reporting position would have been if not for the underlying action and whether the taxpayer's compliance was a direct result of the underlying action. Similarly, the IRS has no way of knowing whether a whistleblower's internal reporting of an issue caused a taxpayer to self-report and pay taxes.

Amount in Dispute

Section 7623(b)(5) provides that subsection (b) applies only when the tax, penalties, interest, additions to tax, and additional amounts in dispute in an action against a taxpayer exceed $2,000,000 (and in the case of an individual taxpayer, when the individual's gross income exceeds $200,000 for any taxable year subject to the action). The proposed regulations defined amount in dispute as the maximum total of tax, penalties, interest, additions to tax, and additional amounts that could have resulted from the action(s) with which the IRS proceeded based on the information provided, if the formal positions taken by the IRS had been sustained. The proposed regulations further provided that the IRS would compute the amount in dispute, for purposes of award determinations, after the final determination of tax. Finally, the proposed regulations provided that, for purposes of conducting whistleblower administrative proceedings, the IRS may rely on the whistleblower's description of the amount owed by the taxpayer(s) or other information. These rules were intended to ensure that administrative proceedings would be conducted for every claim that could arguably satisfy the requirements of section 7623(b)(5), even before the IRS knows whether the claim actually does.

Treasury and the IRS did not receive any comments recommending changes to the definition of amount in dispute. Nevertheless, Treasury and the IRS recognize the need to clarify an aspect of the definition that was not clear and that, without the clarification, could have led to unintended results. Specifically, the final regulations delete the reference to ''could have resulted'' so as not to suggest that a hypothetical computation is required. The final regulations further clarify that the amount in dispute is the greatest of the amounts actually determined and amounts stated in the formal positions actually taken by the IRS. Treasury and the IRS also added additional examples to further clarify the application of the rule adopted in the final regulations.

The definition will apply, regardless of whether an award is paid pursuant to section 7623(a) or section 7623(b), including for purposes of Tax Court review. For purposes of applying the administrative proceedings provided for under the final regulations, however, the Whistleblower Office may rely on the whistleblower's description of the amount owed if that amount is higher than the maximum total amount asserted by the IRS in its formal position in an administrative or judicial action.

Affiliated Claimants

Under section 7623(b)(6)(C), no award may be made under section 7623(b) based on information submitted to the Secretary unless such information is submitted under penalty of perjury. In Notice 2008–4 and the proposed regulations, Treasury and the IRS provided that this requirement precludes the filing of a claim for award by a person serving as a representative of, or in any way on behalf of, another individual as part of implementing the statutory requirement that a claim for award be filed under penalties of perjury. Nonetheless, the proposed regulations provided a definition of affiliated whistleblowers and related rules for addressing eligible and ineligible affiliated whistleblower cases. Treasury and the IRS have reconsidered the need for the affiliated whistleblower rules in light of the statutory penalty of perjury requirement. Indeed, given that the final regulations retain the rule prohibiting a whistleblower from submitting a claim on behalf of another, the definition for affiliated individuals and the cross reference to the rule for ineligible affiliated individuals at § 301.7623–1(b)(3) were removed from the final regulations. The rule for eligible affiliated whistleblowers at § 301.7623–4(c)(4) of the proposed regulations was also removed. The final regulations retain the rule, however, stating that the Whistleblower Office will reject claims filed by ineligible affiliated whistleblowers, to discourage and prevent whistleblowers from claiming an award in their own names based on information obtained from ineligible whistleblowers. In the final regulations, the rule is relocated and added to the list of ineligible whistleblowers.

Whistleblower Administrative Proceedings—§ 301.7623–3

Section 7623 does not require that the IRS conduct a particular administrative process prior to making an award determination, rejection, or denial. Treasury and the IRS, however, have determined that such processes will help ensure that whistleblowers have a meaningful opportunity to participate in the determination process, enable the Whistleblower Office to make award determinations based on complete information, and ensure a fully-documented record on appeal to the Tax Court. This regulation describes the administrative proceedings applicable

to claims for award under both section 7623(a) and section 7623(b).

For purposes of applying the whistleblower administrative proceedings, the final regulations provide that the Whistleblower Office may rely on the whistleblower's description of the amount owed or on other information. This rule is intended to ensure that the IRS can provide whistleblowers the benefits of proceedings applicable to section 7623(b) claims even before having made a final determination of tax.

For awards under section 7623(a), the proposed regulations provided that the Whistleblower Office will send a preliminary award recommendation letter to the whistleblower. Sending this letter marks the beginning of the whistleblower administrative proceeding. The whistleblower will then have 30 days within which to provide comments to the Whistleblower Office. This approach is intended to provide whistleblowers under section 7623(a) with an opportunity to participate in the award process, both to add transparency to the proceeding and to assist the Whistleblower Office in considering all potentially relevant information in paying awards under section 7623(a), even though those awards are not subject to Tax Court review. The proposed regulations did not, however, provide preliminary notice and comment procedures for rejections or denials of claims for award that are treated, for administrative purposes, as claims made under section 7623(a), given the large administrative burden associated with such procedures.

In cases in which the Whistleblower Office determines and pays an award under section 7623(b), the proposed regulations provided that a whistleblower administrative proceeding also begins when the Whistleblower Office sends out the preliminary award recommendation letter. After this letter is sent to the whistleblower, the whistleblower (and the whistleblower's representative, if any) may participate in the administrative proceeding under section 7623(b), which will ultimately culminate in an award determination letter issued by the Whistleblower Office. Finally, the proposed regulations provided that prior to denying or rejecting a claim under section 7623(b), the Whistleblower Office will send a preliminary denial letter to the whistleblower, beginning the administrative proceeding and after which the whistleblower has 30 days to provide comments to the Whistleblower Office. Again, this approach is intended to foster a transparent and accurate review process.

The final regulations in large part adopt the proposed regulations. The comments received and any changes to the proposed rules for § 301.7623–3 are discussed in the sections that follow.

Beginning of Whistleblower Administrative Proceedings

Under the proposed regulations, in cases in which the Whistleblower Office recommends payment of an award under section 7623(a) or determines and pays an award under section 7623(b), the Whistleblower Office will first send a preliminary award recommendation letter to the whistleblower. In these cases, the whistleblower administrative proceeding begins when this letter is sent. In cases in which the Whistleblower Office rejects or denies a claim for award under section 7623(b), the Whistleblower Office will first send a preliminary denial letter to the whistleblower. In these cases, the whistleblower administrative proceeding begins when this letter is sent. In cases in which the Whistleblower Office rejects or denies a claim for award under section 7623(a), there will not be a separate administrative proceeding. (For further information, see Rejections and Denials, later in this preamble.) The final regulations largely adopt the proposed regulations. The comments received and the changes made are discussed in further detail in this section.

Several commenters suggested that whistleblower administrative proceedings should begin earlier. The commenters offered different suggestions for how this could be accomplished, including beginning whistleblower administrative proceedings at the time that a claim is submitted on the Form 211 or when the Form 11369, ''Confidential Evaluation Report on Claim for Award,'' is transmitted to the Whistleblower Office by the Operating Division. One commenter suggested that the regulations should require the Whistleblower Office to notify the whistleblower and begin the administrative proceeding within 90 days of a taxpayer agreeing to pay any taxes, penalties, interest or additional amounts, and requesting that the whistleblower provide any information relevant to an award determination within 30 days. This commenter suggested that the IRS should then send another notification to the whistleblower within 90 days after the IRS had collected proceeds.

The proposed regulations provided for whistleblower administrative proceedings in an effort to respond to whistleblowers' concerns regarding the IRS's ability to communicate with whistleblowers. After considering the comments received, Treasury and the IRS determined that beginning the administrative proceeding before the preliminary award determination letter would not meaningfully increase a whistleblower's ability to participate in and provide comments relating to the award determination. As discussed earlier in this preamble, the IRS will use several tools, including debriefings, section 6103(n) contracts, and section 6103(k)(6) disclosures to communicate with whistleblowers following the submission of a claim. The whistleblower award administrative proceedings discussed in this section of the preamble are intended to facilitate communication with whistleblowers before the IRS makes the award determination.

Deadlines for IRS Whistleblower Office Action

The proposed regulations provided no mandatory deadlines for Whistleblower Office action. The proposed regulations instead provided for payment of an award, when appropriate, as promptly as circumstances permit. Recognizing that the timely and comprehensive evaluation of information provided by whistleblowers is essential to the success of the program, the IRS has articulated goals for Whistleblower Office action in other internal guidance. IRS Whistleblower Program Memorandum (Deputy Commissioner for Services and Enforcement Steven T. Miller, June 20, 2012). This memorandum established goals for action on whistleblower submissions, and demonstrates the IRS's commitment to timely and comprehensive evaluation of whistleblower information. The memorandum also recognizes the need for flexibility and recognizes that there are times when the established goals will not be met. This does not detract from the emphasis placed on timely action, but instead flows from a recognition of the unique nature of these claims and a desire to ensure that when the Whistleblower Office takes action, it has available all relevant and necessary information relating to an action.

The form comment letters suggested that the regulations should adopt and expand on the guidelines set out in the June 20, 2012, IRS Whistleblower Program Memorandum. Several commenters suggested that the final regulations should incorporate mandatory deadlines for action by the Whistleblower Office. Two commenters generally suggested that the regulations

should require that preliminary award determination letters be sent by a specified time after proceeds are collected, for example, between 90 and 180 days after the IRS has collected proceeds. One commenter suggested that the regulations should require the Whistleblower Office to notify the whistleblower and begin the administrative proceeding within 90 days of a taxpayer agreeing to pay any taxes, penalties, interest or additional amounts, and requesting that the whistleblower provide any information relevant to an award determination within 30 days. This commenter suggested that the IRS should then send another notification to the whistleblower 90 days after the IRS had collected proceeds. This commenter suggested that these measures should be implemented to ensure that preliminary award determination letters are issued prior to a final determination of tax.

As noted, the June 20, 2012, IRS Whistleblower Program Memorandum identified timelines and policy goals for Whistleblower Office action. Treasury and the IRS have determined not to adopt these program goals as regulatory requirements to retain flexibility to make changes to accommodate future developments. The Whistleblower Office, however, remains committed to taking timely action on whistleblower submissions from the date a claim is first submitted through the date on which an award is determined or the claim is denied.

Deadlines for Whistleblower Action or Response

The proposed rules at § 301.7623–3 contained several deadlines for whistleblower action. These deadlines are designed to ensure that the administrative proceedings are conducted in a timely fashion. In cases in which the Whistleblower Office recommends payment of an award under section 7623(a), a whistleblower has 30 days to submit comments on the Whistleblower Office's preliminary award determination. In cases in which the Whistleblower Office denies an award under section 7623(b), a whistleblower has 30 days to submit comments on the Whistleblower Office's preliminary denial letter. Finally, in cases in which the Whistleblower Office determines an award under section 7623(b), the whistleblower has 30 days to respond to the preliminary award recommendation letter; when applicable, the whistleblower has 30 days to respond after receiving a detailed report from the Whistleblower Office; and when applicable, the whistleblower has 30 days to submit comments after receiving an opportunity to review the documents supporting the award report recommendations. Under the proposed regulations, the time periods for responding in cases in which the Whistleblower Office determines an award under section 7623(b) may be extended at the sole discretion of the Whistleblower Office.

Several commenters generally suggested that all of the time periods for whistleblowers to respond or submit comments should be more flexible. One commenter requested that different, longer time periods be applied to whistleblowers located outside of the United States. Another commenter suggested that ''good cause'' should be added as a reason why a whistleblower may take longer than 30 days to respond or submit comments to the Whistleblower Office. Finally, one commenter requested clarification on when the 30-day period to respond to the detailed report would begin.

After considering the comments, Treasury and the IRS adopt the proposed regulations without substantive change. The deadlines for whistleblower action in the final regulations are intended to allow whistleblower administrative proceedings to proceed in a timely and efficient manner. Further, the Whistleblower Office has the discretion to extend the time periods and has routinely done so at the request of whistleblowers or their representatives. In response to the comments, however, Treasury and the IRS included language in the final regulations intended to clarify that the periods begin when the Whistleblower Office sends the notices.

Award Consent Forms

A number of comments were received that expressed frustration with the amount of time that it takes from when a whistleblower submits a claim for award to when the Whistleblower Office pays the award. The factors that contribute to this length of time are largely outside of the control of whistleblowers and the Whistleblower Office. The proposed regulations, however, provided for award consent forms, which allow the Whistleblower Office to make an award determination and pay an award, without providing an award determination letter and waiting for the whistleblower's time to appeal such determination to expire. The purpose of the award consent form is to expedite the administrative process for cases in which the whistleblower agrees with the Whistleblower Office's preliminary award recommendation. A whistleblower may submit an award consent form to the Whistleblower Office at any time during the whistleblower administrative proceeding.

One commenter suggested that the award consent form is unfair because it forces the whistleblower to waive any appeal rights before receiving an award. Under the proposed rules, a whistleblower can receive an award regardless of whether an award consent form is submitted. For example, if a whistleblower declines to execute the award consent form, then after the whistleblower has finished participating in the whistleblower administrative proceeding and after a final determination of tax, as defined in § 301.7623–4(d)(2), the Whistleblower Office will provide the whistleblower with a determination letter, stating the amount of any award. In such cases, the award would be payable after all appeals of the Whistleblower Office's determination were final. Executing the award consent and waiving the appeal rights serves to decrease the time between the determination and payment of the award. Because the execution of an award consent form is at the option of the whistleblower, these regulations retain the proposed regulations' rules regarding the use of award consent forms. Under the final regulations, whistleblowers may choose to execute an award consent form at any time during the whistleblower's participation in the administrative proceeding for award under section 7623(b). If the whistleblower signs, dates, and returns the award consent form, the Whistleblower Office will pay the award to the whistleblower as promptly as circumstances permit after there has been a final determination of tax. Thus, while there is absolutely no requirement that a whistleblower execute the award consent, doing so provides whistleblowers a way to get the benefit of finality and, assuming there are no other open issues, a faster award payment.

Confidentiality Agreements

Treasury and the IRS recognize that, while detailed administrative claim files assist the Whistleblower Office in making fair and accurate award determinations, safeguards aimed at preventing the potential redisclosure or misuse of the taxpayer's confidential return information contained in those files remain critical. Section 6103(h)(4) and § 301.6103(h)(4)–1 of the proposed regulations confirmed the authority to disclose return information in the course of a whistleblower administrative proceeding, but neither provides redisclosure prohibitions or

penalties. In the Administration's Fiscal Year 2014 and 2015 Revenue Proposals, Treasury recommended amending section 6103 to provide that the section 6103(p) safeguarding requirements apply to whistleblowers and their legal representatives who receive tax return information in whistleblower administrative proceedings. Despite the lack of statutory redisclosure prohibitions and penalties, Treasury and the IRS, in the proposed regulations, sought to balance whistleblowers' desire for increased communication with protections and safeguards for taxpayers' confidential information. Accordingly, the proposed regulations required whistleblowers to execute confidentiality agreements before they may receive a detailed description of the factors that contributed to the preliminary award recommendation or view documents that support the recommendation. A whistleblower is not required to execute a confidentiality agreement before appealing an award determination to the Tax Court, and executing an agreement does not prevent a whistleblower from seeking Tax Court review.

One commenter recommended that every whistleblower should be required to enter into a confidentiality agreement with the Whistleblower Office at the time that they submit a claim. This commenter suggested that such agreements would allow the Whistleblower Office to share information with the whistleblower earlier in the process, prior to any whistleblower administrative proceeding. Another commenter also suggested that confidentiality agreements should be mandatory in every case to allow for the disclosure of information to whistleblowers and to provide protection to taxpayers with respect to disclosed information.

Although Treasury and the IRS support the use of confidentiality agreements as a mechanism for protecting confidential taxpayer return information disclosed during the course of an administrative proceeding, the agreements do not in themselves authorize the IRS or the Whistleblower Office to disclose such information. In addition, Treasury and the IRS have determined that disclosures are not necessary in every case. Accordingly, the final regulations do not mandate the use of confidentiality agreements in every case. Instead, the final regulations adopt the rule in the proposed regulations permitting whistleblowers to choose to enter into confidentiality agreements with the Whistleblower Office during whistleblower administrative proceedings for awards under section 7623(b). When the whistleblower signs, dates, and returns the confidentiality agreement, the Whistleblower Office will provide the whistleblower with a detailed award report and an opportunity to review documents supporting the report.

Opportunity To Review Documents Supporting Award Report Recommendations

Under the proposed regulations, if a whistleblower signs, dates, and returns the confidentiality agreement accompanying the preliminary award determination, then after reviewing the Whistleblower Office's detailed report, the whistleblower can request an appointment to review the documents supporting the detailed report. During this appointment, the Whistleblower Office will provide for viewing the pertinent information from the administrative claim file. The Whistleblower Office will supervise the whistleblower's review of the documents and the whistleblower will not be permitted to make copies of the documents. Thus, while the proposed regulations provide whistleblowers with an opportunity to view information in the administrative claim file that is not protected from disclosure by one or more common law or statutory privileges, the proposed regulations provided rules intended to safeguard the disclosure of information to a whistleblower.

One commenter suggested that the whistleblower should be able to review all non-privileged information in the administrative claim file, whether or not it is deemed pertinent. Treasury and the IRS have determined that the rules applicable to the document review—including on site review and no copying—adequately protect taxpayer information from redisclosure. Accordingly, in response to this comment, the final regulations remove the term ''pertinent.''

Administrative Record

Under the proposed regulations, the administrative record comprises all information contained in the administrative claim file that is not protected by one or more statutory privileges that is relevant to the award determination. One commenter suggested that the IRS Whistleblower Office should be required to provide a privilege log to detail any items that are excluded from the administrative record. After considering the comment, Treasury and the IRS have determined that creating a privilege log in every administrative proceeding involving privileged documents that are withheld by the Whistleblower Office would offer minimal benefits and pose an unjustifiable administrative burden. As a result, no changes were made to the proposed regulations.

Rejection and Denial Letters

The proposed regulations provided for rejection and denial letters in cases under section 7623(a) and 7623(b). In practice, a rejection is a determination that relates solely to the whistleblower and the information on the face of his or her claim that pertains to the whistleblower, while a denial often relates to or implicates taxpayer information (for example, because the IRS did not proceed based on the information provided or did not collect any proceeds). Pursuant to proposed § 301.7623–3(b)(3), for rejections or denials under section 7623(a), the Whistleblower Office will provide written notice to claimants of the rejection or denial of award claims without an administrative proceeding. One commenter expressed concern with the amount of information contained in rejection and denial letters. In these cases, because there is no whistleblower administrative proceeding, section 6103 (which provides that all tax return information is confidential, unless an exception applies) operates to limit the amount of taxpayer information that the Whistleblower Office can provide. Treasury and the IRS considered whether to make denials of claims under section 7623(a) subject to an administrative proceeding similar to the denial of claims under section 7623(b). However, given the nature of claims under section 7623(a) and the large number of such claims, Treasury and the IRS determined that the administrative burden of providing an administrative proceeding would significantly outweigh the small amount of additional information that would be provided in the denial letters. We note, however, that the same section 6103 concerns are not present with rejection letters. Accordingly, in the case of a rejection under section 7623(a) or (b), the written notice is not subject to the same limitations under section 6103 and will explain the basis for the rejection. Although no substantive changes were made, to improve clarity, the final regulations separate the rules for rejections under section 7623(b) and denials under section 7623(b) into separate provisions and describe when a claim is rejected or denied.

Subsequent Determinations

One commenter suggested that the definition of collected proceeds should take into account circumstances in

which a whistleblower submits a claim for an ongoing issue and an administrative action is taken for some, but not all years (apparently because the statute of limitations has expired). If the taxpayer becomes compliant in future years, the commenter suggested that the whistleblower's award should be determined based on collected proceeds for future years determined as the difference between what is reported and paid, and what would have been reported and paid, if not for the whistleblower's information and the IRS' administrative action. The commenter suggested limiting the future years to the number of years for which the IRS allowed the statute of limitations to expire with respect to the whistleblower claim. No changes were made to the proposed regulations because the commenter's concern—that the IRS will not be diligent in preserving the statute of limitations—is ameliorated by the fact that the IRS suffers a greater harm than the whistleblower if the IRS permits the statute of limitations to expire and, therefore, the IRS is motivated to preserve the statute of limitations.

Another commenter suggested that the final regulations should include procedures for reopening a claim that was initially denied if the information is later used by the IRS, for example, by a different Operating Division. The proposed regulations did not provide specific procedures for addressing the use of a whistleblower's information following a denial. However, nothing in the proposed regulations precluded future IRS action based on a whistleblower's information or the determination of an award in such instances. For example, the proposed regulations did not preclude the Whistleblower Office from making a second or subsequent determination when the IRS proceeds based on the information after having already made a determination. This situation, however, is distinguishable from timing cases, discussed earlier in this preamble, in connection with the definition of collected proceeds, in which the IRS recomputes and pays an award based upon information not known with respect to the taxpayer's account as of the date of the final determination of tax. These cases would include, for example, those in which whistleblower information results in the elimination of an NOL but does not result in collected proceeds until after the final determination. In such cases, there are no new circumstances, only additional collected proceeds. A second or subsequent determination, however, is appropriate when there are new circumstances that result in collected proceeds. Although this result was not precluded under the proposed regulations, Treasury and the IRS added language to the definition of *final determination of tax* at § 301.7623–4(d)(2) of the final regulations to explicitly clarify this point. Because the final regulations allow for subsequent determinations when proceeds are collected after an initial determination, and any such subsequent determination will be subject to all the rules and procedures applicable to an initial determination, no additional procedures are needed in these final regulations.

Determining the Amount of Awards and Paying Awards—§ 301.7623–4

This regulation provides the framework and criteria that the Whistleblower Office will use in exercising the discretion granted under section 7623 to make awards. Under the regulation, based on the Whistleblower Office's review of the entire administrative claim file, the Whistleblower Office will assign a fixed percentage to claims for award by evaluating the substantial contribution of the whistleblower to the underlying action(s). The rules of this section apply to claims for awards under both section 7623(a) and section 7623(b). The comments received and any changes to proposed § 301.7623–4 are discussed in the sections that follow.

Fixed Percentage Computational Framework

Under section 7623(b), whistleblowers may receive as an award at least 15 percent but not more than 30 percent of the collected proceeds resulting from an action (including any related actions), assuming that there is no reduction in award pursuant to section 7623(b)(2) or (3). The proposed regulations adopted a fixed percentage approach pursuant to which the Whistleblower Office will assign claims for award to one of a number of fixed percentages within the applicable award percentage range. Under the proposed regulations, to compute an award, the Whistleblower Office will look to the administrative claim file to determine whether there are any positive factors present that would merit an increased award of 22 or 30 percent. The Whistleblower Office will then determine whether there are negative factors present that would merit a decreased award of 15, 18, 22, or 26 percent.

One commenter disagreed with the use of fixed percentages, suggesting that instead the Whistleblower Office should have the discretion and flexibility to consider the full range of award percentages in reaching an award determination. A number of the comments received, including the form comment letters, suggested that starting the award computation framework at 15 percent sends the wrong message to whistleblowers and would discourage whistleblowers by limiting the size of whistleblower awards. One commenter suggested that starting at 15 percent was unnecessarily biased toward the lower end of the statutorily mandated range of 15 to 30 percent. This commenter suggested that this approach would invite litigation and would limit the upward effect of positive factors. Instead, this commenter recommended that the Whistleblower Office should begin its analysis at 22.5 percent. Another commenter suggested that starting at the bottom prevents the Whistleblower Office from punishing whistleblowers that have only negative factors and also suggested that the Whistleblower Office should begin its analysis at 22.5 percent. One commenter suggested that the regulations should also require payment of a minimum 15-percent award both when a taxpayer self-reports a tax liability after a whistleblower submits information to the IRS and when a whistleblower provides information and the IRS subsequently proceeds with an administrative action without using the whistleblower's information. Finally, several commenters requested that the final regulations provide additional information on when a 30-percent award would be appropriate under the statute. These commenters suggested that the regulations should provide an example of a case in which the Whistleblower Office would determine a 30-percent award. To that end, one commenter suggested that a maximum 30-percent award should be paid when a whistleblower submits information that leads to the collection of additional amounts in an otherwise nearly completed audit, provides specific information that forms the basis for an assessment of tax, provides nearly all of the information and documentation needed by the IRS to conduct an audit, provides assistance or is willing to provide assistance during the administrative action, testifies or is willing to testify in a court proceeding, or wears a wire or is willing to wear a wire to assist in an investigation. Finally one commenter expressed concern with the language in the preamble to the proposed regulations that provided that the Whistleblower Office would

determine a 30-percent award only in extraordinary cases.

Treasury and the IRS continue to believe that the fixed percentage approach provides a structure that will promote consistency in the award determination process by enabling the Whistleblower Office to determine awards across the breadth of the applicable percentage range based on meaningful distinctions among cases. The fixed percentage approach also avoids having to draw fine distinctions that might seem unfair and arbitrary, given the differences among claims for award with respect to both the facts and law of the underlying actions and the nature and extent of the substantial contribution of the whistleblowers. Accordingly, the final regulations retain the fixed percentage approach.

Further, Treasury and the IRS determined that starting the award determination at 15 percent merely reflects the fact that the claim has met the threshold requirements for an award under section 7623(b). All awards under section 7623(b)(1) are paid to whistleblowers that made a substantial contribution to the underlying action(s). Congress, through the plain language of the statute, provided that a 15-percent award is appropriate for a whistleblower that makes a substantial contribution to the underlying action(s). Although commenters are correct that this approach may lead to the same result for both whistleblowers with no positive factors and whistleblowers with all negative factors, Treasury and the IRS do not believe that whistleblowers who merely submit a claim that reflects none of the positive factors and offer nothing beyond the bare minimum to support an award should be entitled to an award above the statutory minimum. A 15-percent award is a significant financial incentive to whistleblowers and starting the award proceedings at 15 percent, with the opportunity for a larger potential award increase, provides the whistleblower with a greater incentive to provide better information and assistance to the IRS than starting at 22.5 percent. Because the presence of positive factors is largely within the whistleblower's control, Treasury and the IRS have adopted an approach that incentivizes whistleblowers to provide high quality submissions that reflect positive factors.

Moreover, the approach taken in the final regulations—starting at 15 percent and applying positive and negative factors, based on the extent of the whistleblower's substantial contribution—is consistent with the approach taken by other government agencies in the regulations and practices that govern the administration of their whistleblower award programs, including the Department of Justice (in making recommendations in False Claims Act cases), the Securities and Exchange Commission, and Commodity Futures Trading Commission (in applying Federal whistleblower statutes). As it has done since the 2006 amendments to the statute, the Whistleblower Office will increase the award percentage, based on the presence of positive factors. The final regulations provide several positive factors designed to allow for increased awards across a broad range of claims, as merited.

Moreover, the concern expressed by some commenters that the IRS will pay minimum awards in most cases is not supported by the evidence. To date, using this computational approach the IRS has paid awards totaling approximately $175 million on collected proceeds totaling approximately $700 million, reflecting an award average of approximately 25 percent—nearer the top than the bottom of the statutory range. After considering the concerns raised by these comments, the final regulations retain the fixed percentage approach adopted in the proposed regulations. Finally, in response to the comments received on 30-percent awards, Treasury and the IRS revised the example, extending it to illustrate the full award percentage range.

Factors Used To Determine Award Percentage

Pursuant to section 7623(b), the Whistleblower Office's determination of an award amount depends on the extent to which the claimant's information substantially contributed to the underlying action(s). Under the proposed regulations, the Whistleblower Office reviews the administrative claim file and applies the positive factors and negative factors, listed in § 301.7623–4(b), to the facts to determine the fixed percentage applicable to a claim for award.

Some commenters offered suggestions for additional positive factors. These suggestions included: (i) The whistleblower provides information on multiple unrelated taxpayers; (ii) the whistleblower identifies the target taxpayer; (iii) the whistleblower provides information that leads to a related party; (iv) the IRS would not have discovered a violation ''but for'' the whistleblower's information; and (v) there is a close nexus between related actions. Some of these suggested factors are already threshold elements required to merit any award. For example, identifying the target taxpayer is required to make a claim. Others restate the circumstances for which the proposed regulations already compensated whistleblowers. For example, if a whistleblower provides information on multiple unrelated taxpayers or uncovering a close nexus between related actions, and the IRS proceeds based on the information and collects proceeds, then the whistleblower's contribution to each action will be evaluated and accounted for in determining the award. Further, the final regulations, like the proposed regulations, provide that the positive factors and negative factors are non-exclusive. Accordingly, the final regulations do not incorporate any of these suggested factors. The Whistleblower Office may recognize and apply additional factors in a particular case that are appropriate in light of the particular facts.

One commenter suggested that the positive factor at § 301.7623–4(b)(1)(ii), regarding information that identifies an issue of a type previously unknown to the IRS, should apply when the information provided identifies facts of a type previously unknown to the IRS, rather than an issue of a type previously unknown to the IRS. In response, the final regulations expand the factor to include a transaction previously unknown to the IRS.

Several commenters suggested that the positive factor at § 301.7623–4(b)(1)(v) should look only to the whistleblower's willingness to provide assistance, rather than to assistance offered in response to a request from the IRS. These comments expressed concern that whistleblowers have not been given opportunities to provide assistance and, therefore, suggested deleting the language ''in response to a request from the Whistleblower Office, the IRS or the IRS Office of Chief Counsel.'' Treasury and the IRS agree that it is the whistleblower's act of providing exceptional cooperation and assistance that should be treated as a positive factor, regardless of whether that cooperation and assistance was in response to a request. As a result, the final regulations delete this language. One commenter suggested that the regulations should provide more information on what would be meaningful whistleblower participation. Treasury and the IRS believe that the positive factors in the final regulations should remain broadly defined providing the Whistleblower Office with the necessary discretion to increase a whistleblower's award percentage in appropriate cases. Exceptional assistance depends on the facts and

circumstances and could evolve in response to specific whistleblower claims. Accordingly, no changes are made in the final regulations in response to this comment. Nevertheless, the IRS will continue to provide further explanations to staff, as appropriate and needed.

One commenter suggested an additional negative factor—when it is more likely than not that the IRS would have discovered the information on its own. One commenter suggested that the IRS should consider mitigating factors when the whistleblower delayed informing the IRS after learning the relevant facts, particularly if the delay adversely affected the IRS's ability to pursue an action or issue. Treasury and the IRS have decided not to incorporate any new negative or mitigating factors into the final regulations, which would serve only to make it harder for whistleblowers to recover. The Whistleblower Office will consider all of the relevant facts and circumstances when looking to apply the positive and negative factors identified in the regulations.

One commenter suggested that the negative factor when the whistleblower contributed to the underpayment of tax or tax noncompliance identified is already addressed by the planned and initiated test. The inclusion of this factor signifies that not all situations when a whistleblower contributes to the actions that led to the underpayment will constitute planning and initiating under the statute and regulations—as discussed later in this preamble, the threshold for planned and initiated is higher than being a mere contributor. In cases when a whistleblower does not plan and initiate within the meaning of the statute and regulations, but nonetheless contributes to the action(s) that led to tax noncompliance, the Whistleblower Office will not apply the threshold planner and initiator test, but in such a case, it may still be appropriate to decrease the award amount because the whistleblower's actions diminish the extent of the whistleblower's substantial contribution to the action. Thus, the Whistleblower Office will instead consider the whistleblower's contribution to the tax noncompliance as a factor that may justify a decrease within the 15-to-30 percent award percentage range. For example, this factor may apply if a whistleblower engaged in planning or initiating activities, but not both, that diminished the whistleblower's substantial contribution to the action with which the IRS proceeded. This factor will not, however, be applied to reduce an award in cases in which the Whistleblower Office determines that the threshold for planned and initiated has been met. If the threshold for planned and initiated is met, the planned and initiated framework will be applied, and the final regulations have been clarified accordingly.

Award for Less Substantial Contribution

Section 7623(b)(2) provides for a reduced award when the Whistleblower Office determines that the action was based primarily on disclosures of specific allegations resulting from a judicial or administrative hearing, a governmental report, hearing, audit, or investigation, or the news media, unless the whistleblower was the original source of the information. Under the proposed regulations, if the Whistleblower Office determined that an action was based principally on disclosures of specific allegations resulting from public source information then the Whistleblower Office will determine an award of no more than 10 percent of the collected proceeds resulting from the action, unless the whistleblower was the original source of the information. The proposed regulations provided that the Whistleblower Office would make the determination based on the extent to which the public source information described a tax violation or facts and circumstances from which a tax violation could be reasonably inferred. Under the proposed regulations, public source information included a judicial or administrative hearing, a government report, hearing, audit, or investigation, or the news media.

Treasury and the IRS received two comments on this proposed rule. One commenter suggested that public source information should be limited to the types of information specified in the statute. This commenter disagreed with the proposed regulations' use of the word ''including'' and expressed concern that this language would allow the Whistleblower Office to expand on the statutory list of public sources. This commenter also suggested that the regulations should exclude public source information that is only available by request. Another commenter disagreed with the application of the original source test in the proposed regulations. This commenter suggested that rather than looking to whether the whistleblower was the original source of the public source information, the regulations should instead look to whether the IRS takes action based on the information provided, and if so, should treat the whistleblower as the original source of the information. Both commenters expressed concern that the proposed regulations did not accurately apply the specific allegation requirement from the statute, and one of the two commenters further suggested that the regulations should employ an ordinary, lay person standard if a ''reasonable inference'' test is retained as a substitute to the ''specific allegation'' requirement in the statute.

In response to the first commenter's concerns, the final regulations remove the term ''public source information'' and the ''including'' language and instead rely solely on the list of statutory sources. In determining that the final regulations should rely solely on the statutory list, Treasury and the IRS also decline to place additional limitations on the statutory language, for example, excluding information available only upon request. The final regulations also clarify the application of the original source test and the specific allegation requirement by more clearly tracking the language of the statute. The final regulations clarify that the reasonable inference test does not replace the specific allegation requirement, but instead provides guidance on how the Whistleblower Office will apply the statute's specific allegation requirement. Changes were also made to the example to illustrate the operation of the reasonable inference test.

Reduction in Award and Denial of Award

Under the proposed regulations, the Whistleblower Office will make a threshold determination of whether a whistleblower planned and initiated the underlying acts, and, if this threshold is met, then the Whistleblower Office will categorize and evaluate the extent of the whistleblower's planning and initiating of the underlying acts, based on the application of factors listed in § 301.7623–4(c)(3)(iv) to the facts contained in the administrative claim file, to determine the amount of the appropriate reduction, if any.

Commenters on this issue generally expressed concern that the threshold determination for planned and initiated is too broad and could discourage potential whistleblowers from coming forward. These commenters suggested that the regulations should adopt the ''principal architect'' approach used in evaluating claims under the False Claims Act. Two of the commenters expressed concern that the standard at § 301.7623–4(c)(3)(ii)(C), which asked whether the whistleblower knew or had reason to know that there were tax implications to planning and initiating the underlying act, was too broad. One of these commenters suggested that

instead, the standard should be whether the whistleblower knew or had reason to know that tax noncompliance could result from the planning and initiating of the underlying act. Similarly, one commenter suggested that the standard should be whether the individual knew or had reason to know that there were ''unlawful'' or ''improper'' tax implications. Some commenters suggested that the language at § 301.7623–4(c)(3)(ii)(C) should specifically exclude a whistleblower who performed any of the underlying activities at the direction of a senior employee or manager. One commenter suggested that including the word ''drafted'' in the definition of ''planned'' created the possibility that an employee drafting a document at the direction of superiors could fall within the definition. This commenter also suggested that including the term ''promoted'' in the definition of ''initiated'' could include someone involved well after the scheme was actually initiated. One commenter suggested that the primary, significant, or moderate categories are not supported by the statute, and risk being implemented in a way that a whistleblower can be something other than a principal architect. Finally, two commenters offered suggestions for the examples in the proposed regulations. The comments on the examples focused on the application of the planned and initiated standard rather than on the application of the computational framework. One comment specifically suggested that the examples should provide guidance about what it means to plan and initiate, rather than guidance on the application of the computational framework.

The final regulations do not adopt a ''principal architect'' approach to the application of section 7623(b)(3), based in part on the statutory language, which does not require a single planner and initiator but instead provides for the possibility of multiple planners and initiators. More than one individual may plan and initiate the actions that lead to a tax underpayment or violation, whether as co-planners or as planners of independent actions that each led to the underpayment or violation. However, the terms ''plan'' and ''initiate'' suggest some voluntary action on the part of the individual. Thus, where an individual is acting under the direction and control of a supervisor, he or she should not be considered as planning or initiating. For example, the planned and initiated standard is not intended to apply to a junior associate acting under the direction of a partner. Nonetheless, the application of these rules is dependent on the relevant facts and circumstances of each case and, at some point, an associate or other employee becomes experienced enough to act sufficiently on his or her own to be considered a planner and initiator. The final regulations modify the examples to clarify the treatment of junior employees.

In addition, in response to the commenters' concern that the standard at § 301.7623–4(c)(3)(ii)(C) was too broad, the final regulations change ''knew or had reason to know there were tax implications'' to ''knew or had reason to know that a tax underpayment or a violation of the internal revenue laws could result, '' consistent with the full range of tax matters—from underpayments of tax to violations of the internal revenue laws—described in section 7623(a).

As the commenters noted, section 7623(b)(3) does not provide categories for planned and initiated. It does, however, provide that after a determination is made that an individual planned and initiated, ''the Whistleblower Office may appropriately reduce such award.'' The final regulations retain the primary, significant, or moderate categories to ensure that any appropriate reduction is made through the application of an established framework. The regulations' use of these categories, like the use of the fixed percentage and criteria approach for determining awards in substantial contribution and less substantial contribution cases, is intended to promote consistency, fairness, and transparency in an award determination process that is inherently subjective. As with the positive and negative factors, the IRS will continue to provide explanations to staff and examples, as appropriate and needed. Treasury and the IRS recognize the value that all whistleblowers, including those who participate in the actions that led to the underpayment, may provide, and the final regulations balance the goal of incentivizing whistleblowers with the plain language of the statute by providing for a sliding scale of reductions to an award for planning and initiating.

Eligible Affiliated Whistleblowers

As discussed earlier in this preamble, Treasury and the IRS decided not to incorporate the proposed rule for eligible affiliated whistleblowers at § 301.7623–4(c)(4) in the final regulations because it is inconsistent with the rule that prohibits a whistleblower from submitting a claim on behalf of another individual.

Multiple Whistleblowers

Section 7623 does not address whether multiple whistleblowers may receive an award from the same collected proceeds. The proposed regulations provided rules for determining awards when two or more independent claims, based on different information, relate to the same collected proceeds. In these situations, the proposed regulations allowed the Whistleblower Office to determine multiple awards, limited in aggregate amount to the maximum amount that could have been awarded to a single whistleblower, rather than restricting the determination to a single award payable to the first whistleblower that files a claim for award or payable on some other basis.

Treasury and the IRS received two comments on this issue. One commenter suggested that multiple whistleblowers should not have to share an award. The other commenter suggested that the first whistleblower should receive full credit for their information and that later whistleblowers should only receive an award for information that was not provided by the first whistleblower. After consideration of the comments, Treasury and the IRS determined to leave open the possibility of award payments for multiple whistleblowers. This determination was based in part on the recognition that the tax administration process is a long and multi-faceted one that may extend over the course of many years and may involve multiple substantial contributions from different sources. Given the unique nature of the tax administration process, Treasury and the IRS determined that it would not be fair or appropriate to determine an award only for the substantial contribution of whistleblowers who submit their information first-in-time. Accordingly, the proposed regulations are adopted without change.

Payment of Awards

Section 7623 provides for payment of an award to the individual that submits information and makes a claim for award. Under the proposed regulation, the IRS will pay any award under section 7623 to a whistleblower as promptly as circumstances permit after there has been a final determination of tax with respect to the action(s) and after the Whistleblower Office has determined the award and all appeals of the determination are final or the whistleblower has executed an award consent form.

Treasury and the IRS received two comments on this proposed rule. One

commenter suggested that the final regulations should provide procedures for payment of an award to attorney trust accounts. Another commenter suggested that whistleblowers should be allowed to assign or sell their claim for award. The issues raised in these comments are beyond the scope of the current regulations and, accordingly, the regulations have been finalized as proposed.

Final Determination of Tax

Under the proposed regulations, the Whistleblower Office can only pay an award determined pursuant to section 7623 after there is a final determination of tax. A final determination of tax may be made after the proceeds resulting from the action(s) subject to the award determination have been collected and either the statutory period for filing a claim for refund has expired or the taxpayer(s) subject to the action(s) and the IRS have agreed with finality to the tax or other liabilities for the period(s) at issue and the taxpayer(s) has waived the right to file a claim for refund.

Comments on this provision generally suggested that the IRS should make a final determination of tax as early as possible. The commenters suggested that the Whistleblower Office should make multiple partial payments on an award by making a final determination of tax with respect to each tax year for each taxpayer. One commenter suggested that the regulations should require mandatory partial payments of tax whenever a final determination is possible. One commenter suggested that it would be inappropriate to aggregate action(s) for purposes of making a final determination of tax because this could delay awards. Other commenters suggested that awards should be paid prior to a final determination of tax. One commenter suggested that the definition of *final determination of tax* should be triggered by each of the following events: The collection of proceeds by the IRS, the posting of a bond by a whistleblower, a determination by the Secretary that payment is in the best interests of the government, and the entering into of a closing agreement between the IRS and a partnership. Moreover, this commenter suggested that a taxpayer's right to file a refund suit should not be relevant to the definition, as taxpayers only file refund suits in a small percentage of cases.

Treasury and the IRS understand the commenters' view that whistleblowers should receive awards as quickly as possible. Under the statute, however, an award cannot be made until there are collected proceeds, and the IRS has not collected proceeds with finality until the taxpayer no longer has a right to seek a refund of the amounts that constitute collected proceeds. The general rule set out in the proposed regulations and adopted in these final regulations provides that a final determination can be made when the proceeds resulting from the action(s) subject to the award determination have been collected and either the statutory period for filing a claim for refund has expired or the taxpayer(s) subject to the action(s) and the IRS have agreed with finality to the tax or other liabilities for the period(s) at issue and the taxpayer(s) have waived the right to file a claim for refund. This general rule already includes the commenter's suggestion that, in many cases, a final determination may occur when the IRS and the taxpayer enter into a closing agreement and the taxpayer makes full payment of the liability. As a result, the regulations were not revised in light of this comment. Recognizing that some claims result in more than one action, the definition provides the Whistleblower Office with the discretion to aggregate or disaggregate actions arising out of a single claim, meaning that the Whistleblower Office can, in appropriate cases, make more than one final determination with respect to a single claim for an award. For example, the Whistleblower Office generally will aggregate two actions, for award determination purposes, when the outcome of one will have an effect on the amount of collected proceeds that will result from the other. As discussed earlier in this preamble, the final regulations include new language that explicitly allows for subsequent determinations when the IRS proceeds based on the information provided after having already paid, rejected, or denied an award. This rule is illustrated through the addition of a new example.

As noted, Treasury and the IRS declined, however, to provide for mandatory, partial or ongoing payments of awards in the final regulations, based on the determination that issuing multiple appealable final determinations as a rule would impose an unreasonable burden on the IRS and the Whistleblower Office. Accordingly, the final regulations' explicit statement that a final determination of tax does not preclude a subsequent final determination of tax is not intended to, and does not in any way, limit the discretion of the Whistleblower Office to aggregate or disaggregate actions for purposes of determining awards. The Whistleblower Office will continue to consider numerous factors relating to efficient tax administration in exercising this discretion, including the factors that it has previously identified in instructions to staff, instructions which are available via the IRS's Web site and that will be incorporated into the IRM when it is next updated.

Deceased Whistleblowers

Existing Treas. Reg. § 301.7623–1(b)(3) allows an executor, administrator, or other legal representative to file a claim for award for a deceased whistleblower, if evidence is provided to show that the representative has legal authority to act on behalf of the deceased. The proposed regulations provided that when a whistleblower dies before or during a whistleblower administrative proceeding, the Whistleblower Office will substitute an executor, administrator, or other legal representative on behalf of the deceased whistleblower for purposes of conducting the whistleblower administrative proceeding. No comments were received on this provision. Because the proposed regulations' use of the word ''will'' could be read to suggest that the regulations require substitution, Treasury and the IRS changed this word to ''may'' in the final regulations. Consistent with the regulations in effect under section 7623 at the time of the 2006 amendments to the statute, the Whistleblower Office will substitute such parties for a deceased whistleblower only when a party can make a proper showing that he or she is legally authorized to act for the deceased. The Whistleblower Office has no obligation to locate or determine a substitute for a deceased whistleblower. Accordingly, the final regulations provide that when a whistleblower dies before or during a whistleblower administrative proceeding, the Whistleblower Office may substitute an executor, administrator, or other legal representative on behalf of the deceased whistleblower for purposes of conducting the whistleblower administrative proceeding.

Tax Treatment of Awards

Under the proposed regulations, all awards are subject to current Federal tax reporting and withholding requirements. No comments were received on this provision. Treasury and the IRS, however, added language to the final regulations to clarify that whistleblower awards are includible in gross income.

Effective/Applicability Dates

Sections 301.7623–1, 301.7623–2, 301.7623–3, and 301.6103(h)(4)–1 were

proposed to apply to information submitted on or after the date the rules are adopted as final regulations in the **Federal Register**, and to claims for award under sections 7623(a) and 7623(b) that are open as of that date. Likewise, § 301.7623–4 was proposed to apply to information submitted on or after the date the rules are adopted as final regulations, and to claims for award under section 7623(b) that are open as of that date. Section 301.7623–4 was not proposed to apply to claims for award under section 7623(a) that are open as of that date.

Treasury and the IRS received two comments on the proposed effective dates. One commenter suggested that the proposed rules at § 301.7623–2 affect substantive rights of whistleblowers and should only be applicable to claims filed after the adoption of the final regulations. The other commenter similarly suggested that the regulations should be prospective and apply only to submissions made after the regulations have been finalized.

The final regulations do not negatively affect substantive rights of whistleblowers because the proposed and final regulations largely incorporate existing practices adhered to by the Whistleblower Office, and changes from existing practices are designed to be favorable to whistleblowers. For example, the regulations provide for whistleblower administrative proceedings, but as discussed earlier in this preamble, these proceedings are intended to benefit whistleblowers, providing them with additional due process and opportunities to participate in a whistleblower award determination. Finally, applying two sets of rules to whistleblower proceedings will be difficult for the Whistleblower Office to administer. The effective dates for the regulations will allow the Whistleblower Office to administer the Whistleblower Program in an efficient manner. Accordingly, after considering the comments, Treasury and the IRS adopt the proposed regulations without changes.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that these regulations will primarily affect individuals who file whistleblower claims under section 7623. Accordingly, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business, and no comments were received.

Drafting Information

The principal author of these regulations is Melissa A. Jarboe of the Office of the Associate Chief Counsel (Procedure and Administration).

List of Subjects in 26 CFR part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Adoption of Amendment to the Regulations

Accordingly, 26 CFR part 301 is amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

■ **Paragraph 1.** The authority citation for part 301 is amended by removing the entry for § 301.7623–1 and adding entries in numerical order for §§ 301.6103(h)(4)–1 and 301.7623–1 through 301.7623–4 to read as follows:

Authority: 26 U.S.C. 7805.

* * * * *

Section 301.6103(h)(4)–1 also issued under 26 U.S.C. 6103(h)(4) and 26 U.S.C. 6103(q).

* * * * *

Sections 301.7623–1 through 301.7623–4 also issued under 26 U.S.C. 7623.

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■ **Par. 2.** Section 301.6103(h)(4)–1 is added to read as follows:

§ 301.6103(h)(4)–1 Disclosure of returns and return information in whistleblower administrative proceedings.

(a) *In general.* A whistleblower administrative proceeding (as described in § 301.7623–3) is an administrative proceeding pertaining to tax administration within the meaning of section 6103(h)(4).

(b) *Disclosures in whistleblower administrative proceedings.* Pursuant to section 6103(h)(4) and paragraph (a) of this section, the Director, officers, and employees of the Whistleblower Office may disclose returns and return information (as defined by section 6103(b)) to a whistleblower (or the whistleblower's legal representative, if any) to the extent necessary to conduct a whistleblower administrative proceeding (as described in § 301.7623–3), including but not limited to—

(1) By communicating a preliminary award recommendation or preliminary denial letter to the whistleblower;

(2) By providing the whistleblower with an award report package;

(3) By conducting a meeting with the whistleblower to review documents supporting the preliminary award recommendation; and

(4) By sending an award decision letter, award determination letter, or award denial letter to the whistleblower.

(c) *Effective/applicability date.* This rule is effective on August 12, 2014. This rule applies to information submitted on or after August 12, 2014, and to claims for award under sections 7623(a) and 7623(b) that are open as of August 12, 2014.

■ **Par. 3.** Section 301.7623–1 is revised to read as follows:

§ 301.7623–1 General rules, submitting information on underpayments of tax or violations of the internal revenue laws, and filing claims for award.

(a) *In general.* In cases in which awards are not otherwise provided for by law, the Whistleblower Office may pay an award under section 7623(a), in a suitable amount, for information necessary for detecting underpayments of tax or detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same. In cases that satisfy the requirements of section 7623(b)(5) and (b)(6) and in which the Internal Revenue Service (IRS) proceeds with an administrative or judicial action based on information provided by an individual, the Whistleblower Office must determine and pay an award under section 7623(b)(1), (2), or (3). The awards provided for by section 7623 and this paragraph must be paid from collected proceeds, as defined in § 301.7623–2(d).

(b) *Eligibility to file claim for award.* (1) *In general.* Any individual, other than an individual described in paragraph (b)(2) of this section, is eligible to file a claim for award and to receive an award under section 7623 and §§ 301.7623–1 through 301.7623–4.

(2) *Ineligible whistleblowers.* The Whistleblower Office will reject any claim for award filed by an ineligible whistleblower and will provide written notice of the rejection to the whistleblower. The following

individuals are not eligible to file a claim for award or receive an award under section 7623 and §§ 301.7623–1 through 301.7623–4—

(i) An individual who is an employee of the Department of Treasury or was an employee of the Department of Treasury when the individual obtained the information on which the claim is based;

(ii) An individual who obtained the information through the individual's official duties as an employee of the Federal Government, or who is acting within the scope of those official duties as an employee of the Federal Government;

(iii) An individual who is or was required by Federal law or regulation to disclose the information or who is or was precluded by Federal law or regulation from disclosing the information;

(iv) An individual who obtained or had access to the information based on a contract with the Federal Government; or

(v) An individual who filed a claim for award based on information obtained from an ineligible whistleblower for the purpose of avoiding the rejection of the claim that would have resulted if the claim was filed by the ineligible whistleblower.

(c) *Submission of information and claims for award.* (1) *Submitting information.* To be eligible to receive an award under section 7623 and §§ 301.7623–1 through 301.7623–4, a whistleblower must submit to the IRS specific and credible information that the whistleblower believes will lead to collected proceeds from one or more persons whom the whistleblower believes have failed to comply with the internal revenue laws. In general, a whistleblower's submission should identify the person(s) believed to have failed to comply with the internal revenue laws and should provide substantive information, including all available documentation, that supports the whistleblower's allegations. Information that identifies a pass-through entity will be considered to also identify all persons with a direct or indirect interest in the entity. Information that identifies a member of a firm who promoted another identified person's participation in a transaction described and documented in the information provided will be considered to also identify the firm and all other members of the firm. Submissions that provide speculative information or that do not provide specific and credible information regarding tax underpayments or violations of internal revenue laws do not provide a basis for an award. If documents or supporting evidence are known to the whistleblower but are not in the whistleblower's control, then the whistleblower should describe the documents or supporting evidence and identify their location to the best of the whistleblower's ability. If all available information known to the whistleblower is not provided to the IRS by the whistleblower, then the whistleblower bears the risk that this information might not be considered by the Whistleblower Office for purposes of an award.

(2) *Filing claim for award.* To claim an award under section 7623 and §§ 301.7623–1 through 301.7623–4 for information provided to the IRS, a whistleblower must file a formal claim for award by completing and sending Form 211, ''Application for Award for Original Information,'' to the Internal Revenue Service, Whistleblower Office, at the address provided on the form, or by complying with other claim filing procedures as may be prescribed by the IRS in other published guidance. The Form 211 should be completed in its entirety and should include the following information—

(i) The date of the claim;

(ii) The whistleblower's name;

(iii) The whistleblower's address and telephone number;

(iv) The whistleblower's date of birth;

(v) The whistleblower's taxpayer identification number; and

(vi) An explanation of how the information on which the claim is based came to the attention and into the possession of the whistleblower, including, as available, the date(s) on which the whistleblower acquired the information and a complete description of the whistleblower's present or former relationship (if any) to person(s) identified on the Form 211.

(3) *Under penalty of perjury.* No award may be made under section 7623(b) unless the information on which the award is based is submitted to the IRS under penalty of perjury. All claims for award under section 7623 and §§ 301.7623–1 through 301.7623–4 must be accompanied by an original signed declaration under penalty of perjury, as follows: ''I declare under penalty of perjury that I have examined this application, my accompanying statement, and supporting documentation and aver that such application is true, correct, and complete, to the best of my knowledge.'' This requirement precludes the filing of a claim for award by a person serving as a representative of, or in any way on behalf of, another individual. Claims filed by more than one whistleblower (joint claims) must be signed by each individual whistleblower under penalty of perjury.

(4) *Perfecting claim for award.* If a whistleblower files a claim for award that does not include information described under paragraph (c)(2) of this section, does not contain specific and credible information as described in paragraph (c)(1) of this section, or is based on information that was not submitted under penalty of perjury as required by paragraph (c)(3) of this section, the Whistleblower Office may reject the claim or notify the whistleblower of the deficiencies and provide the whistleblower an opportunity to perfect the claim for award. If a whistleblower does not perfect the claim for award within the time period specified by the Whistleblower Office, then the Whistleblower Office may reject the claim. If the Whistleblower Office rejects a claim, then the Whistleblower Office will provide notice of the rejection to the whistleblower pursuant to the rules of § 301.7623–3(b)(3) or (c)(7). If the Whistleblower Office rejects a claim for the reasons described in this paragraph, then the whistleblower may perfect and resubmit the claim.

(d) *Request for assistance.* (1) *In general.* The Whistleblower Office, the IRS, or IRS Office of Chief Counsel may request the assistance of a whistleblower or the whistleblower's legal representative. Any assistance shall be at the direction and control of the Whistleblower Office, the IRS, or the IRS Office of Chief Counsel assigned to the matter. See § 301.6103(n)–2 for rules regarding written contracts among the IRS, whistleblowers, and legal representatives of whistleblowers.

(2) *No agency relationship.* Submitting information, filing a claim for award, or responding to a request for assistance does not create an agency relationship between a whistleblower and the Federal Government, nor does a whistleblower or the whistleblower's legal representative act in any way on behalf of the Federal Government.

(e) *Confidentiality of whistleblowers.* Under the informant's privilege, the IRS will use its best efforts to protect the identity of whistleblowers. In some circumstances, the IRS may need to reveal a whistleblower's identity, for example, when it is determined that it is in the best interests of the Government to use a whistleblower as a witness in a judicial proceeding. In those circumstances, the IRS will make every effort to notify the whistleblower before revealing the whistleblower's identity.

(f) *Effective/applicability date.* This rule is effective on August 12, 2014. This rule applies to information submitted on or after August 12, 2014, and to claims for award under sections 7623(a) and 7623(b) that are open as of August 12, 2014.

■ **Par. 4.** Section 301.7623–2 is added to read as follows:

§ 301.7623–2 Definitions.

(a) *Action.* (1) *In general.* For purposes of section 7623(b) and §§ 301.7623–1 through 301.7623–4, the term *action* means an administrative or judicial action.

(2) *Administrative action.* For purposes of section 7623(b) and §§ 301.7623–1 through 301.7623–4, the term *administrative action* means all or a portion of an Internal Revenue Service (IRS) civil or criminal proceeding against any person that may result in collected proceeds, as defined in paragraph (d) of this section, including, for example, an examination, a collection proceeding, a status determination proceeding, or a criminal investigation.

(3) *Judicial action.* For purposes of section 7623(b) and §§ 301.7623–1 through 301.7623–4, the term *judicial action* means all or a portion of a proceeding against any person in any court that may result in collected proceeds, as defined in paragraph (d) of this section.

(b) *Proceeds based on.* (1) *In general.* For purposes of section 7623(b) and §§ 301.7623–1 through 301.7623–4, the IRS *proceeds based on* information provided by a whistleblower when the information provided substantially contributes to an action against a person identified by the whistleblower. For example, the IRS proceeds based on the information provided when the IRS initiates a new action, expands the scope of an ongoing action, or continues to pursue an ongoing action, that the IRS would not have initiated, expanded the scope of, or continued to pursue, but for the information provided. The IRS does not proceed based on information when the IRS analyzes the information provided or investigates a matter raised by the information provided.

(2) *Examples.* The provisions of paragraph (b)(1) of this section may be illustrated by the following examples:

Example 1. Information provided to the IRS by a whistleblower, under section 7623 and § 301.7623–1, identifies a taxpayer, describes and documents specific facts relating to the taxpayer's foreign sales in Country A, and, based on those facts, alleges that the taxpayer was not entitled to a foreign tax credit relating to its foreign sales in Country A. The IRS receives the information after having already initiated an examination of the taxpayer. The IRS's audit plan includes foreign tax credit issues but focuses on taxpayer's foreign sales in Country B and does not specifically address the taxpayer's foreign sales in Country A. Based on the information provided, the IRS expands the examination of the foreign tax credit issue to include consideration of the amount of foreign tax credit relating to the taxpayer's foreign sales in Country A. For purposes of section 7623 and §§ 301.7623–1 through 301.7623–4, the portion of the IRS's examination of the taxpayer relating to the foreign tax credit issue with respect to Country A is an administrative action with which the IRS proceeds based on the information provided by the whistleblower because the information provided substantially contributed to the action by causing the expansion of the IRS's examination.

Example 2. Information provided to the IRS by a whistleblower, under section 7623 and § 301.7623–1, identifies a taxpayer, describes and documents specific facts relating to the taxpayer's activities, and, based on those facts, alleges that the taxpayer owed additional taxes in Year 1. The IRS proceeds with an examination of the taxpayer for Year 1 based on the information provided by the whistleblower. The IRS discovers that the taxpayer engaged in the same activities in Year 2 and expands the examination to Year 2. In the course of the examination, the IRS obtains, through the issuance of Information Document Requests (IDRs) and summonses, additional facts that are unrelated to the activities described in the information provided by the whistleblower. Based on these additional facts, the IRS expands the scope of the examination of the taxpayer for both Year 1 and Year 2. For purposes of section 7623 and §§ 301.7623–1 through 301.7623–4, the portion of the IRS's examination relating to the activities described and documented in the information provided is an administrative action with which the IRS proceeds based on information provided by the whistleblower because the information provided substantially contributed to the action by causing the expansion of the IRS's examination of Year 1 and Year 2. The portions of the IRS's examination of the taxpayer in both Year 1 and Year 2 relating to the additional facts obtained through the issuance of IDRs and summonses are not actions with which the IRS proceeds based on the information provided by the whistleblower because the information provided did not substantially contribute to the action.

Example 3. Information provided to the IRS by a whistleblower, under section 7623 and § 301.7623–1, identifies a taxpayer, describes and documents specific facts relating to the taxpayer's activities, and, based on those facts, alleges that the taxpayer owed additional taxes in Year 1. The IRS receives the information after having already initiated an examination of the taxpayer for Year 1. During the examination, the information is provided to the Exam team and the Exam team uses the information provided to confirm the correctness of adjustments made based on other information. Although the whistleblower's information confirms the correctness of the IRS's adjustments, the IRS does not rely on the whistleblower's information when it makes the adjustments, nor does the information cause the IRS to expand the scope of its examination. The whistleblower's information merely supports information independently obtained by the IRS. For purposes of section 7623 and §§ 301.7623–1 through 301.7623–4, the IRS's examination is not an administrative action with which the IRS proceeds based on information provided by the whistleblower because the information provided did not substantially contribute to the action.

Example 4. Same facts as *Example 3.* During the examination, however, the Exam team identifies inconsistencies between the information provided by the whistleblower and other information already in the Exam team's possession. The Exam team uses the information provided by the whistleblower to make additional adjustments that it would not have made based solely on the other information. For purposes of section 7623 and §§ 301.7623–1 through 301.7623–4, the portion of the IRS's examination relating to the additional adjustments is an administrative action with which the IRS proceeds based on information provided by the whistleblower because the information provided substantially contributed to the action.

(c) *Related action.* (1) *In general.* For purposes of section 7623(b) and §§ 301.7623–1 through 301.7623–4, the term *related action* means an action against a person other than the person(s) identified in the information provided and subject to the original action(s), when—

(i) The facts relating to the underpayment of tax or violations of the internal revenue laws by the other person are substantially the same as the facts described and documented in the information provided (with respect to the person(s) subject to the original action);

(ii) The IRS proceeds with the action against the other person based on the specific facts described and documented in the information provided; and

(iii) The other, unidentified person is related to the person identified in the information provided. For purposes of this paragraph, an unidentified person is related to the person identified in the information provided if the IRS can identify the unidentified person using the information provided (without first having to use the information provided to identify any other person or having to independently obtain additional information).

(2) *Examples.* The provisions of paragraph (c)(1) of this section may be illustrated by the following examples:

Example 1. Information provided to the IRS by a whistleblower, under section 7623

and § 301.7623–1, identifies a taxpayer (Taxpayer 1), describes and documents specific facts relating to Taxpayer 1's activities, and, based on those facts, alleges tax underpayments by Taxpayer 1. The information provided also identifies an accountant (CPA 1) and describes and documents specific facts relating to CPA 1's contribution to the activities of Taxpayer 1 that the whistleblower alleges resulted in tax underpayments. The IRS proceeds with an examination of Taxpayer 1 based on the information provided by the whistleblower. Using the information provided, the IRS obtains CPA 1's client list and identifies two taxpayer/clients of CPA 1 (Taxpayer 2 and Taxpayer 3) that appear to have engaged in activities similar to Taxpayer 1. The IRS proceeds with an examination of Taxpayer 2 and finds that Taxpayer 2 engaged in the same activities as those described in the information provided with respect to Taxpayer 1. The IRS proceeds with an examination of Taxpayer 3 and finds that Taxpayer 3 engaged in different activities from those described in the information provided with respect to Taxpayer 1. For purposes of section 7623 and §§ 301.7623–1 through 301.7623–4, the examination of Taxpayer 2 is a related action because it satisfies the conditions of paragraph (c)(1) of this section. The examination of Taxpayer 3 is not a related action because the relevant facts are not substantially the same as the facts relevant to the examination of Taxpayer 1.

Example 2. Same facts as *Example 1.* Using the information provided by the whistleblower, the IRS identifies a co-promoter of CPA 1 (CPA 2) that appears to have engaged in activities similar to CPA 1. CPA 2 is not a member of CPA 1's firm. The IRS subsequently obtains the client list of CPA 2 and identifies a taxpayer/client of CPA 2 (Taxpayer 4) that appears to have engaged in activities similar to Taxpayer 1. The IRS proceeds with an examination of Taxpayer 4 and finds that Taxpayer 4 engaged in the same activities as those described in the information provided with respect to Taxpayer 1, and that CPA 2 contributed to the activities in the same way as described in the information provided with respect to CPA 1. The IRS proceeds with an examination of CPA 2's liability for promoter penalties under section 6700 in connection with the activities described in the information provided with respect to Taxpayer 1 and CPA 1. For purposes of section 7623 and §§ 301.7623–1 through 301.7623–4, the examination of CPA 2 is a related action because it satisfies the conditions of paragraph (c)(1) of this section. The examination of Taxpayer 4 is not a related action because Taxpayer 4 was not related to a person identified in the information provided. CPA 2 was not identified in the information provided and the IRS first had to identify CPA 2 before identifying Taxpayer 4 and proceeding with the examination of Taxpayer 4.

Example 3. Same facts as *Example 1.* An accountant (CPA 3) is a member of CPA 1's firm. Using the information provided by the whistleblower, the IRS obtains the client list of CPA 3 and identifies a taxpayer/client of CPA 3 (Taxpayer 5) that appears to have engaged in activities similar to Taxpayer 1. The IRS proceeds with an examination of Taxpayer 5 and finds that Taxpayer 5 engaged in the same activities as those described in the information provided with respect to Taxpayer 1, and that CPA 3 contributed to the activities in the same way as described in the information provided with respect to CPA 1. For purposes of section 7623 and §§ 301.7623–1 through 301.7623–4, the examination of Taxpayer 5 is a related action because Taxpayer 5 is related to CPA 3, a person considered to be identified in the information provided under § 301.7623–1(c)(1), and the facts relating to Taxpayer 5 are substantially the same as the facts described and documented in the information provided. An IRS examination of CPA 3's liability for promoter penalties under section 6700, based on the facts described and documented in the information provided with respect to Taxpayer 1 and CPA 1, is an administrative action based on the information provided.

Example 4. Information provided to the IRS by a whistleblower, under section 7623 and § 301.7623–1, identifies a taxpayer (Taxpayer 1), describes and documents specific facts relating to Taxpayer 1's activities, and, in particular, Taxpayer 1's participation in a transaction. Based on those facts, the whistleblower alleges that Taxpayer 1 owed additional taxes. The IRS proceeds with an examination of Taxpayer 1 based on the information provided by the whistleblower. The IRS identifies the other parties to the transaction described in the information provided (Taxpayer 2 and Taxpayer 3). The IRS proceeds with examinations of Taxpayer 2 and Taxpayer 3 relating to their participation in the transaction described in the information provided. For purposes of section 7623 and §§ 301.7623–1 through 301.7623–4, the IRS's examinations of Taxpayer 2 and Taxpayer 3 relating to the activities described and documented in the information provided are related actions because they satisfy the conditions of paragraph (c)(1) of this section.

(d) *Collected proceeds.* (1) *In general.* For purposes of section 7623 and §§ 301.7623–1 through 301.7623–4, the terms *proceeds of amounts collected* and *collected proceeds* (collectively, *collected proceeds*) include: Tax, penalties, interest, additions to tax, and additional amounts collected because of the information provided; amounts collected prior to receipt of the information if the information provided results in the denial of a claim for refund that otherwise would have been paid; and a reduction of an overpayment credit balance used to satisfy a tax liability incurred because of the information provided. Collected proceeds are limited to amounts collected under the provisions of title 26, United States Code.

(2) *Refund netting.* (i) *In general.* If any portion of a claim for refund that is substantively unrelated to the information provided is—

(A) Allowed, and

(B) Used to satisfy a tax liability attributable to the information provided instead of refunded to the taxpayer, then the allowed but non-refunded amount constitutes collected proceeds.

(ii) *Example.* The provisions of paragraph (d)(2)(i) of this section may be illustrated by the following example:

Example. Information provided to the IRS by a whistleblower, under section 7623 and § 301.7623–1, identifies a corporate taxpayer (Corporation), describes and documents specific facts relating to Corporation's activities, and, based on those facts, alleges that Corporation owed additional taxes. Based on the information provided by the whistleblower, the IRS proceeds with an examination of Corporation and determines adjustments that would result in an unpaid tax liability of $500,000. During the examination, Corporation informally claims a refund of $400,000 based on adjustments to items of income and expense that are wholly unrelated to the information provided by the whistleblower. The IRS agrees to the unrelated adjustments. The IRS nets the adjustments and determines a tax deficiency of $100,000. Thereafter, Corporation makes full payment of the $100,000 deficiency. For purposes of section 7623 and §§ 301.7623–1 through 301.7623–4, the collected proceeds include the $400,000 informally claimed as a refund and netted against the adjustments attributable to the information provided, as well as the $100,000 paid by Corporation.

(3) *Amended returns.* Amounts collected based on amended returns constitute collected proceeds if—

(i) The IRS proceeds based on the information provided;

(ii) As a result, the person subject to the action(s) with which the IRS proceeds files amended returns; and

(iii) The amounts collected based on the amended returns relate to the activities or facts described in the information provided.

(4) *Criminal fines.* Criminal fines deposited into the Victims of Crime Fund are not collected proceeds and cannot be used for payment of awards.

(5) *Computation of collected proceeds.* (i) *In general.* Pursuant to § 301.7623–4(d)(1), the IRS cannot make an award payment until there has been a final determination of tax. For purposes of determining the amount of an award under section 7623 and §§ 301.7623–1 through 301.7623–4, after there has been a final determination of tax as defined in § 301.7623–4(d)(2), the IRS will compute the amount of collected proceeds based on all information known with respect to the taxpayer's account, including with respect to all tax attributes, as of the date the computation is made.

(ii) *Post-determination proceeds.* If, based on all information known with respect to the taxpayer's account as of

the date of the computation described in paragraph (d)(5)(i) of this section, there is a possibility that the IRS may collect additional proceeds, then the Whistleblower Office will continue to monitor the case. If the Whistleblower Office identifies additional collected proceeds, then the IRS will compute and pay accordingly.

(iii) *Partial collection.* If the IRS does not collect the full amount of taxes, penalties, interest, additions to tax, and additional amounts assessed against the taxpayer, then any amounts that the IRS does collect will constitute collected proceeds in the same proportion that the adjustments attributable to the information provided bear to the total adjustments.

(e) *Amount in dispute and gross income.* (1) *In general.* Section 7623(b) applies with respect to any action against any taxpayer in which the tax, penalties, interest, additions to tax, and additional amounts in dispute exceed $2,000,000 but, if the taxpayer is an individual, then only if the taxpayer's gross income exceeds $200,000 in at least one taxable year subject to the action.

(2) *Amount in dispute.* (i) *In general.* For purposes of section 7623(b)(5) and §§ 301.7623–1 through 301.7623–4, the term *amount in dispute* means the greater of the maximum total of tax, penalties, interest, additions to tax, and additional amounts that resulted from the action(s) with which the IRS proceeded based on the information provided, or the maximum total of such amounts that were stated in formal positions taken by the IRS in the action(s). The IRS will compute the amount in dispute, for purposes of award determinations described in § 301.7623–3(c)(6), when there has been a final determination of tax as defined in § 301.7623–4(d)(2).

(ii) *Examples.* The provisions of paragraph (e)(2)(i) of this section may be illustrated by the following examples:

Example 1. Information provided to the IRS by a whistleblower, under section 7623 and § 301.7623–1, identifies a corporate taxpayer, describes and documents specific facts relating to the taxpayer's activities, and, based on those facts, alleges that the taxpayer owed additional taxes. The IRS proceeds with an examination of the taxpayer based on the information provided by the whistleblower; makes adjustments to items of income and expense and allows certain credits; and, ultimately, determines a deficiency against the taxpayer of $1,900,000 and issues the taxpayer a statutory notice of deficiency. The taxpayer petitions the notice to the United States Tax Court. The Tax Court sustains the IRS's position resulting in a deficiency of $1,900,000. Following the final determination of tax, the IRS computes that the total of tax, penalties, interest, additions to tax, and additional amounts that resulted from the action was $2,500,000. For purposes of section 7623 and §§ 301.7623–1 through 301.7623–4, the amount in dispute is $2,500,000.

Example 2. Same facts as *Example 1,* except the IRS determines a deficiency of $1,500,000; the Tax Court sustains the deficiency of $1,500,000; and, following the final determination of tax, the IRS computes that the total of tax, penalties, interest, additions to tax, and additional amounts that resulted from the action was $1,750,000. For purposes of section 7623 and §§ 301.7623–1 through 301.7623–4, the amount in dispute is $1,750,000.

Example 3. Same facts as *Example 1,* except the IRS determines a deficiency of $2,100,000; the Tax Court redetermines a deficiency of $1,500,000; and, following the final determination of tax, the IRS computes that the total of tax, penalties, interest, additions to tax, and additional amounts that resulted from the action was $1,750,000. For purposes of section 7623 and §§ 301.7623–1 through 301.7623–4, the amount in dispute is $2,100,000.

(3) *Gross income.* For purposes of section 7623(b)(5) and §§ 301.7623–1 through 301.7623–4, the term *gross income* has the same meaning as provided under section 61(a). The IRS will compute the individual taxpayer's gross income, for purposes of award determinations described in § 301.7623–3(c)(6), when there has been a final determination of tax as defined in § 301.7623–4(d)(2).

(f) *Effective/applicability date.* This rule is effective on August 12, 2014. This rule applies to information submitted on or after August 12, 2014, and to claims for award under sections 7623(a) and 7623(b) that are open as of August 12, 2014.

■ **Par. 5.** Section 301.7623–3 is added to read as follows:

§ 301.7623–3 Whistleblower administrative proceedings and appeals of award determinations.

(a) *In general.* The Whistleblower Office will pay awards under section 7623(a) and determine and pay awards under section 7623(b) in whistleblower administrative proceedings pursuant to the rules of this section. The whistleblower administrative proceedings described in this section are administrative proceedings pertaining to tax administration for purposes of section 6103(h)(4). See § 301.6103(h)(4)-1 for additional rules regarding disclosures of return information in whistleblower administrative proceedings. The Whistleblower Office may determine awards for claims involving multiple actions in a single whistleblower administrative proceeding. For purposes of the whistleblower administrative proceedings for rejections and denials, described in paragraphs (b)(3), (c)(7), and (c)(8) of this section, the Internal Revenue Service (IRS) may rely on the whistleblower's description of the amount owed by the taxpayer(s). The IRS may, however, rely on other information as necessary (for example, when the alleged amount in dispute is below the $2 million threshold of section 7623(b)(5)(B), but the actual amount in dispute is above the threshold).

(b) *Awards under section 7623(a).* (1) *Preliminary award recommendation.* In cases in which the Whistleblower Office recommends payment of an award under section 7623(a), the Whistleblower Office will communicate a preliminary award recommendation under section 7623(a) and §§ 301.7623–1 through 301.7623–4 to the whistleblower by sending a preliminary award recommendation letter that states the Whistleblower Office's preliminary computation of the amount of collected proceeds, recommended award percentage, recommended award amount (even in cases when the application of § 301.7623–4 results in a reduction of the recommended award amount to zero), and a list of the factors that contributed to the recommended award percentage. The whistleblower administrative proceeding described in paragraphs (b)(1) and (2) of this section begins on the date the Whistleblower Office sends the preliminary award recommendation letter. If the whistleblower believes that the Whistleblower Office erred in evaluating the information provided, the whistleblower has 30 days from the date the Whistleblower Office sends the preliminary award recommendation to submit comments to the Whistleblower Office (this period may be extended at the sole discretion of the Whistleblower Office). The Whistleblower Office will review all comments submitted timely by the whistleblower (or the whistleblower's legal representative, if any) and pay an award, pursuant to paragraph (b)(2) of this section.

(2) *Decision letter.* At the conclusion of the process described in paragraph (b)(1) of this section, and when there is a final determination of tax, as defined in § 301.7623–4(d)(2), the Whistleblower Office will pay an award under section 7623(a) and §§ 301.7623–1 through 301.7623–4. The Whistleblower Office will communicate the amount of the award to the whistleblower in a decision letter.

(3) *Rejections and denials.* If the Whistleblower Office rejects a claim for award under section 7623(a), pursuant

to § 301.7623–1(b) or (c), or if the IRS either did not proceed based on information provided by the whistleblower, as defined in § 301.7623–2(b), or did not collect proceeds, as defined in § 301.7623–2(d), then the Whistleblower Office will not apply the rules of paragraphs (b)(1) or (2) of this section. The Whistleblower Office will provide written notice to the whistleblower of the rejection or denial of any award and, in the case of a rejection, the written notice will state the basis for the rejection.

(c) *Awards under section 7623(b).* (1) *Preliminary award recommendation.* For claims under section 7623(b) other than those described in paragraphs (c)(7) and (c)(8) of this section (rejections and denials), the Whistleblower Office will prepare a preliminary award recommendation based on the Whistleblower Office's review of the administrative claim file and the application of the rules of section 7623 and §§ 301.7623–1 through 301.7623–4 to the facts of the case. See paragraph (e)(2) of this section for a description of the administrative claim file. The whistleblower administrative proceeding described in paragraphs (c)(1) through (6) of this section begins on the date the Whistleblower Office sends the preliminary award recommendation letter. The preliminary award recommendation is not a determination letter within the meaning of paragraph (c)(6) of this section and cannot be appealed to Tax Court under section 7623(b)(4) and paragraph (d) of this section. The preliminary award recommendation will notify the whistleblower that the IRS cannot determine or pay any award until there is a final determination of tax, as defined in § 301.7623–4(d)(2).

(2) *Contents of preliminary award recommendation.* The Whistleblower Office will communicate the preliminary award recommendation under section 7623(b) to the whistleblower by sending—

(i) A preliminary award recommendation letter that describes the whistleblower's options for responding to the preliminary award recommendation;

(ii) A summary report that states a preliminary computation of the amount of collected proceeds, the recommended award percentage, the recommended award amount (even in cases when the application of section 7623(b)(2) or section 7623(b)(3) results in a reduction of the recommended award amount to zero), and a list of the factors that contributed to the recommended award percentage;

(iii) An award consent form; and

(iv) A confidentiality agreement.

(3) *Opportunity to respond to preliminary award recommendation.* The whistleblower will have 30 days (this period may be extended at the sole discretion of the Whistleblower Office) from the date the Whistleblower Office sends the preliminary award recommendation letter to respond to the preliminary award recommendation in one of the following ways—

(i) If the whistleblower takes no action, then the Whistleblower Office will make an award determination, pursuant to paragraph (c)(6) of this section;

(ii) If the whistleblower signs, dates, and returns the award consent form agreeing to the preliminary award recommendation and waiving any and all administrative and judicial appeal rights, then the Whistleblower Office will make an award determination, pursuant to paragraph (c)(6) of this section;

(iii) If the whistleblower signs, dates, and returns the confidentiality agreement, then the Whistleblower Office will provide the whistleblower with a detailed award report, and an opportunity to review documents supporting the report pursuant to paragraphs (c)(4) and (5) of this section, and any comments submitted by the whistleblower will be added to the administrative claim file; or

(iv) If the whistleblower submits comments on the preliminary award recommendation to the Whistleblower Office, but does not sign, date, and return the confidentiality agreement, then the comments will be added to the administrative claim file and reviewed by the Whistleblower Office in making an award determination, pursuant to paragraph (c)(6) of this section.

(4) *Detailed report.* (i) *Contents of detailed report.* If the whistleblower signs, dates, and returns the confidentiality agreement accompanying the preliminary award recommendation under section 7623(b), pursuant to paragraph (c)(3) of this section, then the Whistleblower Office will send the whistleblower—

(A) A detailed report that states a preliminary computation of the amount of collected proceeds, the recommended award percentage, and the recommended award amount, and provides a full explanation of the factors that contributed to the recommended award percentage;

(B) Instructions for scheduling an appointment for the whistleblower (and the whistleblower's legal representative, if any) to review information in the administrative claim file that is not protected by one or more common law or statutory privileges; and

(C) An award consent form.

(ii) *Opportunity to respond to detailed report.* The whistleblower will have 30 days (this period may be extended at the sole discretion of the Whistleblower Office) from the date the Whistleblower Office sends the detailed report to respond in one of the following ways—

(A) If the whistleblower takes no action, then the Whistleblower Office will make an award determination, pursuant to paragraph (c)(6) of this section;

(B) If the whistleblower requests an appointment to review information from the administrative claim file that is not protected from disclosure by one or more common law or statutory privileges, then a meeting will be arranged pursuant to paragraph (c)(5) of this section;

(C) If the whistleblower does not request an appointment but does submit comments on the detailed report to the Whistleblower Office, then the comments will be added to the administrative claim file and reviewed by the Whistleblower Office in making an award determination pursuant to paragraph (c)(6) of this section; or

(D) If the whistleblower signs, dates, and returns the award consent form agreeing to the preliminary award recommendation and waiving any and all administrative and judicial appeal rights, then the Whistleblower Office will make an award determination, pursuant to paragraph (c)(6) of this section.

(iii) *Additional rules.* The detailed report is not a determination letter within the meaning of paragraph (c)(6) of this section and cannot be appealed to Tax Court under section 7623(b)(4) and paragraph (d) of this section. The detailed report will notify the whistleblower that the IRS cannot determine or pay any award until there is a final determination of tax, as defined in § 301.7623–4(d)(2).

(5) *Opportunity to review documents supporting award report recommendations.* Appointments for the whistleblower (and the whistleblower's legal representative, if any) to review information from the administrative claim file that is not protected from disclosure by one or more common law or statutory privileges will be held at the Whistleblower Office in Washington, DC, unless the Whistleblower Office, in its sole discretion, decides to hold the meeting at another location. At the appointment, the Whistleblower Office will provide for viewing the information from the administrative claim file. The

Whistleblower Office will supervise the whistleblower's review of the information and the whistleblower will not be permitted to make copies of any documents or other information. The whistleblower will have 30 days (this period may be extended at the sole discretion of the Whistleblower Office) from the date of the appointment to submit comments on the detailed report and the documents reviewed at the appointment to the Whistleblower Office. All comments will be added to the administrative claim file and reviewed by the Whistleblower Office in making an award determination, pursuant to paragraph (c)(6) of this section.

(6) *Determination letter.* After the whistleblower's participation in the whistleblower administrative proceeding, pursuant to paragraph (c) of this section, has concluded, and there is a final determination of tax, as defined in § 301.7623–4(d)(2), a Whistleblower Office official will determine the amount of the award under section 7623(b)(1), (2), or (3), and §§ 301.7623–1 through 301.7623–4, based on the official's review of the administrative claim file. The Whistleblower Office will communicate the award to the whistleblower in a determination letter, stating the amount of the award. If, however, the whistleblower has executed an award consent form agreeing to the amount of the award and waiving the whistleblower's right to appeal the award determination, pursuant to section 7623(b)(4) and paragraph (d) of this section, then the Whistleblower Office will not send the whistleblower a determination letter and will make payment of the award as promptly as circumstances permit.

(7) *Rejections.* A rejection is a determination that relates solely to the whistleblower and the information on the face of the claim that pertains to the whistleblower. If the Whistleblower Office rejects a claim for award under section 7623(b), pursuant to § 301.7623–1(b) or (c), then the Whistleblower Office will not apply the rules of paragraphs (c)(1) through (6) of this section. The Whistleblower Office will send to the whistleblower a preliminary rejection letter that states the basis for the rejection of the claim. The whistleblower administrative proceeding described in this paragraph begins on the date the Whistleblower Office sends the preliminary rejection letter. If the whistleblower believes that the Whistleblower Office erred in evaluating the information provided, the whistleblower has 30 days from the date the Whistleblower Office sends the preliminary rejection letter to submit comments to the Whistleblower Office (this period may be extended at the sole discretion of the Whistleblower Office). The Whistleblower Office will review all comments submitted timely by the whistleblower (or the whistleblower's legal representative, if any) and, following that review, the Whistleblower Office will either provide written notice to the whistleblower of the rejection of the claim, including the basis for the rejection, or apply the rules of paragraphs (c)(1) through (c)(6) of this section.

(8) *Denials.* A denial is a determination that relates to or implicates taxpayer information. If, with respect to a claim for award under section 7623(b), the IRS either did not proceed based on the information provided by the whistleblower, as defined in § 301.7623–2(b), or did not collect proceeds, as defined in § 301.7623–2(d), then the Whistleblower Office will not apply the rules of paragraphs (c)(1) through (6) of this section. The Whistleblower Office will send to the whistleblower a preliminary denial letter that states the basis for the denial of the claim. The whistleblower administrative proceeding described in this paragraph begins on the date the Whistleblower Office sends the preliminary denial letter. If the whistleblower believes that the Whistleblower Office erred in evaluating the information provided, the whistleblower has 30 days from the date the Whistleblower Office sends the preliminary denial letter to submit comments to the Whistleblower Office (this period may be extended at the sole discretion of the Whistleblower Office). The Whistleblower Office will review all comments submitted timely by the whistleblower (or the whistleblower's legal representative, if any) and, following that review, the Whistleblower Office will either provide written notice to the whistleblower of the denial of any award, including the basis for the denial, or apply the rules of paragraphs (c)(1) through (c)(6) of this section.

(d) *Appeal of award determination.* Any determination regarding an award under section 7623(b)(1), (2), or (3) may, within 30 days of such determination, be appealed to the Tax Court.

(e) *Administrative record.* (1) *In general.* The administrative record comprises all information contained in the administrative claim file that is relevant to the award determination and not protected by one or more common law or statutory privileges.

(2) *Administrative claim file.* The administrative claim file will include the following materials relating to the action(s) to which the determination relates—

(i) The Form 211, ''Application for Award for Original Information,'' filed by the whistleblower and all information provided by the whistleblower (whether provided with the whistleblower's original submission or through a subsequent contact with the IRS).

(ii) Copies of all debriefing notes and recorded interviews held with the whistleblower (and the whistleblower's legal representative, if any).

(iii) Form(s) 11369, ''Confidential Evaluation Report on Claim for Award,'' including narratives prepared by the relevant IRS office(s), explaining the whistleblower's contributions to the actions and documenting the actions taken by the IRS in the case(s). The Form 11369 will refer to and incorporate additional documents relating to the issues raised by the claim, as appropriate, including, for example, relevant portions of revenue agent reports, copies of agreements entered into with the taxpayer(s), tax returns, and activity records.

(iv) Copies of all contracts entered into among the IRS, the whistleblower, and the whistleblower's legal representative (if any), and an explanation of the cooperation provided by the whistleblower (or the whistleblower's legal representative, if any) under the contract.

(v) Any information that reflects actions by the whistleblower that may have had a negative impact on the IRS's ability to examine the taxpayer(s).

(vi) All correspondence and documents sent by the Whistleblower Office to the whistleblower.

(vii) All notes, memoranda, and other documents made by officers and employees of the Whistleblower Office and considered by the official making the award determination.

(viii) All correspondence and documents received by the Whistleblower Office from the whistleblower (and the whistleblower's legal representative, if any) in the course of the whistleblower administrative proceeding.

(ix) All other information considered by the official making the award determination.

(f) *Effective/applicability date.* This rule is effective on August 12, 2014. This rule applies to information submitted on or after August 12, 2014, and to claims for award under sections 7623(a) and 7623(b) that are open as of August 12, 2014.

■ **Par. 6.** Section 301.7623–4 is added to read as follows:

§ 301.7623–4 Amount and payment of award.

(a) *In general.* The Whistleblower Office will pay all awards under section 7623(a) and determine and pay all awards under section 7623(b). For all awards under section 7623 and §§ 301.7623–1 through 301.7623–4, the Whistleblower Office will—

(1) Analyze the claim by applying the rules provided in paragraph (c) of this section to the information contained in the administrative claim file to determine an award percentage; and

(2) Multiply the award percentage by the amount of collected proceeds. If the award determination arises out of a single whistleblower administrative proceeding involving multiple actions, the Whistleblower Office may determine separate award percentages on an action-by-action basis and apply the separate award percentages to the collected proceeds attributable to the corresponding actions. The Internal Revenue Service (IRS) will pay all awards in accordance with the rules provided in paragraph (d) of this section. All relevant factors will be taken into account by the Whistleblower Office in determining whether an award will be paid and, if so, the amount of the award. No person is authorized under this section to make any offer or promise or otherwise bind the Whistleblower Office with respect to the amount or payment of an award.

(b) *Factors used to determine award percentage.* (1) *Positive factors.* The application of the following non-exclusive factors may support increasing an award percentage under paragraphs (c)(1) or (2) of this section—

(i) The whistleblower acted promptly to inform the IRS or the taxpayer of the tax noncompliance.

(ii) The information provided identified an issue or transaction of a type previously unknown to the IRS.

(iii) The information provided identified taxpayer behavior that the IRS was unlikely to identify or that was particularly difficult to detect through the IRS's exercise of reasonable diligence.

(iv) The information provided thoroughly presented the factual details of tax noncompliance in a clear and organized manner, particularly if the manner of the presentation saved the IRS work and resources.

(v) The whistleblower (or the whistleblower's legal representative, if any) provided exceptional cooperation and assistance during the pendency of the action(s).

(vi) The information provided identified assets of the taxpayer that could be used to pay liabilities, particularly if the assets were not otherwise known to the IRS.

(vii) The information provided identified connections between transactions, or parties to transactions, that enabled the IRS to understand tax implications that might not otherwise have been understood by the IRS.

(viii) The information provided had an impact on the behavior of the taxpayer, for example by causing the taxpayer to promptly correct a previously-reported improper position.

(2) *Negative factors.* The application of the following non-exclusive factors may support decreasing an award percentage under paragraphs (c)(1) or (2) of this section—

(i) The whistleblower delayed informing the IRS after learning the relevant facts, particularly if the delay adversely affected the IRS's ability to pursue an action or issue.

(ii) The whistleblower contributed to the underpayment of tax or tax noncompliance identified.

(iii) The whistleblower directly or indirectly profited from the underpayment of tax or tax noncompliance identified, but did not plan and initiate the actions that led to the underpayment of tax or actions described in section 7623(a)(2) .

(iv) The whistleblower (or the whistleblower's legal representative, if any) negatively affected the IRS's ability to pursue the action(s), for example by disclosing the existence or scope of an enforcement activity.

(v) The whistleblower (or the whistleblower's legal representative, if any) violated instructions provided by the IRS, particularly if the violation caused the IRS to expend additional resources.

(vi) The whistleblower (or the whistleblower's legal representative, if any) violated the terms of the confidentiality agreement described in § 301.7623–3(c)(2)(iv).

(vii) The whistleblower (or the whistleblower's legal representative, if any) violated the terms of a contract entered into with the IRS pursuant to § 301.6103(n)–2.

(viii) The whistleblower provided false or misleading information or otherwise violated the requirements of section 7623(b)(6)(C) or § 301.7623–1(c)(3).

(c) *Amount of award percentage.* (1) *Award for substantial contribution.* (i) *In general.* If the IRS proceeds with any administrative or judicial action based on information brought to the IRS's attention by a whistleblower, such whistleblower shall, subject to paragraphs (c)(2) and (3) of this section, receive as an award at least 15 percent but not more than 30 percent of the collected proceeds resulting from the action (including any related actions) or from any settlement in response to such action. The amount of any award under this paragraph depends on the extent of the whistleblower's substantial contribution to the action(s). See paragraph (c)(4) of this section for rules regarding multiple whistleblowers.

(ii) *Computational framework.* Starting the analysis at 15 percent, the Whistleblower Office will analyze the administrative claim file using the factors listed in paragraph (b)(1) of this section to determine whether the whistleblower merits an increased award percentage of 22 percent or 30 percent. The Whistleblower Office may increase the award percentage based on the presence and significance of positive factors. The Whistleblower Office will then analyze the contents of the administrative claim file using the factors listed in paragraph (b)(2) of this section to determine whether the whistleblower merits a decreased award percentage of 15 percent, 18 percent, 22 percent, or 26 percent. The Whistleblower Office may decrease the award percentage based on the presence and significance of negative factors. Although the factors listed in paragraphs (b)(1) and (2) of this section are described as positive and negative factors, the Whistleblower Office's analysis cannot be reduced to a mathematical equation. The factors are not exclusive and are not weighted and, in a particular case, one factor may override several others. The presence and significance of positive factors may offset the presence and significance of negative factors. But the absence of negative factors does not constitute a positive factor.

(iii) *Examples.* The operation of the provisions of paragraph (c)(1)(ii) of this section may be illustrated by the following examples. The examples are intended to illustrate the operation of the computational framework. The examples provide simplified descriptions of the facts relating to the claims for award, the information provided, and the facts relating to the underlying tax cases. The application of section 7623(b)(1) and paragraph (c)(1)(ii) of this section will depend on the specific facts of each case.

Example 1. Facts. Whistleblower A, an employee in Corporation's sales department, submitted to the IRS a claim for award under section 7623 and information indicating that Corporation improperly claimed a credit in tax year 2006. Whistleblower A's information consisted of numerous non-privileged documents relevant to Corporation's eligibility for the credit. Whistleblower A's

original submission also included an analysis of the documents, as well as information about meetings in which the claim for credit was discussed. When interviewed by the IRS, Whistleblower A clarified ambiguities in the original submission, answered questions about Corporation's business and accounting practices, and identified potential sources to corroborate the information.

Some of the documents provided by Whistleblower A were not included in Corporation's general record-keeping system and their existence may not have been easily uncovered through normal IRS examination procedures. Corporation initially denied the facts revealed in the information provided by Whistleblower A, which were essential to establishing the impropriety of the claim for credit. IRS examination of Corporation's return confirmed that the credit was improperly claimed by Corporation in tax year 2006, as alleged by Whistleblower A. Corporation agreed to the ensuing assessments of tax and interest and paid the liabilities in full.

Analysis. In this case, Whistleblower A provided specific and credible information that formed the basis for action by the IRS. Whistleblower A provided information that was difficult to detect, provided useful assistance to the IRS, and helped the IRS sustain the assessment. Based on the presence and significance of these positive factors, viewed against all the specific facts relevant to Corporation's 2006 tax year, the Whistleblower Office could increase the award percentage to 22 percent of collected proceeds. If, however, Whistleblower A's claim reflected negative factors, for example Whistleblower A violated instructions provided by the IRS and the violation caused the IRS to expend additional resources, then the Whistleblower Office could, based on this negative factor, reduce the award percentage to 18 or 15 percent (but not to lower than 15 percent of collected proceeds).

Example 2. Facts. Whistleblower B, an employee of Financial Advisory Firm 1 (Firm 1), submitted to the IRS a claim for award under section 7623 and information indicating that Firm 1 helped clients engage in activities that were intended to, and did, result in substantial tax underpayments. The activities were designed to avoid detection by the IRS, and prior IRS audits of several clients of Firm 1 had failed to detect underpayments of tax. Whistleblower B learned of the activities after being reassigned to a new position with Firm 1. Whistleblower B provided the information to the IRS soon after he understood the scope, nature and impact of the activities. The information provided consisted of numerous documents containing client profiles and marketing strategies, as well as descriptions of the transactions and structures used by Firm 1 and its clients to obscure the clients' identities and to generate the substantial tax underpayments. Whistleblower B also provided an analysis of the documents, as well as information about meetings in which the transactions and structures were discussed. When interviewed by the IRS, Whistleblower B clarified ambiguities in the original submission, answered questions about Firm 1's execution of specific client transactions, and identified potential sources to corroborate the information provided. Whistleblower B also notified the IRS of steps taken by Firm 1 to limit the disclosure of information requested by the IRS, enabling the IRS to obtain full disclosure of the information through the targeted use of summonses.

Analysis. Ultimately, the IRS collected tax, penalties, and interest from Firm 1 and multiple clients. In addition, Treasury and the IRS issued a notice identifying the impropriety of the transactions and structures employed by Firm 1 and its clients. Whistleblower B provided specific and credible information that formed the basis for action by the IRS. The information provided identified transactions that were difficult to detect. Whistleblower B acted promptly after he understood the activities at issue and he provided useful assistance to the IRS. Whistleblower B's assistance, and the information he provided, helped the IRS overcome the efforts made to obscure the activities and the clients' identities. And the information provided by Whistleblower B contributed to the decision to issue the notice, which may have a positive effect on client behavior and save IRS resources. Based on the presence and significance of these positive factors, the Whistleblower Office could increase the award percentage to 30 percent of collected proceeds. If Whistleblower B directly or indirectly profited from Firm 1's and the clients' activities resulting in the tax underpayments, then the Whistleblower Office could, based on this negative factor, reduce the award percentage to 26, 22, 18 percent or 15 percent (but not to lower than 15 percent of collected proceeds).

(2) *Award for less substantial contribution.* (i) *In general.* If the Whistleblower Office determines that the action described in paragraph (c)(1) of this section is based principally on disclosures of specific allegations resulting from a judicial or administrative hearing; a government report, hearing, audit, or investigation; or the news media, then the Whistleblower Office will determine an award of no more than 10 percent of the collected proceeds resulting from the action (including any related actions) or from any settlement in response to such action. If the whistleblower is the original source of the information from which the disclosures of specific allegations resulted, however, then the award percentage will be determined under paragraph (c)(1) of this section.

(ii) *Computational framework.* The Whistleblower Office will analyze the administrative claim file to determine—

(A) Whether the claim involves specific allegations regarding a tax underpayment or a violation of the internal revenue laws that reasonably may be inferred to have resulted from a judicial or administrative hearing; a government report, hearing, audit, or investigation; or the news media;

(B) Whether the action described in paragraph (c)(1) of this section was based principally on the disclosure of the specific allegations; and

(C) Whether the whistleblower was the original source of the information that gave rise to the specific allegations. If the Whistleblower Office determines that the action was based principally on disclosures of specific allegations, as stated in paragraph (c)(2)(ii)(B) of this section, and that the whistleblower was not the original source of the information, then, starting at 1 percent, the Whistleblower Office will analyze the administrative claim file using the factors listed in paragraph (b)(1) of this section to determine whether the whistleblower merits an increased award percentage of 4 percent, 7 percent, or 10 percent. The Whistleblower Office will then determine whether the whistleblower merits a decreased award percentage of zero, 1 percent, 4 percent, or 7 percent using the factors listed in paragraph (b)(2) of this section. The Whistleblower Office may increase the award percentage based on the presence and significance of positive factors and may decrease (to zero) the award percentage based on the presence and significance of negative factors. Like the analysis described in paragraph (c)(1)(ii) of this section, the Whistleblower Office's analysis cannot be reduced to a mathematical equation. The factors are not exclusive and are not weighted and, in a particular case, one factor may override several others. The presence and significance of positive factors may offset the presence and significance of negative factors. But the absence of negative factors does not constitute a positive factor.

(iii) *Example.* The operation of the provisions of paragraph (c)(2)(ii) of this section may be illustrated by the following example. The example is intended to illustrate the operation of the computational framework. The example provides a simplified description of the facts relating to the claim for award, the information provided, and the facts relating to the underlying tax case(s). The application of section 7623(b)(2) and paragraph (c)(2)(ii) of this section will depend on the specific facts of each case.

Example. Facts. Whistleblower A submitted to the IRS a claim for award under section 7623 and information indicating that Taxpayer B was the defendant in a criminal prosecution for embezzlement. Whistleblower A's information further indicated that evidence presented at Taxpayer B's trial revealed Taxpayer B's efforts to conceal the embezzled funds by depositing them in bank accounts of entities

controlled by Taxpayer B. Taxpayer B's failure to pay tax on the embezzled funds was not explicitly stated during the judicial hearing, but could be reasonably inferred from the facts and circumstances, including Taxpayer B's efforts to conceal the funds.

Analysis. In this case, Whistleblower A's information is based principally on disclosures of specific allegations resulting from a judicial hearing. Absent information demonstrating that the investigation leading to the embezzlement charge was based on information provided by Whistleblower A, section 7623(b)(2) and paragraph (c)(2) of this section apply to the determination of Whistleblower A's award. In this case, there is no reason for the Whistleblower Office to increase the applicable award percentage above 1 percent, the starting point for its analysis, given the absence of positive factors. Accordingly, Whistleblower A may receive an award of 1 percent of collected proceeds.

(3) *Reduction in award and denial of award.* (i) *In general.* If the Whistleblower Office determines that a claim for award is brought by a whistleblower who planned and initiated the actions, transaction, or events (underlying acts) that led to the underpayment of tax or actions described in section 7623(a)(2), then the Whistleblower Office may appropriately reduce the amount of the award percentage that would otherwise result under section 7623(b)(1) and paragraph (c)(1) of this section or section 7623(b)(2) and paragraph (c)(2) of this section, as applicable. The Whistleblower Office will deny an award if the whistleblower is convicted of criminal conduct arising from his or her role in planning and initiating the underlying acts.

(ii) *Threshold determination.* A whistleblower *planned and initiated* the underlying acts if the whistleblower—

(A) Designed, structured, drafted, arranged, formed the plan leading to, or otherwise planned, an underlying act,

(B) Took steps to start, introduce, originate, set into motion, promote or otherwise initiate an underlying act, and

(C) Knew or had reason to know that an underpayment of tax or actions described in section 7623(a)(2) could result from planning and initiating the underlying act.

(D) The whistleblower need not have been the sole person involved in planning and initiating the underlying acts. A whistleblower who merely furnishes typing, reproducing, or other mechanical assistance in implementing one or more underlying acts will not be treated as initiating any underlying act. A whistleblower who is a junior employee acting at the direction, and under the control, of a senior employee will not be treated as initiating any underlying act.

(E) If the Whistleblower Office determines that a whistleblower has satisfied this initial threshold of planning and initiating, the Whistleblower Office will then reduce the award amount based on the extent of the whistleblower's planning and initiating, pursuant to paragraph (c)(3)(iii) of this section.

(iii) *Computational framework.* After determining the award percentage that would otherwise result from the application of section 7623(b)(1) and paragraph (c)(1) of this section or section 7623(b)(2) and paragraph (c)(2) of this section, as applicable, the Whistleblower Office will analyze the administrative claim file to make the threshold determination described in paragraph (c)(3)(ii) of this section. If the whistleblower is determined to have planned and initiated the underlying acts, then the Whistleblower Office will reduce the award based on the extent of the whistleblower's planning and initiating. The Whistleblower Office's analysis and the amount of the appropriate reduction determined in a particular case cannot be reduced to a mathematical equation. To determine the appropriate award reduction, the Whistleblower Office will—

(A) Categorize the whistleblower's role as a planner and initiator as primary, significant, or moderate; and

(B) Appropriately reduce the award percentage that would otherwise result from the application of section 7623(b)(1) and paragraph (c)(1) of this section or section 7623(b)(2) and paragraph (c)(2) of this section, as applicable, by 67 percent to 100 percent in the case of a primary planner and initiator, by 34 percent to 66 percent in the case of a significant planner and initiator, or by 0 percent to 33 percent in the case of a moderate planner and initiator. If the whistleblower is convicted of criminal conduct arising from his or her role in planning and initiating the underlying acts, then the Whistleblower Office will deny an award without regard to whether the Whistleblower Office categorized the whistleblower's role as a planner and initiator as primary, significant, or moderate.

(iv) *Factors demonstrating the extent of a whistleblower's planning and initiating.* The application of the following non-exclusive factors may support a determination of the extent of a whistleblower's planning and initiating of the underlying acts—

(A) The whistleblower's role as a planner and initiator. Was the whistleblower the sole decision-maker or one of several contributing planners and initiators? To what extent was the whistleblower acting under the direction and control of a supervisor?

(B) The nature of the whistleblower's planning and initiating activities. Was the whistleblower involved in legitimate tax planning activities? Did the whistleblower take steps to hide the actions at the planning stage? Did the whistleblower commit any identifiable misconduct (legal, ethical, etc.)?

(C) The extent to which the whistleblower knew or should have known that tax noncompliance could result from the course of conduct.

(D) The extent to which the whistleblower acted in furtherance of the noncompliance, including, for example, efforts to conceal or disguise the transaction.

(E) The whistleblower's role in identifying and soliciting others to participate in the actions reported, whether as parties to a common transaction or as parties to separate transactions.

(v) *Examples.* The operation of the provisions of paragraphs (c)(3)(ii) and (iii) of this section may be illustrated by the following examples. These examples are intended to illustrate the operation of the computational framework. The examples provide simplified descriptions of the facts relating to the claim for award, the information provided, and the facts relating to the underlying tax case. The application of section 7623(b)(3) and paragraph (c)(3) of this section will depend on the specific facts of each case.

Example 1. Facts. Whistleblower A is employed as a junior associate in a law firm and is responsible for performing research and drafting activities for, and under the direction and control of, partners of the law firm. Whistleblower A performed research on financial products for Partner B that Partner B used in advising a client (Corporation 1) on a financial strategy. After Corporation 1 executed the strategy, Whistleblower A submitted a claim for award under section 7623 along with information about the strategy to the IRS. The IRS initiated an examination of Corporation 1 based on Whistleblower A's information, determined deficiencies in tax and penalties, and ultimately assessed and collected the tax and penalties as determined.

Analysis. Whistleblower A did nothing to design or set into motion Corporation 1's activities. Whistleblower A did not know or have reason to know that an underpayment of tax or actions described in section 7623(a)(2) could result from the research and drafting activities. Accordingly, as a threshold matter, Whistleblower A was not a planner and initiator of Corporation 1's strategy, and the award that would otherwise be determined based on the application of section 7623(b)(1) and paragraph (c)(1) of this section is not subject to reduction under section 7623(b)(3) and paragraph (c)(3) of this section.

Example 2. Facts. Whistleblower C is employed in the human resources department of a corporation (Corporation 2). Corporation 2 tasked Whistleblower C with hiring a large number of temporary employees to meet Corporation 2's seasonal business demands. Whistleblower C organized, scheduled, and conducted job fairs and job interviews to hire the seasonal employees. Whistleblower C was not responsible for, had no knowledge of, and played no part in, classifying the seasonal employees for Federal income tax purposes. Whistleblower C later discovered, however, that Corporation 2 classified the seasonal employees as independent contractors. After discovering the misclassification, Whistleblower C submitted a claim for award under section 7623 along with non-privileged information describing the employee misclassification to the IRS. The IRS initiated an examination of Corporation 2 based on Whistleblower C's information, determined deficiencies in tax and penalties, and ultimately assessed and collected the tax and penalties as determined.

Analysis. The award that would otherwise be determined based on the application of section 7623(b)(1) and paragraph (c)(1) of this section would not be subject to a reduction under section 7623(b)(3) and paragraph (c)(3) of this section because Whistleblower C did not satisfy the requirements of the threshold determination of a planner and initiator. Whistleblower C did not know and had no reason to know that her actions could result in an underpayment of tax or actions described in section 7623(a)(2) or that Corporation 2 would misclassify the employees as independent contractors.

Example 3. Facts. Whistleblower D is employed as a supervisor in the finance department of a corporation (Corporation 3) and is responsible for planning Corporation 3's overall financial strategy. Pursuant to the overall financial strategy, Whistleblower D and others at Corporation 3, in good faith but incorrectly, planned tax-advantaged transactions. Whistleblower D and others at Corporation 3 prepared documents needed to execute the transactions. After Corporation 3 executed the transactions, Whistleblower D reached the conclusion that the tax consequences claimed were incorrect and Whistleblower D submitted a claim for award under section 7623 along with non-privileged information about the transactions to the IRS. The IRS initiated an examination of Corporation 3 based on Whistleblower D's information, determined deficiencies in tax and penalties, and ultimately assessed and collected the tax and penalties as determined.

Analysis. The award that would otherwise be determined based on the application of section 7623(b)(1) and paragraph (c)(1) of this section would be subject to an appropriate reduction under section 7623(b)(3) and paragraph (c)(3) of this section because Whistleblower D satisfies the requirements of the threshold determination of a planner and initiator. Whistleblower D planned the transactions, prepared the necessary documents, and knew that an underpayment of tax could result from the transactions. Whistleblower D was not the sole planner and initiator of Corporation 3's transactions. Whistleblower D did nothing to conceal Corporation 3's activities. Corporation 3 had a good faith basis for claiming the disallowed tax benefits. On the basis of those facts, Whistleblower D was a moderate-level planner and initiator. Accordingly, the Whistleblower Office will exercise its discretion to reduce Whistleblower D's award by 0 to 33 percent.

Example 4. Facts. Same facts as *Example 3,* except that Whistleblower D independently planned a high-risk tax avoidance transaction and prepared draft documents to execute the transaction. Whistleblower D presented the transaction, along with the draft documents, to Corporation 3's Chief Financial Officer. Without the further involvement of Whistleblower D, Corporation 3's Chief Financial Officer, Chief Executive Officer, and Board of Directors subsequently approved the execution of the transaction. After Corporation 3 executed the transaction, Whistleblower D submitted a claim for award under section 7623 along with non-privileged information about the transaction to the IRS. The IRS initiated an examination of Corporation 3 based on Whistleblower D's information, determined deficiencies in tax and penalties, and ultimately assessed and collected the tax and penalties as determined.

Analysis. The award that would otherwise be determined based on the application of section 7623(b)(1) and paragraph (c)(1) of this section would be subject to an appropriate reduction under section 7623(b)(3) and paragraph (c)(3) of this section because Whistleblower D satisfies the requirements of the threshold determination of a planner and initiator. Whistleblower D planned the transaction, prepared the necessary documents, and knew that an underpayment of tax or actions described in section 7623(a)(2) could result from the transaction. Working independently, Whistleblower D designed and took steps to effectuate the transaction while knowing that the planning and initiating of the transaction was likely to result in tax noncompliance. Whistleblower D, however, did not approve the execution of the transaction by Corporation 3 and, therefore, was not a decision-maker. On the basis of these facts, Whistleblower D was a significant-level planner and initiator. Accordingly, the Whistleblower Office will exercise its discretion to reduce Whistleblower D's award by 34 to 66 percent.

Example 5. Facts. Whistleblower E is a financial planner. Whistleblower E designed a financial product that the IRS identified as an abusive tax avoidance transaction. Whistleblower E marketed the transaction to taxpayers, facilitated their participation in the transaction, and, initially, took steps to disguise the transaction. After several taxpayers had participated in the transaction, Whistleblower E submitted a claim for award under section 7623 along with non-privileged information to the IRS about the transaction and the participating taxpayers. The IRS initiated an examination of the identified taxpayers based on Whistleblower E's information, determined deficiencies in tax and penalties, and ultimately assessed and collected the tax and penalties as determined. Whistleblower E was not criminally prosecuted.

Analysis. The award that would otherwise be determined based on the application of section 7623(b)(1) and paragraph (c)(1) of this section would be subject to an appropriate reduction under section 7623(b)(3) and paragraph (c)(3) of this section because Whistleblower E satisfies the requirements of the threshold determination of a planner and initiator. Whistleblower E designed the financial product, marketed and facilitated its use by taxpayers, and knew that an underpayment of tax or actions described in section 7623(a)(2) could result from the transaction. Whistleblower E was the sole designer of the transaction, solicited clients to participate in the transaction, and facilitated and attempted to conceal their participation in the transaction. Whistleblower E knew that the planning and initiating of the taxpayers' participation in the transaction was likely to result in an underpayment of tax or actions described in section 7623(a)(2). On the basis of these facts, Whistleblower E was a primary-level planner and initiator. Accordingly, the Whistleblower Office will exercise its discretion to reduce Whistleblower E's award by 67 to 100 percent.

(4) *Multiple whistleblowers.* If two or more independent claims relate to the same collected proceeds, then the Whistleblower Office may evaluate the contribution of each whistleblower to the action(s) that resulted in collected proceeds. The Whistleblower Office will determine whether the information submitted by each whistleblower would have been obtained by the IRS as a result of the information previously submitted by any other whistleblower. If the Whistleblower Office determines that multiple whistleblowers submitted information that would not have been obtained based on a prior submission, then the Whistleblower Office will determine the amount of each whistleblower's award based on the extent to which each whistleblower contributed to the action(s). The aggregate award amount in cases involving two or more independent claims that relate to the same collected proceeds will not exceed the maximum award amount that could have resulted under section 7623(b)(1) or section 7623(b)(2), as applicable, subject to the award reduction provisions of section 7623(b)(3), if a single claim had been submitted.

(d) *Payment of Award.* (1) *In general.* The IRS will pay any award determined under section 7623 and §§ 301.7623–1 through 301.7623–4 to the whistleblower(s) that filed the corresponding claim for award. Payment of an award will be made as promptly as the circumstances permit, but not until there has been a final

determination of tax with respect to the action(s), as defined in paragraph (d)(2) of this section, the Whistleblower Office has determined the award, and all appeals of the Whistleblower Office's determination are final or the whistleblower has executed an award consent form agreeing to the amount of the award and waiving the whistleblower's right to appeal the determination.

(2) *Final determination of tax.* (i) *In general.* For purposes of §§ 301.7623–1 through 301.7623–4, a *final determination of tax* means that the proceeds resulting from the action(s) subject to the award determination have been collected and either the statutory period for filing a claim for refund has expired or the taxpayer(s) subject to the action(s) and the IRS have agreed with finality to the tax or other liabilities for the period(s) at issue and the taxpayer(s) have waived the right to file a claim for refund. A final determination of tax does not preclude a subsequent final determination of tax if the IRS proceeds based on the information provided following the payment, denial, or rejection of an award.

(ii) *Example.* The provisions of paragraph (d)(2)(i) of this section, regarding subsequent final determination of tax, may be illustrated by the following example:

Example. Information provided to the IRS by a whistleblower, under section 7623 and § 301.7623–1, identifies a taxpayer (Corporation 1), describes and documents specific facts relating to Corporation 1's activities, and, based on those facts, alleges that Corporation 1 owed additional taxes in Year 1. The Whistleblower Office processes the incoming claim and provides the information to an IRS Operating Division (Operating Division 1). Operating Division 1 reviews the claim and the allegations and ultimately decides not to proceed with an action against Corporation 1. Operating Division 1 conveys its determination not to proceed with an action against Corporation 1 to the Whistleblower Office on a Form 11369 along with all of the relevant supporting documents. The Whistleblower Office provides written notice to the whistleblower, denying any award pursuant to § 301.7623–3(c)(8), and the whistleblower does not appeal the notice to Tax Court within 30 days.

Two months after the Whistleblower Office denies the award, the Whistleblower Office recognizes a potential connection between the information provided and a recently-initiated, ongoing, examination of a second taxpayer by a second IRS Operating Division (Operating Division 2). The Whistleblower Office provides the information to Operating Division 2. Operating Division 2 evaluates the information and proceeds with an action against Taxpayer 2 based on the information provided. Ultimately, Operating Division 2 assesses and collects taxes resulting from the action and totaling $3 million. Following the conclusion of the whistleblower's participation in a whistleblower administrative proceeding described in § 301.7623–3(c) and the expiration of the statutory period for filing a claim for refund by Taxpayer 2, the Whistleblower Office determines the amount of the award and communicates the award to the whistleblower in a determination letter. The whistleblower may appeal the notice to the Tax Court within 30 days.

(3) *Joint Whistleblowers.* If multiple whistleblowers jointly submit a claim for award, the IRS will pay any award in equal shares to the joint whistleblowers unless the joint whistleblowers specify a different allocation in a written agreement, signed by all the joint whistleblowers and notarized, and submitted with the claim for award. The aggregate award payment in cases involving joint whistleblowers will be within the award percentage range of section 7623(b)(1) or section 7623(b)(2), as applicable, and subject to the award reduction provisions of section 7623(b)(3).

(4) *Deceased Whistleblower.* If a whistleblower dies before or during the whistleblower administrative proceeding, the Whistleblower Office may substitute an executor, administrator, or other legal representative on behalf of the deceased whistleblower for purposes of conducting the whistleblower administrative proceeding.

(5) *Tax treatment of award.* All awards are includible in gross income and subject to current Federal tax reporting and withholding requirements.

(e) *Effective/applicability date.* This rule is effective on August 12, 2014. This rule applies to information submitted on or after August 12, 2014, and to claims for award under section 7623(b) that are open as of August 12, 2014.

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

Approved: July 20, 2014.

Mark J. Mazur,

Assistant Secretary of the Treasury (Tax Policy).

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Part V

Securities and Exchange Commission

17 CFR Parts 240, 241, and 250

Application of ''Security-Based Swap Dealer'' and ''Major Security-Based Swap Participant'' Definitions to Cross-Border Security-Based Swap Activities; Final Rule; Republication

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240, 241, and 250

[Release No. 34–72472; File No. S7–02–13]

RIN 3235–AL25

Application of ''Security-Based Swap Dealer'' and ''Major Security-Based Swap Participant'' Definitions to Cross-Border Security-Based Swap Activities; Republication

Editorial Note: Proposed rule document 2014–15337 was originally published on pages 39067 through 39162 in the issue of Wednesday, July 9, 2014. In that publication the footnotes contained erroneous entries. The corrected document is republished in its entirety.

AGENCY: Securities and Exchange Commission.

ACTION: Final rules; interpretation.

SUMMARY: The Securities and Exchange Commission (''SEC'' or ''Commission'') is adopting rules and providing guidance to address the application of certain provisions of the Securities Exchange Act of 1934 (''Exchange Act'') that were added by Subtitle B of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act''), to cross-border security-based swap activities. These rules and guidance in large part focus on the application of the Title VII definitions of ''security-based swap dealer'' and ''major security-based swap participant'' in the cross-border context. The Commission also is adopting a procedural rule related to the submission of applications for substituted compliance. In addition, the Commission is adopting a rule addressing the scope of our authority, with respect to enforcement proceedings, under section 929P of the Dodd-Frank Act.

DATES: Effective September 8, 2014.

FOR FURTHER INFORMATION CONTACT: Richard Gabbert, Senior Special Counsel, Joshua Kans, Senior Special Counsel, or Margaret Rubin, Special Counsel, Office of Derivatives Policy, at 202–551–5870, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–7010.

SUPPLEMENTARY INFORMATION: The Commission is adopting the following rules under the Exchange Act, accompanied by related guidance, regarding the application of Subtitle B of Title VII of the Dodd-Frank Act to cross-border activities: Rule 0–13 (filing procedures regarding substituted compliance requests); Rule 3a67–10 (regarding the cross-border implementation of the ''major security-based swap participant'' definition); Rule 3a71–3 (regarding the cross-border implementation of the *de minimis* exception to the ''security-based swap dealer'' definition); Rule 3a71–4 (regarding the cross-border implementation of the aggregation provisions of the dealer *de minimis* exception); and Rule 3a71–5 (regarding an exception, from the dealer *de minimis* analysis, for certain cleared anonymous transactions). The Commission is not addressing, as part of this release, certain other rules that we proposed regarding the application of Subtitle B of Title VII in the cross-border context. The Commission also is adopting Rule 250.1 to clarify the scope of its antifraud civil law-enforcement authority, with respect to enforcement proceedings, in the cross-border context.

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I. Background

A. Scope of This Rulemaking

The Commission is adopting the first of a series of rules and providing guidance regarding the application of Title VII of the Dodd-Frank Act [1] (''Title VII'') to cross-border security-based swap activities and persons engaged in those activities.[2] This rulemaking primarily focuses on the application of the *de minimis* exception to the definition of ''security-based swap dealer'' in the cross-border context, and on the application of thresholds related to the definition of ''major security-based swap participant'' in the cross-border context. We also are adopting a procedural rule regarding the submission of ''substituted compliance'' requests to allow market participants to satisfy certain Title VII obligations by complying with comparable foreign regulatory requirements.[3]

The rules and guidance we are adopting are based on our May 23, 2013 proposal, which addressed the application of Title VII in the cross-border context.[4] Aside from addressing the definitions and procedural rule noted above, the Cross-Border Proposing Release also addressed a range of other cross-border issues, including issues regarding the requirements applicable to dealers and major participants, and requirements relating to mandatory clearing, trade execution, regulatory reporting, and public dissemination. The Cross-Border Proposing Release stated that it was possible that we would consider final rules and guidance related to some of those issues in the adopting releases related to the relevant substantive rulemakings, and that we would address others in a separate rulemaking.[5]

This rulemaking's focus on the cross-border application of the dealer and major participant definitions reflects the critical and foundational role that those definitions occupy with regard to the implementation of Title VII.[6] We expect to address other matters raised by the Cross-Border Proposing Release as part of subsequent rulemakings, to allow us to consider the cross-border application of the substantive requirements imposed by Title VII—including the economic consequences of that cross-border application—in conjunction with the final rules that will implement those substantive requirements.[7] Market participants are not required to comply with certain of those Title VII requirements pending the publication of final rules or other Commission action, and temporarily are exempt from having to comply with certain other requirements added by or arising from Title VII.[8]

These final rules and guidance do not address one key issue related to the application of the ''security-based swap dealer'' definition in the cross-border context. In the Cross-Border Proposing Release, we proposed that non-U.S. persons must count, against the relevant thresholds of the *de minimis* exemption, their dealing activity involving ''transactions conducted within the United States.'' [9] Commenters raised a number of significant issues related to this proposed requirement, including issues regarding the Commission's authority to impose this requirement and regarding the costs associated with this requirement. While we continue to preliminarily believe that the cross-border application of the security-based

[1] Public Law 111–203, 124 Stat. 1376 (2010). Unless otherwise indicated, references to Title VII in this release are to Subtitle B of Title VII.

[2] Consistent with the scope of the final rules as discussed below, the references in this release to the application of Title VII to ''cross-border activities'' refer to security-based swap transactions involving: (i) A U.S. person and a non-U.S. person, or (ii) two non-U.S. persons conducting a security-based swap transaction that otherwise occurs in relevant part within the United States, including where performance of one or both counterparties under the security-based swap are guaranteed by a U.S. person. For purposes of this release only, ''cross-border activities'' do not indicate activities involving a transaction between two non-U.S. persons where one or both are conducting dealing activity within the United States, because, as discussed below, we anticipate considering this issue in a subsequent release.

[3] The procedural rule addresses only the process for submitting such substituted compliance requests to the Commission. It does not address issues regarding whether substituted compliance would be available in connection with particular regulatory requirements, and, if so, under what conditions. We expect to address those matters as part of later rulemakings.

[4] *See* Cross-Border Security-Based Swap Activities; Re-Proposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants, Exchange Act Release No. 69490 (May 1, 2013), 78 FR 30968 (May 23, 2013) (''Cross-Border Proposing Release'').

[5] *See id.* at 30974.

[6] This rulemaking does not address the requirements under section 5 of the Securities Act applicable to security-based swap transactions. Security-based swaps, as securities, are subject to the provisions of the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) (''Securities Act'') and the rules and regulations thereunder applicable to securities. The Securities Act requires that any offer and sale of a security must either be registered under the Securities Act (*see* section 5 of the Securities Act, 15 U.S.C. 77e) or made pursuant to an exemption from registration (*see, e.g.,* sections 3 and 4 of the Securities Act, 15 U.S.C. 77c and 77d, respectively). In addition, the Securities Act requires that any offer to sell, offer to buy or purchase, or purchase or sale of, a security-based swap to any person who is not an eligible contract participant must be registered under the Securities Act (*see* section 5(e) of the Securities Act, 15 U.S.C. 77e(e)). Because of the statutory language of section 5(e) of the Securities Act, exemptions from this requirement in sections 3 and 4 of the Securities Act are not available.

[7] Those subsequent rulemakings may make use of definitions of ''U.S. person'' and certain other terms that we are adopting today.

[8] *See* Temporary Exemptions and Other Temporary Relief, Together With Information on Compliance Dates for New Provisions of the Securities Exchange Act of 1934 Applicable to Security-Based Swaps, Exchange Act Release No. 64678 (Jun. 15, 2011), 76 FR 36287 (Jun. 22, 2011) (clarifying the compliance date for certain requirements added by Title VII, and in some cases providing temporary exemptive relief in connection with those requirements); Order Extending Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with the Revision of the Definition of ''Security'' to Encompass Security-Based Swaps, and Request for Comment, Exchange Act Release No. 71485 (Feb. 5, 2014), 79 FR 7731 (Feb. 10, 2014) (extending exemptive relief from certain Exchange Act provisions in connection with Title VII's revision of the Exchange Act definition of ''security'' to encompass security-based swaps).

[9] *See* proposed Exchange Act rule 3a71–3(b). The proposal further would have defined a ''transaction conducted within the United States'' to encompass transactions that are solicited, executed, or booked within the United States by or on behalf of either counterparty, regardless of either counterparty's location, domicile or residence status, subject to an exception for transactions conducted through the foreign branches of U.S. banks. *See* proposed Exchange Act rule 3a71–3(a)(5).

swap dealer definition should account for activities in the United States related to dealing—even when neither party to the transaction is a U.S. person—we also believe that the final resolution of this issue can benefit from further consideration and public comment. Accordingly, we anticipate soliciting additional public comment regarding approaches by which the cross-border application of the dealer definition appropriately can reflect activity between two non-U.S. persons where one or both are conducting dealing activity within the United States.

B. The Dodd-Frank Act

As discussed in the Cross-Border Proposing Release, the 2008 financial crisis highlighted significant issues in the over-the-counter (''OTC'') derivatives markets, which had experienced dramatic growth in the years leading up to the crisis and are capable of affecting significant sectors of the U.S. economy.[10] The Dodd-Frank Act was enacted, among other reasons, to promote the financial stability of the United States by improving accountability and transparency in the financial system, including in connection with swaps and security-based swaps.[11]

Title VII provides for a comprehensive new regulatory framework for swaps and security-based swaps. Under this framework, the Commodity Futures Trading Commission (''CFTC'') regulates ''swaps'' while the Commission regulates ''security-based swaps,'' and the Commission and CFTC jointly regulate ''mixed swaps.'' The new framework encompasses the registration and comprehensive regulation of dealers and major participants, as well as requirements related to clearing, trade execution, regulatory reporting, and public dissemination.[12] Security-based swap transactions are largely cross-border in practice,[13] and the various market participants and infrastructures operate in a global market. To ensure that our regulatory framework appropriately reflects and addresses the nature and extent of the potential impact that the global market can have on U.S. persons and the U.S. financial system, it is critically important that we provide market participants with clear rules and guidance regarding how the regulatory framework mandated by Title VII will apply in the cross-border context.

In developing these final rules and guidance, we have consulted and coordinated with the CFTC, the prudential regulators,[14] and foreign regulatory authorities in accordance with the consultation provisions of the Dodd-Frank Act,[15] and more generally as part of our domestic and international coordination efforts.[16] Commission staff has participated in numerous bilateral and multilateral discussions with foreign regulatory authorities addressing the regulation of OTC derivatives.[17] Through these discussions and the Commission staff's participation in various international task forces and working groups,[18] we have gathered information about foreign regulatory reform efforts and the possibility of conflicts and gaps, as well as inconsistencies and overlaps, between U.S. and foreign regulatory regimes. We have taken this information into consideration in developing the final rules and guidance.

C. The Cross-Border Proposing Release and the CFTC Cross-Border Guidance

In expressing our preliminary views regarding the application of Title VII to security-based swap activity carried out in the cross-border context (including to persons engaged in such activities), the Cross-Border Proposing Release recognized that the security-based swap market is global in nature and that it developed prior to the enactment of the Dodd-Frank Act.[19] The proposal further recognized that the rules we adopt and guidance we provide regarding the cross-border application of Title VII could significantly affect the global security-based swap market.[20]

Reflecting the range of regulatory requirements that Title VII imposes upon the security-based swap market,

[10] *See generally* Cross-Border Proposing Release, 78 FR 30972–73.

[11] *See* Pub. L. 111–203, Preamble (stating that the Dodd-Frank Act was enacted ''[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail', to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes'').

[12] The Commission has proposed a series of rules regarding these matters. *See* Cross-Border Proposing Release, 78 FR 30972 nn.11–18. Most recently, the Commission proposed rules governing recordkeeping, reporting, and notification requirements for dealers and major participants. *See* Exchange Act Release No. 71958 (Apr. 17, 2014), 79 FR 25194 (May 2, 2014).

The Dodd-Frank Act further provides that the SEC and CFTC jointly should further define certain terms, including ''security-based swap dealer'' and ''major security-based swap participant.'' *See* Dodd-Frank Act section 712(d). Pursuant to that requirement, the SEC and CFTC jointly adopted rules to further define those terms. *See* Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' ''Major Swap Participant,'' ''Major Security-Based Swap Participant'' and ''Eligible Contract Participant,'' Exchange Act Release No. 66868 (Apr. 27, 2012), 77 FR 30596 (May 23, 2012) (''Intermediary Definitions Adopting Release''); *see also* Cross-Border Proposing Release, 78 FR 30972 n.9 (discussing joint rulemaking to further define various Title VII terms).

[13] *See* section II.A, *infra,* regarding the preponderance of cross-border activity in the security-based swap market.

[14] The term ''prudential regulator'' is defined in section 1a(39) of the CEA, 7 U.S.C. 1a(39), and that definition is incorporated by reference in section 3(a)(74) of the Exchange Act, 15 U.S.C. 78c(a)(74). Pursuant to the definition, the Board of Governors of the Federal Reserve System (''Federal Reserve Board''), the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Farm Credit Administration, or the Federal Housing Finance Agency (collectively, the ''prudential regulators'') is the ''prudential regulator'' of a security-based swap dealer or major security-based swap participant if the entity is directly supervised by that regulator.

[15] Section 712(a)(2) of the Dodd-Frank Act provides in part that the Commission shall ''consult and coordinate to the extent possible with the Commodity Futures Trading Commission and the prudential regulators for the purposes of assuring regulatory consistency and comparability, to the extent possible.''

In addition, section 752(a) of the Dodd-Frank Act provides in part that ''[i]n order to promote effective and consistent global regulation of swaps and security-based swaps, the Commodity Futures Trading Commission, the Securities and Exchange Commission, and the prudential regulators . . . as appropriate, shall consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to the regulation (including fees) of swaps.''

[16] In 2009, leaders of the Group of 20 (''G20'')—whose membership includes the United States, 18 other countries, and the European Union (''EU'')—called for global improvements in the functioning, transparency, and regulatory oversight of OTC derivatives markets. *See* G20 Leaders' Statement, Pittsburgh, United States, September 24–25, 2009, available at: *http://www.treasury.gov/resource-center/international/g7-g20/Documents/pittsburgh_summit_leaders_statement_250909.pdf. (''G20 Leaders' Pittsburgh Statement'').*

In subsequent summits, the G20 leaders have reiterated their commitment to OTC derivatives regulatory reform. For example, in September 2013, the leaders of the G20 reaffirmed their commitments with respect to the regulation of the OTC derivatives markets, welcoming Financial Stability Board (''FSB'') members' confirmed actions and committed timetables to put the agreed OTC derivatives reforms into practice. *See* the G20 Leaders Declaration (September 2013), para. 71, available at: *https://www.g20.org/sites/default/files/g20_resources/library/Saint_Petersburg_Declaration_ENGpdf* (''G20 Leaders' St. Petersburg Declaration'').

[17] Senior representatives of authorities with responsibility for regulation of OTC derivatives have met on a number of occasions to discuss international coordination of OTC derivatives regulations. *See, e.g.,* Report of the OTC Derivatives Regulators Group (''ODRG'') on Cross-Border Implementation Issues March 2014 (Mar. 31, 2014), available at: *http://www.cftc.gov/ucm/groups/public/@internationalaffairs/documents/file/odrgreport033114.pdf.*

[18] Commission representatives participate in the FSB's Working Group on OTC Derivatives Regulation (''ODWG''), both on its own behalf and as the representative of the International Organization of Securities Commissions (''IOSCO''), which is co-chair of the ODWG. A Commission representative also serves as one of the co-chairs of the IOSCO Task Force on OTC Derivatives Regulation.

[19] *See* Cross-Border Proposing Release, 78 FR 30975–76.

[20] *See id.* at 30975.

the Cross-Border Proposing Release addressed the cross-border application of: (a) The *de minimis* exception to the ''security-based swap dealer'' definition; (b) the entity-level and transaction-level requirements applicable to security-based swap dealers (*e.g.,* margin, capital, and business conduct requirements); (c) the ''substantial position'' and ''substantial counterparty exposure'' thresholds for the ''major security-based swap participant'' definition and the requirements applicable to major participants; (d) the registration of security-based swap clearing agencies and mandatory clearing requirements; (e) the registration of security-based swap execution facilities and mandatory trade execution requirements; and (f) the registration of security-based swap data repositories and regulatory reporting and public dissemination requirements. The proposal also addressed the potential for market participants to satisfy certain of those Title VII requirements by complying with comparable foreign rules as a substitute. This rulemaking establishes a process for submission of such requests.

Following the Commission's proposal, the CFTC issued guidance regarding Title VII's application to cross-border swap activity.[21] The CFTC Cross-Border Guidance differed from the Commission's proposed rules in certain ways, including, as discussed below, with regard to the meaning of ''U.S. person,'' the cross-border application of the *de minimis* exception to the dealer definition, the cross-border application of the major participant definition, and the process for submitting substituted compliance requests.[22]

Certain foreign regulators also have addressed or are in the process of addressing issues related to the cross-border implementation of requirements applicable to OTC derivatives.[23]

D. Comments on the Proposal

The Commission received 36 comments in connection with the proposal.[24] Several of the commenters addressed differences between the SEC's proposed rules and the CFTC Cross-Border Guidance, and urged the Commission to harmonize its rules with the approaches taken by the CFTC and by foreign regulators.[25]

Many of those commenters particularly focused on differences between the two regulators' meanings of the term ''U.S. person,'' with several suggesting that we change our proposed definition to align with the CFTC's approach.[26] A number of commenters also addressed the definition of ''transaction conducted within the United States,'' with several opposing any use of the concept as part of the Commission's rules.[27]

Commenters further raised a number of more general concerns in connection with the proposal, including concerns regarding cost-benefit issues,[28] the clarity of the proposal as a whole,[29] the link between the rules and the location of the associated risk,[30] and perceived concessions to the financial industry.[31]

In addition, commenters addressed issues specific to the cross-border

[21] *See* ''Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations'' (Jul. 17, 2013), 78 FR 45292 (Jul. 26, 2013) (''CFTC Cross-Border Guidance'').

[22] The CFTC Cross-Border Guidance currently is subject to legal challenge. *See* Complaint, *Securities Indus. & Fin. Mkts. Ass'n.* v. *CFTC,* No. 1:13-cv-1916 (D.D.C. filed Dec. 4, 2013).

[23] *See* section III.B, *infra.*

[24] The comment letters are located at: *http://www.sec.gov/comments/s7-02-13/s70213.shtml.* The majority of those commenters addressed, at least in part, the definitional issues that are the subject of this release. A number of commenters also addressed aspects of the proposal that are outside the scope of this release, and a few of those commenters only addressed issues that were outside the scope of this release (for example, addressing only proposed Regulation SBSR). We will consider those comments in connection with the relevant rulemakings.

[25] *See, e.g.,* Managed Funds Assoc. and Alternative Investment Management Assoc. (''MFA/AIMA'') Letter at 3 (''We recognize that there are differences between the Commission's proposed approach and the CFTC Cross-Border Guidance, and we expect that other international regulators will similarly issue proposals related to the cross-border application of their regulations. Thus, in light of the global nature of the derivatives market, we urge continued harmonization with the CFTC and other regulatory authorities with respect to the extraterritorial scope of all these regimes. In particular, we encourage international coordination of substituted compliance regimes to ensure appropriate recognition of comparable regulations, create practical and administrable frameworks, and alleviate duplicative regulation.'' (footnotes omitted)). *See also* letter from six members of the United States Senate at 2 (stating that there should be no gaps or loopholes between the Commission's and the CFTC's rules); Futures and Options Association (''FOA'') Letter at 8 (urging the Commission and the CFTC ''to coordinate, to the extent possible, on their approaches in order to minimise distortions or other unintended consequences for market participants''); letter from Senator Jeffrey A. Merkley, et al., Congress of the United States (Aug. 6, 2013).

Some commenters generally suggested that we harmonize with aspects of the CFTC Cross-Border Guidance, but also expressed preferences for particular elements of our proposed approach. *See, e.g.,* Institute of International Bankers (''IIB'') Letter at 3–4 (generally emphasizing the need for consistency with the CFTC and European Securities and Markets Authority (''ESMA'') approaches, unless the SEC requirement is more flexible than those other requirements). One commenter took the view that the Commission's rules should be at least as strong as the CFTC Cross-Border Guidance, but should go further than the CFTC wherever necessary. *See* Better Markets (''BM'') Letter. *See also* Chris Barnard Letter at 2 (recommending that the Commission and the CFTC propose one set of rules applicable to cross-border activities to avoid duplicative and conflicting rules).

[26] *See* notes 192–224, *infra,* and accompanying text.

[27] As noted above, these final rules and guidance do not address the application of the ''transaction conducted within the United States'' concept to the dealer definition. We instead anticipate soliciting additional public comment regarding the issue.

[28] For example, a few commenters took the view that cost-benefit principles weighed in favor of consistency with the CFTC Cross-Border Guidance. *See* Securities Industry and Financial Markets Association/Futures Industry Association/Financial Services Roundtable (''SIFMA/FIA/FSR'') Letter at 3; PensionsEurope Letter (incorporating by reference SIFMA/FIA/FSR Letter; all references to SIFMA/FIA/FSR Letter incorporate reference to PensionsEurope Letter); IIB Letter at 2, 3. One commenter further took the view that cost-benefit principles merited rejection of the use of the ''transaction conducted within the United States'' concept. *See* SIFMA/FIA/FSR Letter at 3. *See also* Chris Barnard Letter at 2 (suggesting that there is insufficient administrative, legal, or economic rationale for having ''very different rules'' of cross-border application between the SEC and the CFTC); Coalition for Derivatives End-Users (''CDEU'') Letter at 2 (stating that conflicting regulatory regimes will result in increased compliance and regulatory costs and an inefficient financial system); Association of Financial Guaranty Insurers (''AFGI'') Letter, dated August 20, 2013 (''AFGI Letter I'') at 2 (stating that the security-based swap dealer and major security-based swap participant regime would be disruptive and have financial consequences for guaranty insurers and their counterparties who have legacy transactions with a projected run-off date in the near future); AFGI letter, dated July 22, 2013 (''AFGI Letter II'') at 4 (incorporated by reference in AFGI Letter I); AFGI letter, dated February 15, 2013 (''AFGI Letter III'') at 4 (incorporated by reference in AFGI Letter I).

One commenter conversely argued that, in lieu of cost-benefit principles, the Commission instead should be guided by public interest and investor protection principles, as well as the Dodd-Frank Act's intent to increase financial system soundness and prevent another financial crisis. *See* BM Letter at 4, 37–45 (stating, *inter alia,* that ''Congress passed the Dodd-Frank Act knowing full well that it would impose significant costs on industry, yet it determined those costs were not only justified but necessary to stabilize our financial system and avoid another financial crisis'').

One commenter challenged the adequacy—indeed, the existence—of the cost-benefit analysis in the proposing release. *See* CDEU Letter at 6 (''To better understand the negative effects of imposing conflicting rules on the market, the SEC should conduct a direct cost-benefit analysis of the conflicting rule regimes (*e.g.,* with the European Market Infrastructure Regulation and the CFTC's cross-border guidance). Instead, the SEC asks the public to conduct such an analysis for the SEC: 'what would be the economic impact, including the costs and benefits, of these differences on market participants . . . ?' '').

[29] *See* BM Letter at 2–3, 7–8; CDEU Letter at 5.

[30] *See* Americans for Financial Reform (''AFR'') Letter, dated August 22, 2013 (''AFR Letter I'') at 3–4 (criticizing the proposal as having failed to apply the rules based on the geographic location of the entity ultimately responsible for the resulting liabilities, and stating that the rules should apply to transactions engaged in by ''guaranteed foreign subsidiaries of U.S. entities'').

[31] *See* BM Letter at 7–8 (stating that the proposal was the result of unwarranted and inappropriate concessions, such as with regard to the application of the *de minimis* threshold to U.S.-guaranteed entities). *See also* Karim Shariff letter at 1 (stating that the proposal will allow banks to take risks that will lead to an economic collapse).

application of the entity-level and transaction-level requirements for dealers,[32] as well as requirements specific to clearing, trade execution, regulatory reporting and public disclosure.[33] We expect to address those comments regarding the relevant substantive requirements in subsequent rulemakings and guidance regarding the relevant substantive requirements.

Commenters also addressed the proposed availability of substituted compliance.[34] Although today we are adopting a procedural rule regarding requests for substituted compliance, we generally expect to address the potential availability of substituted compliance for specific Title VII requirements in connection with subsequent rulemakings regarding each substantive requirement.

We have carefully considered the comments received in adopting the final rules and providing guidance. Our final rules and guidance further reflect consultation with the CFTC, prudential regulators, and foreign regulatory authorities with regard to the development of consistent and comparable standards. Accordingly, certain aspects of the final rules and guidance—such as, for example, the treatment of guaranteed affiliates of U.S. persons for purposes of the dealer *de minimis* exception—have been modified from the proposal.[35]

II. The Economic, Legal, and Policy Principles Guiding the Commission's Approach to the Application of Title VII to Cross-Border Activities

In this section, we describe the most significant economic considerations regarding the security-based swap market that we have taken into account in implementing the cross-border application of the security-based swap dealer and major security-based swap participant definitions of Title VII. We are sensitive to the economic consequences and effects, including costs and benefits, of our rules, including with respect to the scope of our application of the security-based swap dealer and major security-based swap participant definitions in the cross-border context. We have taken into consideration the costs and benefits associated with persons being brought within one of these definitions through our cross-border application, as well as the costs market participants may incur in determining whether they are within the scope of these definitions and thus subject to Title VII, while recognizing that the ultimate economic impact of these definitions will be determined in part by the final rules regarding the substantive requirements applicable to security-based swap dealers and major security-based swap participants. Some of these economic consequences and effects stem from statutory mandates, while others result from the discretion we exercise in implementing the mandates.

A. Economic Considerations in the Cross-Border Regulation of Security-Based Swaps

1. Economic Features of the Security-Based Swap Market

As noted above, the cross-border implementation of the rules defining security-based swap dealer and major security-based swap participant is the first in a series of final rules that consider the cross-border implications of security-based swaps and Title VII. In determining how Title VII security-based swap dealer and major security-based swap participant definitions should apply to persons and transactions in the cross-border context, the Commission has been informed by our analysis of current market activity, including the extent of cross-border trading activity in the security-based swap market. Several key features of the market inform our analysis.

First, the security-based swap market is a global market. Security-based swap business currently takes place across national borders, with agreements negotiated and executed between counterparties often in different jurisdictions (and at times booked, managed, and hedged in still other jurisdictions). The global nature of the security-based swap market is evidenced by the data available to the Commission.[36] Based on market data in the Depository Trust and Clearing Corporation's Trade Information Warehouse (''DTCC–TIW''),[37] viewed from the perspective of the domiciles of the counterparties booking credit default swap (''CDS'') transactions, approximately 48 percent of price forming North American corporate single-name CDS transactions[38] from

[32] *See, e.g.,* BM Letter at 3, 20–21, 28 (stating that transactions conducted through foreign branches of U.S. dealers with non-U.S. persons should be subject to external business conduct requirements, and that margin should be treated as a transaction-level requirement); SIFMA/FIA/FSR Letter at A–22 to A–26 (addressing application of margin, segregation, external business conduct and certain other requirements).

[33] *See, e.g.,* BM Letter at 3, 21–22 (criticizing exceptions from mandatory clearing and trade execution requirements); SIFMA/FIA/FSR Letter at A–38 to A–52 (in part urging that application of regulatory reporting, public dissemination, trade execution and clearing requirements should follow the same rules as external business conduct requirements).

[34] *See, e.g.,* AFR Letter I at 8, 12 (opposing rationale for substituted compliance, and noting need for the Commission to retain discretion to find a lack of comparability based on substantive enforcement issues); AFR letter to CFTC, dated August 27, 2012 (''AFR Letter II'') (stating that CFTC should narrow the scope of substituted compliance) (incorporated by reference in AFR Letter I); Michael Greenberger letter to CFTC, dated February 6, 2013 at 13 (''Greenberger Letter I'') (stating that substituted compliance should be a last resort and that the CFTC regime be enforced vigorously) (incorporated by reference in AFR Letter I); Michael Greenberger letter to CFTC, dated August 27, 2012 at 8, 19–23 (''Greenberger Letter II'') (explaining that international comity does not require that the CFTC exempt foreign subsidiaries from compliance with U.S. financial regulation) (incorporated by reference in AFR Letter I); BM Letter at 3, 26–27 (questioning authority for substituted compliance and suggesting potential for loopholes; also stating that substituted compliance should not be allowed for transactions with U.S. persons or for transactions in the United States and urging limited use of exemptive authority; further stating that the proposal gave only passing reference to foreign supervision and enforcement); SIFMA/FIA/FSR Letter at A–30 to A–38 (in part supporting the approach to focus on similar regulatory objectives rather than requiring foreign rules to be identical, stating that foreign branches should be able to make use of substituted compliance for certain purposes, stating that variations in foreign supervisory practices should not be assumed to be defects, and requesting further clarity regarding substituted compliance assessment factors); ESMA Letter at 1, 3–4 (suggesting particular expansions of the proposed scope of substituted compliance); European Commission (''EC'') Letter (supporting ''holistic'' approach toward substituted compliance based on comparison of regulatory outcomes).

[35] In this regard, the final rules in a number of areas take approaches that are similar to the approaches taken by the CFTC in its own cross-border guidance, although independent considerations have driven our approaches. Moreover, throughout the Cross-Border Proposing Release we recognized and solicited comment on the differences between our proposal and the CFTC's proposed guidance on the cross-border application of swap regulation. As noted above, many commenters urged harmonization with various aspects of the CFTC's guidance. We have taken these comments into account, and in developing final rules we have carefully considered the CFTC's guidance and the underlying policy rationales. Further, where we have determined such policy rationales and approaches are applicable in the context of the market for security-based swaps, we have adopted similar approaches to the CFTC (*see, e.g.,* application of the *de minimis* exception to non-U.S. persons' dealing transactions with foreign branches of U.S. banks).

[36] *See* section III.A.2, *infra* (discussing in detail the global nature of the security-based swap market).

[37] The information was made available to the Commission under an agreement with the DTCC–TIW and in accordance with guidance provided to DTCC–TIW by the OTC Derivatives Regulatory Forum (''ODRF'').

[38] This figure is based on all price-forming DTCC–TIW North American corporate single-name CDS transactions. Price-forming transactions include all new transactions, assignments, modifications to increase the notional amounts of previously executed transactions, and terminations of previously executed transactions. Transactions terminated, transactions entered into in connection with a compression exercise, and expiration of contracts at maturity are not considered price-forming and are therefore excluded, as are

January 2008 to December 2012 were cross-border transactions between a U.S.-domiciled [39] counterparty and a foreign-domiciled counterparty [40] and an additional 39 percent of such CDS transactions were between two foreign-domiciled counterparties.[41] Thus, approximately 13 percent of the North American corporate single-name CDS transactions in 2008–2012 were between two U.S.-domiciled counterparties.[42] These statistics indicate that, rather than being an exception, cross-border North American corporate single-name CDS transactions are as common as intra-jurisdictional transactions in the security-based swap market.[43]

Second, dealers and other market participants are highly interconnected within this global market. While most market participants have only a few counterparties, dealers can have hundreds of counterparties, consisting of both non-dealing market participants (*e.g.,* non-dealers, including commercial and financial market participants and investment funds) and other dealers.[44] Furthermore, as described in more detail below, the great majority of trades are dealer-to-dealer, rather than dealer-to-non-dealer or non-dealer-to-non-dealer, and a large fraction of single-name CDS volume is between counterparties domiciled in different jurisdictions. This interconnectedness facilitates the use of security-based swaps as a tool for sharing financial and commercial risks. In an environment in which market participants can have diverse and offsetting risk exposures, security-based swap transactions can allow participants to transfer risks so that they are borne by those who can do so efficiently. The global scale of the security-based swap market allows counterparties to access liquidity across jurisdictional boundaries, providing U.S. market participants with opportunities to share these risks with counterparties around the world. As discussed further in section VIII, a broad set of counterparties across which risks can be shared may result in more efficient risk sharing.

However, these opportunities for international risk sharing also represent channels for risk transmission. In other words, the interconnectedness of security-based swap market participants provides paths for liquidity and risk to flow throughout the system, so that it can be difficult to isolate risks to a particular entity or geographic segment. Because dealers facilitate the great majority of security-based swap transactions, with bilateral relationships that extend to potentially hundreds of counterparties, liquidity problems or other forms of financial distress that begin in one entity or one corner of the globe can potentially spread throughout the network, with dealers as a central conduit.

Third, as highlighted in the Intermediary Definitions Adopting Release, dealing activity within the market for security-based swaps is highly concentrated.[45] This concentration in large part appears to reflect the fact that larger entities possess competitive advantages in engaging in OTC security-based swap dealing activities, particularly with regard to having sufficient financial resources to provide potential counterparties with adequate assurances of financial performance.

The security-based swap market developed as an OTC market, without centralized trading venues or dissemination of pre- or post-trade pricing and volume information. In markets without transparent pricing, access to information confers a competitive advantage. In the current security-based swap market, large dealers and other large market participants with a large share of order flow have an informational advantage over smaller dealers and non-dealers who, in the absence of pre-trade transparency, observe a smaller subset of the market. Greater private information about order flow enables better assessment of current market values by dealers, permitting them to extract economic rents from counterparties who are less informed.[46] Non-dealers are aware of this information asymmetry, and certain non-dealers—particularly larger entities who transact with many dealers—may be able to obtain access to competitive pricing or otherwise demand a price discount that reflects the information asymmetry. Typically, however, the value of private information (*i.e.,* the economic rent or informational premium) will be earned by those who have the most information. In the case of security-based swap markets, it is predominantly dealers who observe the greatest order flow and benefit from market opacity.

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replacement trades and all bookkeeping-related trades.

''North American corporate single-name CDS transactions'' are classified as such because they use The International Swaps and Derivatives Association, Inc. (''ISDA'') North American documentation. These may include certain transactions involving non-U.S. reference entities. We do not have sufficiently reliable data on reference entity domicile (as opposed to counterparty domicile, which we have sought to identify in the manner described in note 39, *infra*) to limit our analysis to only U.S. single-name CDS. Although the inclusion of transactions involving such non-U.S. reference entities introduces some noise into the data, we do not believe that this noise is sufficiently significant to alter the conclusions we draw from the data.

[39] The domicile classifications in DTCC–TIW are based on the market participants' own reporting and have not been verified by Commission staff. Prior to enactment of the Dodd-Frank Act, funds and accounts did not formally report their domicile to DTCC–TIW because there was no systematic requirement to do so. After enactment of the Dodd-Frank Act, the DTCC–TIW has collected the registered office location of the account or fund. This information is self-reported on a voluntary basis. It is possible that some market participants may misclassify their domicile status because the databases in DTCC–TIW do not assign a unique legal entity identifier to each separate entity. It is also possible that the domicile classifications may not correspond precisely to treatment as a U.S. person under the rules adopted today. Notwithstanding these limitations, we believe that the cross-border and foreign activity presented in the analysis by the Commission's Division of Economic and Risk Analysis demonstrates the nature of the single-name CDS market. *See* section III.A.2, *infra.*

[40] DTCC–TIW classifies a foreign branch or foreign subsidiary of a U.S.-domiciled entity as foreign-domiciled. Therefore, CDS transactions classified as involving a foreign-domiciled counterparty in the DTCC–TIW data may include CDS transactions with a foreign branch or foreign subsidiary of a U.S.-domiciled entity as counterparty.

[41] Put another way, between 2008 and 2012, a vast majority (approximately 87 percent) of North American corporate single-name CDS transactions directly involved at least one foreign-domiciled counterparty. This observation is based on the data compiled by the Commission's Division of Economic and Risk Analysis on North American corporate single-name CDS transactions from DTCC–TIW between January 1, 2008, and December 31, 2012. *See* section III.A.2, *infra.*

[42] *See id.*

[43] We note, however, that, in addition to classifying transactions between a U.S. counterparty and a foreign branch of a U.S. bank as cross-border transactions, *see* note 40, *supra,* these statistics characterize as cross-border transactions some transactions in which all or substantially all of the activity takes place in the United States and all or much of the risk of the transactions ultimately is borne by U.S. persons. That is, a transaction is classified as cross-border if the legal domicile of at least one of the counterparties to the transaction is outside the United States, but if the transaction is classified as cross-border solely on the basis of legal domicile, the risk associated with these transactions may still ultimately be borne by U.S. persons. In this sense, our estimates of the cross-border allocation of security-based swap activity may not precisely reflect the proportion of transactions that are cross-border in nature.

[44] Based on an analysis of 2012 transaction data by staff in the Division of Economic and Risk Analysis, accounts associated with market participants recognized by ISDA as dealers had on average 403 counterparties. All other accounts (*i.e.,* those more likely to belong to non-dealers) averaged four counterparties.

[45] *See* Intermediary Definitions Adopting Release, 77 FR 30639–42.

[46] In this situation, economic rents are the profits that dealers earn by trading with counterparties who are less informed. In a market with competitive access to information, there is no informational premium; dealers only earn a liquidity premium. The difference between the competitive liquidity premium and the actual profits that dealers earn is the economic rent.

Taken together, the need for financial resources and the private information conveyed by order flow suggest that new entrants who intend to engage in security-based swap dealing activity in fact face high barriers to entry. One consequence of the current concentrated market structure is the potential for risk spillovers and contagion, which can occur when the financial sector as a whole (or certain key segments) becomes undercapitalized.[47] Unlike most other securities transactions, a security-based swap gives rise to ongoing obligations between transaction counterparties during the life of the transaction. This means that each counterparty to the transaction undertakes the obligation to perform the security-based swap in accordance with its terms and bears counterparty credit risk and market risk until the transaction expires or is terminated.[48] Within this interconnected market, participants may have ongoing bilateral obligations with multiple counterparties, allowing for efficient risk-sharing and access to liquidity throughout the global network. However, a primary risk of the integrated market is the potential for sequential counterparty failure and contagion when one or more large market participants become financially distressed, causing the market participant to default on its obligations to its counterparties.[49] A default by one or more security-based swap dealers or major security-based swap participants, or even the perceived lack of creditworthiness of these large entities, could produce contagion, either through direct defaults and risk spillovers, reduced willingness to extend credit, reduced liquidity, or reduced valuations for financial instruments. As financial distress spreads, the aggregate financial system may become undercapitalized, hindering its ability to provide financial intermediation services, including security-based swap intermediation services.

In other words, the failure of a single large firm active in the security-based swap market can have consequences beyond the firm itself. One firm's default may reduce the willingness of dealers to trade with, or extend credit to, both non-dealers and other dealers. By reducing the availability of sufficient credit to provide intermediation services, and by reducing transaction volume that reveals information about underlying asset values, the effects of a dealer default may, through asset price and liquidity channels, spill over into other jurisdictions and even other markets in which security-based swap dealers participate.

Given that firms may be expected to consider the implications of security-based swap activity only on their own operations, without considering aggregate financial sector risk,[50] the financial system may end up bearing more risk than the aggregate capital of the intermediaries in the system can support and may cease to function normally during times of market distress. For example, during times of financial distress a dealer's leverage constraints may begin to bind, either because lenders require more collateral or because market declines erode a dealer's capital position, forcing the dealer to de-lever, either by selling assets or raising additional capital. Without adequate capital, the dealer may be unable to intermediate trades, potentially reducing liquidity in the markets it serves. Security-based swap positions replicate leveraged positions in the underlying asset, with a small amount of capital supporting large notional exposures.[51] Given the leveraged nature of swap transactions, and the concentrated structure of the dealer market, in which a large amount of highly leveraged risk exposures may be concentrated in a relatively small number of entities that are responsible for the vast majority of global dealing activity,[52] the potential consequences arising from financial instability in the security-based swap market may be acute.

In sum, the security-based swap market is characterized by a high level of interconnectedness, facilitating risk sharing by counterparties. Further, it is a global market, in which the potential for significant inter-jurisdictional activity and access to liquidity may enhance risk sharing among counterparties. At the same time, channels for risk sharing also represent channels for risk transmission. The global nature of this market, combined with the interconnectedness of market participants, means that liquidity shortfalls or risks that begin pooling in one corner of the market can potentially spread beyond that corner to the entire security-based swap market, with dealers as a key conduit. Because dealers and major participants are a large subset of all participants in the global security-based swap market and facilitate the majority of transactions (and thus reach many counterparties), concerns surrounding these types of spillovers are part of the framework in which we analyze the economic effects of our final rules implementing the security-based swap dealer and major participant definitions in the cross-border context.[53]

2. Context for Regulatory Determinations

In determining how Title VII requirements should apply to persons and transactions in a market characterized by the types of risks we have described, we are aware of the potentially significant tradeoffs inherent in our policy decisions. Our primary economic considerations for promulgating rules and guidance regarding the application of the security-based swap dealer and major participant definitions to cross-border activities include the effect of our choices on efficiency, competition, and

[47] *See* Viral V. Acharya, Lasse H. Pedersen, Thomas Philippon, and Matthew Richardson, ''Measuring Systemic Risk'' (May 2010), available at: *http://vlab.stern.nyu.edu/public/static/SR-v3.pdf.* The authors use a theoretical model of the banking sector to show that, unless the external costs of their trades are considered, financial institutions will have an incentive to take risks that are borne by the aggregate financial sector. Under this theory, in the context of Title VII, the relevant external cost is the potential for risk spillovers and sequential counterparty failure, leading to an aggregate capital shortfall and breakdown of financial intermediation in the financial sector.

[48] *See* Intermediary Definitions Adopting Release, 77 FR 30616–17 (noting that ''the completion of a purchase or sale transaction'' in the secondary equity or debt markets ''can be expected to terminate the mutual obligations of the parties,'' unlike security-based swap transactions, which often give rise to ''an ongoing obligation to exchange cash flows over the life of the agreement'').

[49] *See* Brunnermeier, Markus K., Andrew Crockett, Charles A. Goodhart, Avinash Persaud, and Hyun Song Shin. ''The Fundamental Principles of Financial Regulation.'' (2009) at 15, available at: *www.princeton.edu/~markus/research/papers/Geneva11.pdf.*

[50] *See* Daron Acemoglu, Asuman Ozdaglar & Alireza Tahbaz-Salehi, Systemic Risk and Stability in Financial Networks (NBER Working Paper No. 18727, Jan. 2013), available at: *http://www.nber.org/papers/w18727.*

[51] *See* Giulio Girardi, Craig Lewis, and Mila Getmansky, ''Interconnectedness in the CDS Market,'' Division of Economic and Risk Analysis White Paper, April 2014, available at *http://www.sec.gov/servlet/sec/dera/staff-papers/white-papers/credit-defaul-swaps-interconnectivity-04-2014.pdf* (describing institutional features of credit default swaps).

[52] The Commission estimates that, of approximately 1,000 transacting agents that participated in single-name CDS transactions in 2012, nearly 80 percent of transactions, by notional volume, can be attributed to the 13 largest entities. *See also* section III.A.2, *infra.*

[53] We have previously noted that, depending on the size of the security-based swap dealer, default by a security-based swap dealer ''could have adverse spillover or contagion effects that could create instability for the financial markets more generally.'' *See* Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers, Exchange Act Release No. 68071 (Oct. 18, 2012), 77 FR 70214, 70304 (Nov. 23, 2012) (''Capital and Margin Proposing Release'').

capital formation,[54] the potential risks of security-based swaps to U.S. market participants that could affect financial stability,[55] the level of transparency and counterparty protection in the security-based swap market, and the costs to market participants.[56]

As noted above, participants may use security-based swaps to manage financial and commercial risks and benefit from a liquid market with broad participation that facilitates risk sharing. We also recognize the possibility that the same channels that enable risk sharing also facilitate the transmission of risks and liquidity problems that begin pooling in one geographic segment of the market to the global security-based swap market. As described more fully in section III.A.1, U.S. entities may take on risk exposures in the security-based swap market by transacting with non-U.S. counterparties through non-U.S. affiliates. This suggests that an approach that applied these Title VII definitions to transactions only where all activity occurs inside the United States would have little effect in addressing the risks associated with security-based swaps, including risks and associated economic consequences flowing from contagion that may originate abroad and reach U.S. market participants through security-based swap activities and the multiple bilateral relationships that may form as a result of those activities. The global reach of security-based swap dealers, including U.S. dealers, participating in the vast majority of trades [57] and extending to upwards of hundreds of counterparties,[58] provides paths for these risks to flow back into the United States.[59]

At the same time, the Commission recognizes that the regulatory requirements we adopt for security-based swap dealers and major participants under Title VII may not reach all market participants that act as dealers or that have positions that pose considerable risk concerns in the global security-based swap markets. These limits to the application of Title VII raise several issues. First, market participants may shift their behavior. Final Title VII requirements may impose significant direct costs on participants falling within the security-based swap dealer and major security-based swap participant definitions that are not borne by other market participants, including costs related to capital and margin requirements, regulatory reporting requirements, and business conduct requirements. The costs of these requirements may provide economic incentive for some market participants falling within the dealer and major participant definitions to restructure their security-based swap business to seek to operate wholly outside of the Title VII regulatory framework by exiting the security-based swap market in the United States and not transacting with U.S. persons, potentially fragmenting liquidity across geographic boundaries.[60] Conversely, such incentives potentially may be mitigated by the fact that capital and margin requirements, counterparty protections, and business conduct standards required by Title VII [61] may promote financial stability and lead to non-dealer market participants exhibiting a preference for transacting with registered dealers and major participants.

Second, to the extent that other jurisdictions may adopt requirements with different scopes or on different timelines, the requirements we adopt may also result in competitive distortions. That is, differences in regulatory requirements across jurisdictions, or the ability of certain non-U.S. market participants to avoid security-based swap dealer regulation under Title VII, may generate competitive burdens and provide incentives for non-U.S. persons to avoid transacting with U.S. persons.

Third, key elements of the rules adopted today—the definition of ''U.S. person,'' as well as rules covering treatment of guaranteed transactions, transactions with foreign branches, transactions conducted through conduit affiliates, and cleared anonymous transactions, and rules covering aggregation standards—all have implications for how U.S. and non-U.S. entities perform their *de minimis* and major participant threshold calculations and may affect the number of participants who ultimately register as security-based swap dealers or major security-based swap participants. The number of persons required to register will affect the costs and benefits of the substantive Title VII requirements that will ultimately be adopted; depending on the final rules, more or fewer entities, and therefore more or fewer security-based swaps, will be subject to Title VII requirements applicable to security-based swap dealers and major security-based swap participants.[62] Title VII requires the Commission to create a new regulatory regime that includes capital, margin, registration and reporting requirements aimed at increasing transparency and customer protections as well as mitigating the risk of financial contagion. Each of these requirements will impose new costs and regulatory burdens on persons that engage in security-based swap dealing activity at levels above the *de minimis* thresholds and on persons whose security-based swap positions are large enough to cause them to be major security-based swap participants.

We expect that these requirements' application to security-based swap

[54] *See* Exchange Act section 3(f).

[55] Title VII imposes financial responsibility and risk mitigation requirements on registered security-based swap dealers and major security-based swap participants. As we noted in proposing rules regarding capital and margin requirements applicable to security-based swap dealers, ''the capital and margin requirements in particular are broadly intended to work in tandem to strengthen the financial system by reducing the potential for default to an acceptable level and limiting the amount of leverage that can be employed by [security-based swap dealers] and other market participants.'' *See* Capital and Margin Proposing Release, 77 FR 70304. We also noted that ''[r]equiring particular firms to hold more capital or exchange more margin may reduce the risk of default by one or more market participants and reduce the amount of leverage employed in the system generally, which in turn may have a number of important benefits.'' *Id.*

[56] As we noted in the Cross-Border Proposing Release, the Commission generally understands the ''U.S. financial system'' to include the U.S. banking system and the U.S. financial markets, including the U.S. security-based swap market, the traditional securities markets (*e.g.,* the debt and equity markets), and the markets for other financial activities (*e.g.,* lending). *See* Cross-Border Proposing Release, 78 FR 30980 n.97.

[57] *See* note 139, *infra,* and accompanying text.

[58] *See* note 44, *supra.*

[59] As discussed above, the global security-based swaps network, characterized by multiple bilateral relationships between counterparties, has the potential for risk spillovers and sequential counterparty failure. These exposures are not unique to the U.S. financial system. Indeed, the global scope of the security-based swap market suggests that, given our territorial approach to Title VII, there will be the fewest potential gaps in coverage if other jurisdictions also adopt similar comprehensive and comparable derivative regulations. *See* Section III.B for a discussion of global regulatory efforts in this space.

[60] To the extent that registered dealers are ultimately subject to more extensive reporting and public dissemination requirements than other market participants under Title VII, these requirements may also alter the incentives of market participants to transact with registered dealers if, for example, public dissemination requirements reveal information that participants wish to treat as confidential about trading strategies or future hedging needs. Incentives for these participants to avoid registered dealers could potentially isolate liquidity to less transparent corners of the market.

[61] *See, e.g.,* Exchange Act sections 15F(e), (f), (h) (providing that security-based swap dealers and major security-based swap participants be subject to requirements relating to capital and margin, reporting and recordkeeping, and business conduct).

[62] Any forward-looking analysis of the costs and benefits that flow from these Title VII requirements necessarily encompasses uncertain elements, since the final requirements have not been adopted. For example, whether foreign security-based swap dealers will be subject to the full range of Title VII requirements in all of their transactions will be determined in subsequent rulemaking.

dealers and major security-based swap participants subject to Title VII will be associated with a number of benefits to the security-based swap market and security-based swap market participants, including transparency, accountability, and increased counterparty protections.[63] Nevertheless, as we discuss later in this release, the *de minimis* rules for non-U.S. persons could allow certain non-U.S. entities to avoid the costs of dealer registration, which could reduce the number of entities that register as security-based swap dealers, relative to the Commission's estimates in the Intermediary Definitions Adopting Release. Although the number of entities that are not required to register will depend on the availability of the *de minimis* exclusions, we believe that, to the extent that the final rules change the number of eventual registrants, the ultimate programmatic costs and benefits expected from Title VII may differ from those that were described in the Intermediary Definitions Adopting Release.[64]

Finally, the final rules determining how non-U.S. persons must perform their *de minimis* and major participant threshold calculations may face limits as to how precisely they address the risk mitigation goals of Title VII that are reflected in our rules implementing the *de minimis* exception and the ''major security-based swap participant'' definition. On the one hand, the scope of dealer and major participant regulation under Title VII may be subject to limitations on the ability to control risk because the global nature of counterparty interconnections means that it is difficult to prevent risk that pools in one geographic segment of the market from flowing throughout the entire security-based swap network. On the other hand, there is a possibility that the rules defining the scope of dealer and major participant regulation, including the territorial application of the definitions, may capture certain activity that does not represent risk to the U.S. financial system. Because these rules and guidance implementing Title VII regulatory definitions will not capture all transactions and all entities that engage in security-based swap activity, these rules and guidance therefore may create incentives for those entities at the boundaries of the definitions to restructure their business in a way that allows them to operate outside the scope of Title VII. However, as we described in the Intermediary Definitions Adopting Release, we have sought to implement the statutory dealer and major participant definitions in such a way as to impose the substantive rules of Title VII on those entities most likely to contribute to those risks that Title VII is intended to address without imposing unnecessary burdens on those who do not pose comparable risks to the U.S. financial system.[65]

B. Scope of Title VII's Application to Cross-Border Security-Based Swap Activity

Congress has given the Commission authority in Title VII to implement a security-based swap regulatory framework to address the potential effects of security-based swap activity on U.S. market participants, the financial stability of the United States, on the transparency of the U.S. financial system, and on the protection of counterparties.[66] The global nature of the security-based swap market and the high proportion of cross-border transactions in that market[67] mean that much of this activity occurs at least in part outside the United States and frequently involves persons that are incorporated, organized, or established in a location outside the United States.[68] In light of these market realities, we noted in the proposal that applying Title VII only to persons incorporated, organized, or established within the United States or only to security-based swap activity occurring entirely within the United States would inappropriately exclude from regulation a majority of security-based swap activity that involves U.S. persons or otherwise involves conduct within the United States, even though such activity raises the types of concerns that we believe Congress intended to address through Title VII.[69]

Because some commenters had, prior to the proposal, argued that section 30(c) of the Exchange Act limited our ability to reach certain types of activity occurring at least in part outside the United States,[70] we discussed in some detail in the proposal our preliminary views on the appropriate approach to determining whether certain security-based swap activity that involves some conduct outside the United States also occurs within the United States for purposes of Title VII.[71] In this subsection, we discuss comments received on this question following publication of our proposal and explain our final views—which remain largely unchanged from the proposal—on the proper approach to determining whether cross-border security-based swap activity occurs, in relevant part, within the United States.[72] We then briefly describe how this framework

[63] Title VII imposes a number of business conduct requirements designed to protect counterparties to security-based swaps, including disclosures about material risks and conflicts of interest, disclosures concerning the daily mark, or value of the position, and segregation of customer assets and collateral from the dealer's assets.

[64] See section IV.I.1 for a discussion of how we expect the cross-border application of the *de minimis* exception to alter the number of entities required to register with the Commission, and how that may affect the programmatic costs and benefits of Title VII.

[65] In adopting the definition of ''security-based swap dealer,'' we intended to determine the set of entities in the security-based swap market for whom regulation ''is warranted due to the nature of their interactions with counterparties, or is warranted to promote market stability and transparency.'' *See* Intermediary Definitions Adopting Release, 77 FR 30726. Similarly, in adopting rules governing the ''major security-based swap participant'' definition, we sought to impose regulations applicable to major security-based swap participants in a way that reflects ''when it would be 'prudent' that particular entities be subject to monitoring, management and oversight of entities that may be systemically important or may significantly impact the U.S. financial system.'' *See id.* at 30666.

Future rulemakings that depend on these definitions are intended to address the transparency, risk, and customer protection goals of Title VII. For example, to further risk mitigation in the security-based swap market, we explained that ''section 15F(e) of the Exchange Act and related rules impose capital and margin requirements on dealers and major participants, which will reduce the financial risks of these institutions and contribute to the stability of the security-based swap market in particular and the U.S. financial system more generally.'' *See id.* at 30723.

[66] *See* note 11, *supra*. *See also* Pub. L. 111–203 sections 701–774 (providing for, among other things, a comprehensive new regulatory framework for security-based swaps, including by: (i) Providing for the registration and comprehensive regulation of security-based swap dealers and major security-based swap participants; (ii) imposing clearing and trade execution requirements on security-based swaps, subject to certain exceptions; and (iii) creating real-time reporting and public dissemination regimes for security-based swaps).

[67] *See* section II.A, *supra* (noting that cross-border activity accounts for the majority of security-based swaps involving U.S. firms).

[68] For example, a single financial firm engaged in dealing activity may utilize two or more entities domiciled in different countries to effectuate a single transaction with a counterparty that may similarly use multiple entities domiciled in different countries.

[69] *See* Cross-Border Proposing Release, 78 FR 30984.

[70] *See id.* at 30983. Exchange Act section 30(c) was added to the Act by Title VII and provides, among other things, that ''[n]o provision of [Title VII] . . . shall apply to any person insofar as such person transacts a business in security-based swaps without the jurisdiction of the United States,'' unless that business is transacted in contravention of rules prescribed to prevent evasion of Title VII. *See* section 30(c) of the Exchange Act, 15 U.S.C. 78dd(c), added by section 772(b) of the Dodd-Frank Act.

[71] *See* Cross-Border Proposing Release, 78 FR 30984–87.

[72] We also interpret what it means for a person to ''transact a business in security-based swaps without the jurisdiction of the United States'' as set forth in Exchange Act section 30(c). 15 U.S.C. 78dd(c).

applies to specific types of transactions relevant to the rules we are adopting here.[73]

1. Commenters' Views

Prior to our proposal, several commenters raised concerns about the application of Title VII to security-based swap activity in the cross-border context and specifically about the possibility that we would impose Title VII requirements on ''extraterritorial'' conduct. We received only a few comments on this issue in response to our preliminary views set forth in the proposal, and these generally focused on the application of section 30(c) of the Exchange Act to specific types of activity that we proposed to subject to Title VII rather than the proposed territorial framework more broadly.

One commenter expressed general agreement with our proposed guidance.[74] Three commenters suggested that textual differences between section 30(c) of the Exchange Act and section 2(i) of the Commodity Exchange Act (''CEA'') do not require the Commission to take a different approach to application of Title VII to cross-border security-based swap activity from that taken by the CFTC.[75] Two commenters expressed the view that section 30(c) of the Exchange Act, considered in light of what they described as the risk-based focus of Title VII, prohibited the Commission from imposing Title VII requirements on transactions carried out within the United States but booked in locations outside the United States.[76] One commenter stated that section 30(c) of the Exchange Act prevents us from imposing Title VII requirements on transactions of guaranteed foreign affiliates of U.S. persons.[77] One commenter argued that section 30(c) prevents application of Title VII to certain joint ventures.[78]

2. Scope of Application of Title VII in the Cross-Border Context

We continue to believe that a territorial approach to the application of Title VII is appropriate. This approach, properly understood, is grounded in the text of the relevant statutory provisions and is designed to help ensure that our application of the relevant provisions is consistent with the goals that the statute was intended to achieve.

(a) Overview and General Approach

As in our proposal, our analysis begins with an examination of the text of the statutory provision that imposes the relevant requirement. The statutory language generally identifies the types of conduct that trigger the relevant requirement and, by extension, the focus of the statute.[79] Once we have identified the activity regulated by the statutory provision, we can determine whether a person is engaged in conduct that the statutory provision regulates and whether this conduct occurs within the United States. When the statutory text does not describe the relevant activity with specificity or provides for further Commission interpretation of statutory terms or requirements, this analysis may require us to identify through interpretation of the statutory text the specific activity that is relevant under the statute or to incorporate prior interpretations of the relevant statutory text.[80]

As noted above, the Dodd-Frank Act was enacted, in part, with the intent to address the risks to the financial stability of the United States posed by entities engaged in security-based swap activity, to promote transparency in the U.S. financial system, and to protect counterparties to such transactions.[81] These purposes, considered together with the specific statutory requirement, lead us to conclude that it is appropriate to impose the statutory requirements, and rules or regulations thereunder, on security-based swap activity occurring within the United States even if certain conduct in connection with the security-based swap also occurs in part outside the United States.

Contrary to the views expressed by some commenters,[82] we do not agree that the location of risk alone should necessarily determine the scope of an appropriate territorial application of

[73] The following discussion does not reflect a comprehensive analysis of the full range of transactions that may fall within our territorial approach to application of Title VII or of the full range of substantive requirements to which such transactions may be subject under Title VII.

It is important to note that our approach to the application of Title VII security-based swap dealer and major security-based swap participant registration requirements does not limit, alter, or address the cross-border reach or extraterritorial application of any other provisions of the federal securities laws, including Commission rules, regulations, interpretations, or guidance.

[74] *See* BM Letter at 6.

[75] *See* IIB Letter at 4 (noting, *inter alia,* that section 712 of the Dodd-Frank Act requires consultation and coordination between the SEC, CFTC, and prudential regulators, and arguing that differences between Exchange Act section 30(c) and CEA section 2(i) do not require the Commission to take an approach to regulation of cross-border security-based swap activity that is ''fundamentally different'' from that taken by the CFTC); SIFMA/FIA/FSR Letter at A–4 to A–5 (stating that Exchange Act section 30(c) must be read to harmonize with CFTC approach in light of congressional intent that rules be harmonized); FOA Letter at 7 (referring to this element of the SIFMA/FIA/FSR Letter). Section 2(i) of the CEA provides, *inter alia,* that Title VII requirements will not apply to activities outside the United States unless they ''have a direct and significant connection with activities in, or effect on, commerce of the United States.'' 7 U.S.C. 2(i). The CFTC Cross-Border Guidance was adopted as an interpretation of this provision. *See* CFTC Cross-Border Guidance, 78 FR 45295.

[76] *See* SIFMA/FIA/FSR Letter at 4, A–4 to A–6 (acknowledging that proposed application of Title VII to transactions conducted within the United States between two non-U.S. persons is consistent with Commission practice in traditional securities markets but arguing that similar language in sections 30(b) and 30(c) of the Exchange Act should be read differently, given the different nature of security-based swap transactions and focus of Title VII on risk); FOA Letter at 7 (referring to this element of the SIFMA/FIA/FSR Letter). These commenters argue that we should focus on risks to the U.S. financial system and the protection of U.S. counterparties, and that neither concern is raised by transactions between two non-U.S. persons that happen to occur within the United States. *See* SIFMA/FIA/FSR Letter at A–5 to A–6. We continue to believe that this argument does not account for the full range of concerns addressed by Title VII, but, as discussed further below, we are not addressing issues surrounding the proposed ''transaction conducted within the United States'' definition in this release.

Because, as discussed above, we are not adopting ''transaction conducted within the United States'' as part of the final rule, we anticipate considering these comments in connection with soliciting additional public comment.

[77] *See id.* at A–11 (stating that a guarantee may not necessarily import risk into the United States and thus creates ''no nexus for purposes of [s]ection 30(c) of the Exchange Act'').

[78] *See* Mitsubishi UFJ Financial Group (''MUFJ'') Letter at 4–5 (urging the Commission not to require both participants in a foreign joint venture to aggregate the dealing transactions of the joint venture for purposes of the dealer *de minimis* calculation).

[79] *See Morrison* v. *National Australia Bank, Ltd.,* 130 S. Ct. 2869, 2884 (2010) (identifying focus of statutory language to determine what conduct was relevant in determining whether the statute was being applied to domestic conduct).

Section 772(b) of the Dodd-Frank Act amends section 30 of the Exchange Act to provide that ''[n]o provision of [Title VII] * * * shall apply to any person insofar as such person transacts a business in security-based swaps without the jurisdiction of the United States,'' unless that business is transacted in contravention of rules prescribed to prevent evasion of Title VII. *See* section 30(c) of the Exchange Act. As noted above, some commenters suggest that statutory language requiring us to coordinate and consult with the CFTC also requires us to interpret section 30(c) of the Exchange Act in a manner similar to the CFTC's interpretation of CEA section 2(i). See note 75, *supra.* However, in light of the differences between Exchange Act section 30(c) and CEA section 2(i), we do not find this argument persuasive. As noted above, however, in developing final rules we have carefully considered the CFTC's guidance and the underlying policy rationales, consistent with the statutory requirement that we consult and coordinate with the CFTC.

[80] The Dodd-Frank Act provides that the CFTC and SEC ''*shall* further define'' several terms, including ''security-based swap dealer'' and ''major security-based swap participant.'' Dodd-Frank Act section 712(d) (emphasis added). The Commissions fulfilled this mandate in the Intermediary Definitions Adopting Release. *See* Intermediary Definitions Adopting Release, 77 FR 30973.

[81] *See e.g.,* note 11, *supra. See also* Exchange Act section 15F(h) (establishing business conduct standards for security-based swap dealers and major security-based swap participants).

[82] *See* notes 76–77, *supra.*

every Title VII requirement, given that the definition and the relevant regulatory regime address not only risk but other concerns as well, as just described. For example, neither the statutory definition of ''security-based swap dealer,'' our subsequent further definition of the term pursuant to section 712(d) of the Dodd-Frank Act, nor the regulatory requirements applicable to security-based swap dealers focus solely on risk to the U.S. financial system.[83]

We believe that this approach to territorial application of Title VII provides a reasonable means of helping to ensure that our regulatory framework focuses on security-based swap activity that is most likely to raise the concerns that Congress intended to address in Title VII, including the potential effects of security-based swap activity on U.S. market participants, on the financial stability of the United States, on the transparency of the U.S. financial markets, and on the protection of counterparties.[84] Persons that engage in relevant conduct, as identified through this analysis, within the United States are not, in our view, ''transact[ing] a business in security-based swaps without the jurisdiction of the United States,'' [85] and thus are properly subject to regulation under Title VII.

(b) Territorial Approach to Application of Title VII Security-Based Swap Dealer Registration Requirements

In determining whether specific transactions should be included in a person's dealer *de minimis* calculation, we begin by looking to the statutory text to identify the type of dealing activity that the statute describes as relevant to a person's status as a security-based swap dealer.[86] Section 3(a)(71) of the Exchange Act [87] defines security-based swap dealer as a person that engages in any of the following types of activity:

(i) Holding oneself out as a dealer in security-based swaps,

(ii) making a market in security-based swaps,

(iii) regularly entering into security-based swaps with counterparties as an ordinary course of business for one's own account, or

(iv) engaging in any activity causing oneself to be commonly known in the trade as a dealer in security-based swaps.[88]

In accordance with the authority provided by section 712(d)(1) of the Dodd-Frank Act, which provides that the CFTC and the Commission shall by rule further define, among other things, ''security-based swap dealer,'' [89] we further interpreted the statutory definition by identifying the types of activities that are relevant in determining whether a person is a security-based swap dealer.[90] Pursuant to this further definition, indicia of security-based swap dealing activity include any of the following activities:

- Providing liquidity to market professionals or other persons in connection with security-based swaps;
- seeking to profit by providing liquidity in connection with security-based swaps,
- providing advice in connection with security-based swaps or structuring security-based swaps;
- having a regular clientele and actively soliciting clients;
- using inter-dealer brokers; and
- acting as a market maker on an organized security-based swap exchange or trading system.[91]

As the foregoing lists illustrate, both the statutory text and our interpretation further defining the statutory term include within the security-based swap dealer definition a range of activities. In the Intermediary Definitions Adopting Release, we stated that transactions arising from dealing activity, as identified by the indicia described above, would generally be subject to relevant Title VII requirements applicable to dealers, including that such transactions be included in a person's calculations for purposes of the dealer *de minimis* calculations. Our territorial approach applying Title VII to dealing activity similarly looks to whether any of the activities described above occur within the United States, and not simply to the location of the risk, as some commenters suggested is required under section 30(c) of the Exchange Act.[92] To the extent that such activity does occur within the United States, the person engaged in such activity, in our view, is transacting a business in security-based swaps within the United States,[93] and therefore applying Title VII to the activity by, among other things, requiring the person to include transactions arising from such activity in its *de minimis* calculation is consistent with a territorial approach, even if some of this activity (or other activity bearing the indicia of dealing activity) relating to the transaction also occurs outside the United States.

This approach is consistent with the purposes of the dealer definition and the *de minimis* exception as they relate to dealer regulation under Title VII. The *de minimis* exception excludes from the dealer registration requirement those entities that may engage in dealing activity but that do so in amounts that may not raise, to a degree that warrants application of security-based swap dealer requirements, the risk, counterparty protection, or other concerns that the dealer registration and regulatory framework were intended to address.[94] On the other hand, dealing activity, as identified by the types of activities described above, carried out within the United States at levels exceeding the *de minimis* threshold is likely to raise these concerns, which would be addressed by requiring persons engaged in that volume of dealing activity to register as security-based swap dealers under Title VII and to comply with relevant requirements applicable to security-based swap dealers. Accordingly, to the extent that a person engages in dealing activity within the United States that results in transactions in a notional amount exceeding the applicable *de minimis* threshold, it is appropriate to require the person to register as a security-based swap dealer.

i. Dealing Activity of U.S. Persons

Under the foregoing analysis and consistent with our proposal, when a U.S. person as defined under this final rule [95] engages in dealing activity, it necessarily engages in such activity within the United States, even when it enters into such transactions through a

[83] *See* note 88, *infra,* and accompanying text (describing elements of statutory definition of ''security-based swap dealer''); note 90, *infra,* and accompanying text (describing elements of the further definition of ''security-based swap dealer'' adopted by the Commission and the CFTC pursuant to section 712(d) of the Dodd-Frank Act); Exchange Act section 15F(h) (establishing business conduct standards for security-based swap dealers).

[84] *See* note 11, *supra.*

[85] Exchange Act section 30(c).

[86] *See* Intermediary Definitions Adopting Release, 77 FR 30616–30619 (further defining ''security-based swap dealer'' by identifying the types of activities that characterize dealing and that would therefore lead a transaction to be required to be included in a person's *de minimis* calculation under Exchange Act rule 3a71–2).

[87] 15 U.S.C. 78c(a)(71).

[88] Exchange Act section 3(a)(71)(A), 15 U.S.C. 78c(a)(71)(A).

[89] *See* Dodd-Frank Act section 712(d)(1).

[90] *See* Intermediary Definitions Adopting Release, 77 FR 30617–18.

[91] *Id.*

[92] *See* notes 76–77, *supra.*

[93] *Cf.* Exchange Act section 30(c) (limiting the application of, among other provisions, Title VII to ''any person insofar as such person transacts a business in security-based swaps without the jurisdiction of the United States'').

[94] *See, e.g.,* Intermediary Definitions Adopting Release, 77 FR 30629–30 (noting that the *de minimis* threshold is intended to capture firms that engage in a level of dealing activity that is likely to raise the types of concerns that the dealer regulatory framework is intended to address).

[95] *See* Exchange Act rule 3a71–3(a)(4).

foreign branch or office. As discussed in further detail below, the definition of ''U.S. person'' in the final rule is intended, in part, to identify those persons for whom it is reasonable to infer that a significant portion of their financial and legal relationships are likely to exist within the United States and that it is therefore reasonable to conclude that risk arising from their security-based swap activities could manifest itself within the United States, regardless of the location of their counterparties, given the ongoing nature of the obligations that result from security-based swap transactions.[96]

Wherever a U.S. person enters into a transaction in a dealing capacity, it is the U.S. person as a whole that is holding itself out as a dealer in security-based swaps, given that the financial resources of the entire person stand behind any dealing activity of the U.S. person, both at the time it enters into the transaction and for the life of the contract, even when the U.S. person enters into the transaction through a foreign branch or office. Moreover, the U.S. person as a whole seeks to profit by providing liquidity and engaging in market-making in security-based swaps, and the financial resources of the entire person enable it to provide liquidity and engage in market-making in connection with security-based swaps. Its dealing counterparties will look to the entire U.S. person, even when the U.S. person enters into the transaction through a foreign branch or office, for performance on the transaction. The entire U.S. person assumes, and stands behind, the obligations arising from the resulting agreement and is directly exposed to liability arising from non-performance of the non-U.S. person.[97]

For these reasons, in our view a person does not hold itself out as a security-based swap dealer as anything other than a single person even when it enters into transactions through its foreign branch or office.[98] Because the foreign branch generally could not operate as a dealer absent the financial and other resources of the entire U.S. person, its dealing activity with all of its counterparties, including dealing activity conducted through its foreign branch or office, is best characterized as occurring, at least in part, within the United States and should therefore be included in the person's *de minimis* threshold calculation.[99]

ii. Dealing Transactions of Non-U.S. Persons That Are Subject to Recourse Guarantees by Their U.S. Affiliates

In the proposing release, we explained that we preliminarily believed that a territorial approach consistent with the text and purposes of the Dodd-Frank Act encompasses transactions involving a non-U.S. person counterparty whose dealing activity is guaranteed by a U.S. person.[100] However, because we proposed to treat non-U.S. persons receiving a guarantee on their security-based swap transactions from a U.S. person like any other non-U.S. person for purposes of the *de minimis* exception (*i.e.,* requiring them to include in their calculations only dealing activity involving U.S.-person counterparties or transactions conducted within the United States), we did not elaborate specifically on how the presence of a guarantee related to a territorial application of the dealer definition, including the *de minimis* exception. Because our final rule requires transactions of non-U.S. persons whose obligations under the security-based swap are subject to recourse guarantees enforceable against their U.S. affiliates to be included in the dealer *de minimis* calculation of the non-U.S. person, we address it here.

In our view, a non-U.S. person engaged in dealing activity, to the extent that one or more transactions arising from such activity are guaranteed by a U.S. person, is engaged in relevant activity for purposes of the security-based swap dealer definition within the United States, with respect to those transactions. By virtue of the guarantee, the non-U.S. person effectively acts together with the U.S. person to engage in the dealing activity that results in the transactions, and the non-U.S. person's dealing activity with respect to such transactions cannot reasonably be isolated from the U.S. person's activity in providing the guarantee. The U.S.-person guarantor together with the non-U.S. person whose dealing activity it guarantees, and not just the non-U.S. person, may seek to profit by providing liquidity and engaging in market-making in security-based swaps, and the non-U.S. person provides liquidity and engages in market-making in connection with security-based swaps by drawing on the U.S. person's financial resources.[101] The non-U.S. person's counterparty, pursuant to the recourse guarantee, looks to both the non-U.S. person and its U.S. guarantor, which is responsible for performance on the transaction that is part of the non-U.S. person's dealing activity. In sum, the non-U.S. person is engaged in the United States in relevant dealing activity identified in the statutory definition and in our jointly adopted further definition of ''security-based swap dealer.''

Moreover, the economic reality of the non-U.S. person's dealing activity, where the resulting transactions are guaranteed by a U.S. person, is identical, in relevant respects, to a transaction entered into directly by the

[96] *See* section IV.C, *infra.* In our view, dealing activity involving such persons is particularly likely to raise the types of concerns Title VII was intended to address, including those related to risk to the U.S. financial system, transparency of the U.S. financial markets, and customer protection.

[97] *Cf.* SIFMA/FIA/FSR Letter at 4, A–5 (stating that main purpose of Title VII is to address risk arising from security-based swap activity).

[98] This is consistent with the view expressed in our proposing release. *See* Cross-Border Proposing Release, 78 FR 30985.

[99] As discussed in further detail below, this interpretation is consistent with the goals of dealer regulation under Title VII. Security-based swap activity that results in a transaction involving a U.S.-person counterparty creates ongoing obligations that are borne by a U.S. person and, as such, is properly viewed as occurring within the United States. See note 186, *infra.*

[100] In our proposal, we noted that in a security-based swap transaction between two non-U.S. persons where the performance of at least one side of the transaction is guaranteed by a U.S. person, the guarantee gives the guaranteed person's counterparty recourse to the U.S. person for performance of obligations owed by the guaranteed person under the security-based swap, and the U.S. guarantor exposes itself to the risk of the security-based swap as if it were a counterparty to the security-based swap through the security-based swap activity engaged in by the guaranteed person. *See* Cross-Border Proposing Release, 78 FR 30986–87. This interpretation of guarantee was consistent with our discussion of the application of the major participant tests to guaranteed positions in the Intermediary Definitions Adopting Release, where we, together with the CFTC, noted that a person's security-based swap positions are attributed to a parent, other affiliate, or guarantor for purposes of the major participant analysis to the extent that the counterparties to those positions have recourse to that parent, other affiliate, or guarantor in connection with the position; as we noted in that release, positions are not attributed in the absence of recourse. *See* Intermediary Definitions Adopting Release, 77 FR 30689. In this release, we continue to use the term ''guarantee'' to refer to an arrangement pursuant to which one party to a security-based swap transaction has recourse to its counterparty's parent, other affiliate, or guarantor with respect to the counterparty's obligations owed under the transaction. *See* section IV.E.1(b), *infra.*

[101] Even if the U.S. guarantor generally does not hold itself out as a dealer or make a market in security-based swaps, the U.S. guarantor enables the non-U.S. person whose dealing activity it guarantees to engage in dealing activity by providing financial backing. We note that references to ''guarantee,'' ''recourse guarantee,'' or ''rights of recourse,'' as those terms are used in this release, may describe economic relationships that are different from ''guarantee'' under section 2(a)(1) of the Securities Act. We note, however, that, depending on the nature of the ''guarantee,'' ''recourse guarantee,'' or ''rights of recourse'' provided by the guarantor, the transaction at issue may involve not only a security-based swap between two non-U.S. persons but also the offer and sale of a security by a U.S. person, given that a ''guarantee'' of a security-based swap is itself a separate security issued by the U.S. guarantor. *See, e.g.,* Securities Act section 2(a)(1), 15 U.S.C. 77b(a)(1) (including in the statutory definition of ''security'' a guarantee of a security).

U.S. guarantor. By virtue of the guarantee, transactions arising from the non-U.S. person's dealing activity result in risk from the transaction being borne by a U.S. person (the guarantor, which is responsible for the transactions it guarantees in a manner similar to a direct counterparty to the transactions) and potentially the U.S. financial system in a manner similar to a dealing transaction entered into directly by a U.S. person. As with transactions entered into directly by a U.S. person, transactions for which a counterparty has a right of recourse against a U.S. person create risk to a U.S. person and potentially the U.S. financial system regardless of the location of the counterparty.

Our interpretation of the statutory text of the definition, as well as our further definition of the term, as it applies to these entities is consistent with the purposes of Title VII, as discussed above. The exposure of the U.S. guarantor creates risk to U.S. persons and potentially to the U.S. financial system via the guarantor to a comparable degree as if the transaction were entered into directly by a U.S. person. We understand that in some circumstances a counterparty may choose not to enter into a security-based swap transaction (or may not do so on the same terms) with a non-U.S. subsidiary of a U.S. person when that non-U.S. subsidiary is acting in a dealing capacity to the extent that its dealing activity is not subject to a recourse guarantee by a U.S. affiliate, absent other circumstances (*e.g.,* adequate capitalization of the hitherto-guaranteed affiliate).

One commenter noted that U.S. guarantors may provide guarantees for a variety of reasons, including to satisfy regulatory requirements, to ''manage capital treatment across an entity,'' and to ''avoid negative credit rating consequences,'' and argued that a guarantee may therefore not create risk within the United States.[102] Absent the creation of such risk, this commenter further argued that a guarantee creates ''no nexus for purposes of section 30(c) of the Exchange Act.'' [103] However, regardless of the motivation for providing the guarantee, the non-U.S. person's dealing activity still occurs within the United States and creates risk within the United States in the manner described above. The commenter provided no evidence that the motivation for providing a guarantee affects this analysis: It neither alters the risk created within the United States by such a guarantee when it is provided by a U.S. person nor affects the economic reality of the transaction. Moreover, even if a person provides guarantees not in response to counterparty demands but to satisfy regulatory requirements or to avoid negative credit rating consequences, the very reasons for issuing the guarantee suggest that the non-U.S. person would not be able to engage in dealing activity, or to do so on the same terms, without the guarantee.[104]

In sum, the guarantee provided by a U.S. person poses risk to U.S. persons and potentially to the U.S. financial system, and both the non-U.S. person whose dealing activity is guaranteed and its counterparty rely on the creditworthiness of the U.S. guarantor when entering into a security-based swap transaction and for the duration of the security-based swap. The economic reality of this transaction, even though entered into by a non-U.S. person, is substantially identical, in relevant respects, to a transaction entered into directly by a U.S. person. Accordingly, in our view, it is consistent with both the statutory text and with the purposes of the statute to identify such transactions as occurring within the United States for purposes of Title VII.

iii. Dealing Activity of Other Non-U.S. Persons

In our proposal, we stated that non-U.S. persons engaging in dealing activity would be required to count toward their *de minimis* thresholds only transactions arising from their dealing activity with U.S. persons or dealing activity otherwise conducted within the United States. Under the approach described above, and consistent with our proposal, we believe that a non-U.S. person engaged in dealing activity with U.S. persons engages in relevant activity for purposes of the security-based swap dealer definition within the United States.[105]

Dealing activity of non-U.S. persons that involves counterparties who are U.S. persons, as that term is defined in the final rule, necessarily involves the performance by the non-U.S. person of relevant activity under the ''security-based swap dealer'' definition at least in part within the United States. For example, in our view, a non-U.S. person engaging in dealing activity with a U.S. person is holding itself out as a dealer in security-based swaps within the United States.[106] Similarly, by entering into a transaction with a U.S. person in a dealing capacity, it is seeking to profit by providing liquidity within the United States and possibly engaging in market-making in security-based swaps within the United States, given that its decision to engage in dealing activity with U.S. persons, as defined by the rule, affects the liquidity of the security-based swap market within the United States. Particularly at volumes in excess of the *de minimis* threshold, entering into security-based swap transactions in a dealing capacity with U.S. persons likely is the type of activity that would cause a non-U.S. person ''to be commonly known in the trade as a dealer in security-based swaps'' [107] within the United States, that constitutes ''regularly entering into security-based swaps with counterparties as an ordinary course of business for one's own account'' [108] within the United States, and that permits a reasonable inference that it has a regular clientele and actively solicits clients within the United States.[109]

Our application of the statute to non-U.S. persons is consistent with the purposes of Title VII, as discussed

[102] SIFMA/FIA/FSR Letter at A–11.

[103] *Id.*

[104] In addition, this commenter suggested that any risk created by guarantees provided to prudentially regulated foreign entities is adequately addressed by the foreign prudential regulation. *See id.* Although we recognize that foreign prudential regulation may reduce the risk that a guaranteed foreign affiliate's counterparties will seek to enforce the terms of the guarantee against the U.S. guarantor (depending on the quality of prudential regulation in the foreign jurisdiction), it does not eliminate this risk, and the counterparty continues to retain a right of recourse under the guarantee against the guarantor.

Given the role of a foreign person whose activity is guaranteed in creating risk within the United States through its dealing activity, we believe that it is important to ensure that such a foreign person be required to register as a security-based swap dealer to the extent that its guaranteed dealing transactions (together with any dealing transactions with U.S. persons) are included in its *de minimis* threshold calculations. As noted above, our proposal set forth a framework under which substituted compliance potentially would be available for certain Title VII requirements, including for dealer-specific requirements such as capital and margin, which should mitigate concerns about overlapping regulation of such entities.

[105] We continue to believe that security-based swap activity carried out within the United States may also be relevant activity under our territorial approach, even if the resulting transaction involves two non-U.S. counterparties. As discussed below, however, we anticipate soliciting additional public comment regarding the issue.

[106] Given the global nature of the security-based swap market, U.S. persons seeking to access this market may readily do so through both U.S.-person dealers and foreign dealers. That a foreign dealer holding itself out as a dealer to U.S. persons is based in, and operating out of, a foreign jurisdiction does not alter the economic reality of its activity: It is holding itself out as a dealer within the United States in a manner largely indistinguishable from a U.S.-person dealer that ''hangs out its shingle'' in Manhattan.

[107] Exchange Act section 3(a)(71)(A)(iv).

[108] Exchange Act section 3(a)(71)(A)(iii).

[109] *See* Intermediary Definitions Adopting Release, 77 FR 30618.

above. U.S. persons incur risks arising from this dealing activity, which in turn potentially creates risk to other market participants and the U.S. financial system more generally, and transactions with U.S. persons raise counterparty protection and market transparency concerns that Title VII is intended to address. Accordingly, we believe that the dealing activity of a non-U.S. person that involves a U.S.-person counterparty is appropriately characterized as occurring, at least in part, within the United States.[110]

(c) Territorial Approach to Application of Title VII Major Security-Based Swap Participant Registration Requirements

As in our territorial approach to the security-based swap dealer definition (including the *de minimis* exception) described above, our territorial approach to the application of the major security-based swap participant definition looks first to the statutory text to identify the types of activity that are relevant for purposes of the definition. Section 3(a)(67) of the Exchange Act provides that a major security-based swap participant is any person who is not a dealer and who satisfies one or more of the following requirements:

(i) Maintains a substantial position in security-based swaps for any of the major security-based swap categories,[111] excluding certain positions;

(ii) has outstanding security-based swaps that create substantial counterparty exposure that could have serious adverse effects on the financial stability of the U.S. banking system or financial markets; or

(iii) is a highly leveraged financial entity that maintains substantial position in outstanding security-based swaps in any major security-based swap category.[112]

The statute directs us to further define, jointly with the CFTC, ''major security-based swap participant'' [113] and separately provides us with authority to ''define . . . the term 'substantial position' at the threshold that the Commission determines to be prudent for the effective monitoring, management, and oversight of entities that are systemically important or can significantly impact the financial system of the United States.'' [114]

Pursuant to these provisions, we further interpreted this definition by, among other things, defining what constitutes a ''substantial position'' and ''substantial counterparty exposure'' for purposes of the major security-based swap participant definition.[115] In doing so, we set forth calculation methodologies and thresholds for each and adopted rules requiring persons that exceeded these thresholds to register as major security-based swap participants.[116] These thresholds were designed to identify persons that were likely to pose counterparty credit risks, as such risks are ''more closely linked to the statutory criteria that the definition focuses on entities that are 'systemically important' or can 'significantly impact' the U.S. financial system.'' [117] We also noted that our definition of ''substantial position'' was intended to address the risk that would be posed by the default of multiple entities close in time and the aggregate risks presented by a person's security-based swap activity, as these considerations reflect the market risk concerns expressly identified in the statute.[118]

The statutory focus of the major security-based swap participant definition differs from that of security-based swap dealer, in that the security-based swap dealer definition focuses on *activity* that may raise the concerns that dealer regulation is intended to address, while the major security-based swap participant definition focuses on *positions* that may raise systemic risk concerns within the United States. Accordingly, a territorial approach to application of the definition of major security-based swap participant involves identifying security-based swap positions that exist within the United States.[119] In our view, and consistent with the approach taken in our proposal, a security-based swap position exists within the United States when it is held by or with a U.S. person, or when it is subject to a recourse guarantee against a U.S. person,[120] as the risks associated with such positions are borne within the United States, and given the involvement of U.S. persons may, at the thresholds established for the major security-based swap participant definition, give rise to the types of systemic risk within the United States that major security-based swap regulation is intended to address. To the extent that a position exists within the United States in this sense, we believe that it is appropriate under a territorial approach to require a market participant, whether a U.S. person or otherwise, that is a counterparty or guarantor with respect to that position, to include that position in its major security-based swap participant threshold calculations, wherever the security-based swap was entered into.

(d) Regulations Necessary or Appropriate To Prevent Evasion of Title VII

Consistent with our proposal, we interpret section 30(c) of the Exchange Act as not requiring us to find that actual evasion has occurred or is occurring to invoke our authority to reach activity ''without the jurisdiction of the United States'' or to limit application of Title VII to security-based swap activity ''without the jurisdiction of the United States'' only to business that is transacted in a way that is purposefully intended to evade Title VII. Section 30(c) of the Exchange Act authorizes the Commission to apply Title VII to persons transacting a business ''without the jurisdiction of the United States'' if they contravene rules that the Commission has prescribed as ''necessary or appropriate to prevent the evasion of any provision'' of Title VII. The focus of this provision is not whether such rules impose Title VII requirements only on entities engaged in evasive activity but whether the rules are generally ''necessary or appropriate'' to prevent potential evasion of Title VII. In other words, section 30(c) of the Exchange Act permits us to impose prophylactic rules intended to prevent possible purposeful evasion, even though such rules may affect or prohibit

[110] Although at least one commenter suggested that we lack the authority under section 30(c) of the Exchange Act to require non-U.S. person joint-ventures to aggregate relevant dealing transactions with the relevant dealing transactions of multiple investors in the joint-venture, *see* note 78, *supra,* we believe that our limitation on application of the aggregation requirement only to the transactions of such non-U.S. persons that occur within the United States (because they involve U.S.-person counterparties or are subject to a recourse guarantee against a U.S. person) is consistent with our territorial approach.

[111] The statute further provides the Commission with the authority to determine the scope of these categories. *See* Exchange Act section 3(a)(67)(A)(ii)(I).

[112] Exchange Act section 3(a)(67)(A).

[113] Dodd-Frank Act section 712(d)(1).

[114] Exchange Act section 3(a)(67)(B).

[115] *See* Intermediary Definitions Adopting Release, 77 FR 30663–84.

[116] *See id.*

[117] *Id.* at 30666.

[118] *See id.* We defined ''substantial counterparty exposure'' in a similar manner, noting the focus of the statutory test on ''serious adverse effects on financial stability or financial markets.'' *Id.* at 30683. *Cf.* Section 3(a)(67)(A)(ii)(II) of the Exchange Act (encompassing in major security-based swap participant definition persons whose ''outstanding security-based swaps create substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets'').

[119] *Cf. Morrison,* 130 S. Ct. at 2884 (performing a textual analysis to identify the focus of the statute).

[120] The economic reality of a position subject to such a guarantee, even though entered into by a non-U.S. person, is substantially identical in relevant respects to a position entered into directly by the U.S. guarantor. *See* section II.B.2(b)ii, *supra.*

some non-evasive conduct. Moreover, exercising the section 30(c) authority does not require us to draw a distinction between conduct ''without the jurisdiction of the United States'' that is purposely evasive as opposed to identical conduct that was motivated by some non-evasive purpose. Indeed, to interpret section 30(c) authority otherwise could create a bifurcated regulatory regime where the same conduct is treated differently based on parties' underlying purpose for engaging in it, which could create extraordinary oversight challenges involving difficult subjective considerations concerning parties' true intentions in entering any given transaction or establishing particular business structures, and could create significant competitive advantages for incumbent firms.[121] Thus, we read the statute to permit us to prescribe such rules to conduct without the jurisdiction of the United States, even if those rules would also apply to a market participant that has been transacting business through a pre-existing market structure, such as a foreign branch or foreign affiliate whose positions are guaranteed by the market participant, established for valid business purposes, provided the proposed rule or guidance is designed to prevent possibly evasive conduct.[122]

C. Principles Guiding Final Approach To Applying ''Security-Based Swap Dealer'' and ''Major Security-Based Swap Participant'' Definitions in the Cross-Border Context

As in our proposal, our final rules and guidance reflect our careful consideration of the global nature of the security-based swap market and the types of risks created by security-based swap activity to the U.S. financial system and market participants and other concerns that the dealer and major security-based swap participant definitions were intended to address, as well as the needs of a well-functioning security-based swap market.[123] We also have been guided by the purpose of Title VII[124] and the applicable requirements of the Exchange Act, including the following:

- *Economic Impacts*—The Exchange Act requires the Commission to consider the impact of our rulemakings on efficiency, competition, and capital formation.[125]
- *Counterparty Protection*—The Dodd-Frank Act adds provisions to the Exchange Act relating to counterparty protection, particularly with respect to ''special entities.''[126]
- *Transparency*—The Dodd-Frank Act was intended to promote transparency in the U.S. financial system.[127]
- *Risk to the U.S. Financial System*—The Dodd-Frank Act was intended to promote, among other things, the financial stability of the United States by limiting/mitigating risks to the financial system.[128]
- *Anti-Evasion*—The Dodd-Frank Act amends the Exchange Act to provide the Commission with authority to prescribe rules and regulations as necessary or appropriate to prevent the evasion of any provision of the Exchange Act that was added by the Dodd-Frank Act.[129]
- *Consultation and Coordination with Other U.S. Regulators*—In connection with implementation of Title VII, the Dodd Frank Act requires the Commission to consult and coordinate with the CFTC and prudential regulators for the purpose of ensuring ''regulatory consistency and comparability, to the extent possible.''[130]
- *Consistent International Standards*—To promote effective and consistent global regulation of swaps and security-based swaps, the Dodd-Frank Act requires the Commission and the CFTC to consult and coordinate with foreign regulatory authorities on the ''establishment of consistent international standards'' with respect to the regulation of swaps and security-based swaps.[131] In this regard, the Commission recognizes that regulators in other jurisdictions are currently engaged in implementing their own regulatory reforms of the OTC derivatives markets and that our application of Title VII to cross-border activities may affect the policy decisions of these other regulators as they seek to address potential conflicts or overlaps in the regulatory requirements that apply to market participants under their authority.[132]

At times, these principles reinforce one another; at other times, they may be in tension. For instance, regulating risk posed to the United States may, depending on the final rules, make it more costly for U.S.-based firms to conduct security-based swap business, particularly in foreign markets, compared to foreign firms; it could make foreign firms less willing to deal with U.S. persons; and it could discourage foreign firms from carrying out security-based swap dealing activity through branches or offices located in the United States. On the other hand, providing U.S. persons greater access to foreign security-based swap markets may, depending on the final rules, fail to appropriately address the risks posed to the United States from transactions conducted in part outside the United States or create opportunities for market participants to evade the application of Title VII, particularly until such time as other jurisdictions adopt similar comprehensive and comparable derivative regulations.

Balancing these sometimes competing principles has been complicated by the fact that Title VII imposes a new regulatory regime in a global marketplace. Title VII establishes reforms that will have implications for entities that compete internationally in the global security-based swap market. We have generally sought, in accordance with the statutory factors described above, to avoid creating opportunities for market participants to evade Title VII requirements, whether by restructuring their business or other means, or the potential for overlapping or conflicting regulations. We also have considered the needs for a well-functioning security-based swap market and for avoiding disruption that may

[121] Such an interpretation of our anti-evasion authority, for example, could privilege incumbent firms by allowing them to leverage existing business models that may not be available to new entrants under rules promulgated pursuant to that authority.

[122] As a general matter, the final rules adopted in this release are not being applied to persons who are ''transacting a business in security-based swaps without the jurisdiction of the United States'' within the meaning of section 30(c) of the Exchange Act. *See* sections II.B.2(a)–(c), *supra.* However, as noted below, the Commission also believes that these rules are necessary or appropriate as a prophylactic measure to help prevent the evasion of the provisions of the Exchange Act that were added by the Dodd-Frank Act and thus help ensure that the particular purposes of the Dodd-Frank Act addressed by the rule are not undermined. *See, e.g.,* section II.B.2(d) and note 186, *infra.*

[123] *See* section II.A, *supra.*

[124] *See* note 11, *supra.*

[125] Specifically, section 3(f) of the Exchange Act provides: ''Whenever pursuant to this title the Commission is engaged in rulemaking, . . ., and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.'' Section 23(a)(2) of the Exchange Act also provides: ''The Commission . . . , in making rules and regulations pursuant to any provisions of this title, shall consider among other matters the impact any such rule or regulation would have on competition. The Commission . . . shall not adopt any such rule or regulation which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of [the Exchange Act].''

[126] *See* Exchange Act section 15F(h), as added by section 764(a) of the Dodd-Frank Act, in particular.

[127] *See* note 11, *supra.*

[128] *Id.*

[129] *See* Exchange Act section 30(c), 15 U.S.C. 78dd(c), as discussed in section II.B.2(d), *supra.*

[130] *See* section 712(a)(2) of the Dodd-Frank Act.

[131] *See* section 752(a) of the Dodd-Frank Act.

[132] For example, subjecting non-U.S. persons to Title VII may prompt a foreign jurisdiction to respond by subjecting U.S. persons to the foreign jurisdiction's regulatory regime.

reduce liquidity, competition, efficiency, transparency, or stability in the security-based swap market.

III. Baseline

To assess the economic impact of the final rules described in this release, we are using as our baseline the security-based swap market as it exists at the time of this release, including applicable rules we have already adopted but excluding rules that we have proposed but not yet finalized.[133] The analysis includes the statutory and regulatory provisions that currently govern the security-based swap market pursuant to the Dodd-Frank Act.[134] We acknowledge limitations in the degree to which we can quantitatively characterize the current state of the security-based swap market. As we describe in more detail below, because the available data on security-based swap transactions do not cover the entire market, we have developed an understanding of market activity using a sample that includes only certain portions of the market.

A. Current Security-Based Swap Market

Our analysis of the state of the current security-based swap market is based on data obtained from DTCC–TIW, especially data regarding the activity of market participants in the single-name CDS market during the period from 2008 to 2012. While other repositories may collect data on transactions in total return swaps on equity and debt, we do not currently have access to such data for these products (or other products that are security-based swaps). We have previously noted that the definition of security-based swaps is not limited to single-name CDS but we believe that the single-name CDS data are sufficiently representative of the market and therefore can directly inform the analysis of the state of the current security-based swap market.[135] Additionally, the data for index CDS encompass both broad-based security indices and narrow-based security indices, and ''security-based swap'' in relevant part encompasses swaps based on single securities or reference entities or on narrow-based security indices. Accordingly, with the exception of the analysis regarding the degree of overlap between participation in the single-name CDS market and the index CDS market (cross-market activity), our analysis below does not include data regarding index CDS.

We believe that the data underlying our analysis here provide reasonably comprehensive information regarding the single-name CDS transactions and composition of the single-name CDS market participants. We note that the data available to us from DTCC–TIW do not encompass those CDS transactions that both: (i) Do not involve U.S. counterparties;[136] and (ii) are based on non-U.S. reference entities. Notwithstanding this limitation, we believe that the DTCC–TIW data provide sufficient information to identify the types of market participants active in the security-based swap market and the general pattern of dealing within that market.[137]

1. Security-Based Swap Market Participants

A key characteristic of security-based swap activity is that it is concentrated among a relatively small number of entities that engage in dealing activities. In addition to these entities, thousands of other participants appear as counterparties to security-based swap contracts in our sample, and include, but are not limited to, investment companies, pension funds, private (hedge) funds, sovereign entities, and industrial companies. We observe that most non-dealer users of security-based swaps do not engage directly in the trading of swaps, but use dealers, banks, or investment advisers as intermediaries or agents to establish their positions. Based on an analysis of the counterparties to trades reported to the DTCC–TIW, there are 1,695 entities that engaged directly in trading between November 2006 and December 2012.

Table 1, below, highlights that more than three-quarters of these entities (DTCC-defined ''firms'' shown in DTCC–TIW, which we refer to here as ''transacting agents'') were identified as investment advisers, of which approximately 40 percent (about 30 percent of all transacting agents) were registered investment advisers under the Investment Advisers Act of 1940 (''Investment Advisers Act'').[138] Although investment advisers comprise the vast majority of transacting agents, the transactions they executed account for only 10.8 percent of all single-name CDS trading activity reported to the DTCC–TIW, measured by number of transaction-sides (each transaction has two transaction sides, *i.e.,* two transaction counterparties). The vast majority of transactions (81.9 percent) measured by number of transaction-sides were executed by ISDA-recognized dealers.[139]

[133] We also consider, where appropriate, the impact of rules and technical standards promulgated by other regulators, such as the CFTC and the European Securities and Markets Authority, on practices in the security-based swap market.

[134] As noted above, we have not yet adopted other substantive requirements of Title VII that may affect how firms structure their security-based swap business and market practices more generally.

[135] According to data published by the Bank for International Settlements (''BIS''), the global notional amount outstanding in equity forwards and swaps as of June 2013 was $2.32 trillion. The notional amount outstanding in single-name CDS was approximately $13.14 trillion, in multi-name index CDS was approximately $10.17 trillion, and in multi-name, non-index CDS was approximately $1.04 trillion. *See* Semi-annual OTC derivatives statistics at end-June 2013 (Nov. 2013), Table 19, available at: *http://www.bis.org/statistics/dt1920a.pdf.* As we stated in the Cross-Border Proposing Release, for the purposes of this analysis, we assume that multi-name index CDS are not narrow-based index CDS and therefore, do not fall within the security-based swap definition. *See* Cross-Border Proposing Release, 78 FR 31120 n.1301; *see also* Exchange Act section 3(a)(68)(A); Further Definition of ''Swap,'' ''Security-Based-Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, Exchange Act Release No. 67453 (July 18, 2012), 77 FR 48208 (Aug. 13, 2012) (''Product Definitions Adopting Release''), 77 FR 48208. We also assume that all instruments reported as equity forwards and swaps are security-based swaps, potentially resulting in underestimation of the proportion of the security-based swap market represented by single-name CDS. Based on those assumptions, single-name CDS appear to constitute roughly 80 percent of the security-based swap market. No commenters disputed these assumptions, and we therefore continue to believe that, although the BIS data reflect the global OTC derivatives market, and not just the U.S. market, these ratios are an adequate representation of the U.S. market.

[136] We note that DTCC–TIW's entity domicile determinations may not reflect our definition of ''U.S. person'' in all cases.

[137] The challenges we face in estimating measures of current market activity stems, in part, from the absence of comprehensive reporting requirements for security-based swap market participants. The Commission has proposed rules regarding trade reporting, data elements, and real-time public reporting for security-based swaps that would provide us with appropriate measures of market activity. *See* Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, Exchange Act Release No. 34–63346 (Nov. 19, 2010), 75 FR 75208 (Dec. 2, 2010).

[138] *See* 15 U.S.C. 80b1–80b21. Transacting agents participate directly in the security-based swap market, without relying on an intermediary, on behalf of principals. For example, a university endowment may hold a position in a security-based swap that is built up by an investment adviser that transacts on the endowment's behalf. In this case, the university endowment is a principal that uses the investment adviser as its transacting agent.

[139] The 1,695 entities included all DTCC-defined ''firms'' shown in DTCC–TIW as transaction counterparties that report at least one transaction to DTCC–TIW as of December 2012. The staff in the Division of Economic and Risk Analysis classified these firms, which are shown as transaction counterparties, by machine matching names to known third-party databases and by manual classification. This is consistent with the methodology used in the proposal. *See* Cross-Border Proposing Release, 78 FR 31120 n.1304. Manual classification was based in part on searches of the EDGAR and Bloomberg databases, the SEC's Investment Adviser Public Disclosure database, and a firm's public Web site or the public Web site of the account represented by a firm. The staff also referred to ISDA protocol adherence letters available on the ISDA Web site.

TABLE 1—THE NUMBER OF TRANSACTING AGENTS BY COUNTERPARTY TYPE AND THE FRACTION OF TOTAL TRADING ACTIVITY, FROM NOVEMBER 2006 THROUGH DECEMBER 2012, REPRESENTED BY EACH COUNTERPARTY TYPE

Transacting agents	Number	Percent	Transaction share (percent)
Investment Advisers	1,261	74.4	10.9
—SEC registered	*510*	*30.1*	*6.6*
Banks	256	15.1	5.9
Pension Funds	27	1.6	0.1
Insurance Companies	32	1.9	0.3
ISDA-Recognized Dealers [140]	17	1.0	82.1
Other	102	6.0	0.8
Total	1,695	100.0	100.0

Principal holders of CDS risk exposure are represented by ''accounts'' in the DTCC–TIW.[141] The staff's analysis of these accounts in DTCC–TIW shows that the 1,695 transacting agents classified in Table 1 represent over 9,238 principal risk holders. Table 2, below, classifies these principal risk holders by their counterparty type and whether they are represented by a registered or unregistered investment adviser.[142] For instance, 256 banks in Table 1 allocated transactions across 364 accounts, of which 25 were represented by investment advisers. In the remaining 339 instances, banks traded for their own accounts. Meanwhile, 17 ISDA-recognized dealers in Table 1 allocated transactions across 65 accounts.

Among the accounts, there are 1,000 Dodd-Frank Act-defined special entities and 570 investment companies registered under the Investment Company Act of 1940.[143] Private funds comprise the largest type of account holders that we were able to classify, and although not verified through a recognized database, most of the funds we were not able to classify appear to be private funds.[144]

TABLE 2—THE NUMBER AND PERCENTAGE OF ACCOUNT HOLDERS—BY TYPE—WHO PARTICIPATE IN THE SECURITY-BASED SWAP MARKET THROUGH A REGISTERED INVESTMENT ADVISER, AN UNREGISTERED INVESTMENT ADVISER, OR DIRECTLY AS A TRANSACTING AGENT, FROM NOVEMBER 2006 THROUGH DECEMBER 2012

Account holders by type	Number	Represented by a registered investment adviser		Represented by an unregistered investment adviser		Participant is transacting agent [145]	
Private Funds	2,696	1,275	47%	1,400	52%	21	1%
DFA Special Entities	1,000	973	97%	7	1%	20	2%
Registered Investment Companies	570	560	98%	8	1%	2	0%
Banks (non-ISDA-recognized dealers)	364	21	6%	4	1%	339	93%
Insurance Companies	205	132	64%	20	10%	53	26%
ISDA-Recognized Dealers	65	0	0%	0	0%	65	100%
Foreign Sovereigns	57	40	70%	2	4%	15	26%
Non-Financial Corporations	55	37	67%	3	5%	15	27%
Finance Companies	8	4	50%	0	0%	4	50%
Other/Unclassified	4,218	2,885	68%	1,146	27%	187	4%
All	9,238	5,927	64%	2,590	28%	721	8%

(a) Dealing Structures

Security-based swap dealers use a variety of business models and legal structures to engage in dealing business with counterparties in jurisdictions all around the world. As we noted in the proposal, both U.S.-based and foreign-based entities use certain dealing structures for a variety of legal, tax, strategic, and business reasons.[146] Dealers may use a variety of structures in part to reduce risk and enhance credit protection based on the particular characteristics of each entity's business.

Bank and non-bank holding companies may use subsidiaries to deal with counterparties. Further, dealers may rely on multiple sales forces to

[140] For the purpose of this analysis, the ISDA-recognized dealers are those identified by ISDA as belonging to the G14 or G16 dealer group during the period: JP Morgan Chase NA (and Bear Stearns), Morgan Stanley, Bank of America NA (and Merrill Lynch), Goldman Sachs, Deutsche Bank AG, Barclays Capital, Citigroup, UBS, Credit Suisse AG, RBS Group, BNP Paribas, HSBC Bank, Lehman Brothers, Société Générale, Credit Agricole, Wells Fargo and Nomura. *See, e.g., http://www.isda.org/c_and_a/pdf/ISDA-Operations-Survey-2010.pdf.*

[141] ''Accounts'' as defined in the DTCC–TIW context are not equivalent to ''accounts'' in the definition of ''U.S. person'' provided by Exchange Act rule 3a71–3(a)(4)(i)(C). They also do not necessarily represent separate legal persons. One entity or legal person may have multiple accounts. For example, a bank may have one DTCC account for its U.S. headquarters and one DTCC account for one of its foreign branches.

[142] Unregistered investment advisers include all investment advisers not registered under the Investment Advisers Act and may include investment advisers registered with a state or a foreign authority.

[143] *See* 15 U.S.C. 80a1 through 80a64. There remain over 4,000 DTCC ''accounts'' unclassified by type. Although unclassified, each was manually reviewed to verify that it was not likely to be a special entity within the meaning of the Dodd-Frank Act and instead was likely to be an entity such as a corporation, an insurance company, or a bank.

[144] Private funds for this purposes encompasses various unregistered pooled investment vehicles, including hedge funds, private equity funds, and venture capital funds.

[145] This column reflects the number of participants who are also trading for their own accounts.

[146] *See* Cross-Border Proposing Release, 78 FR 30976–78.

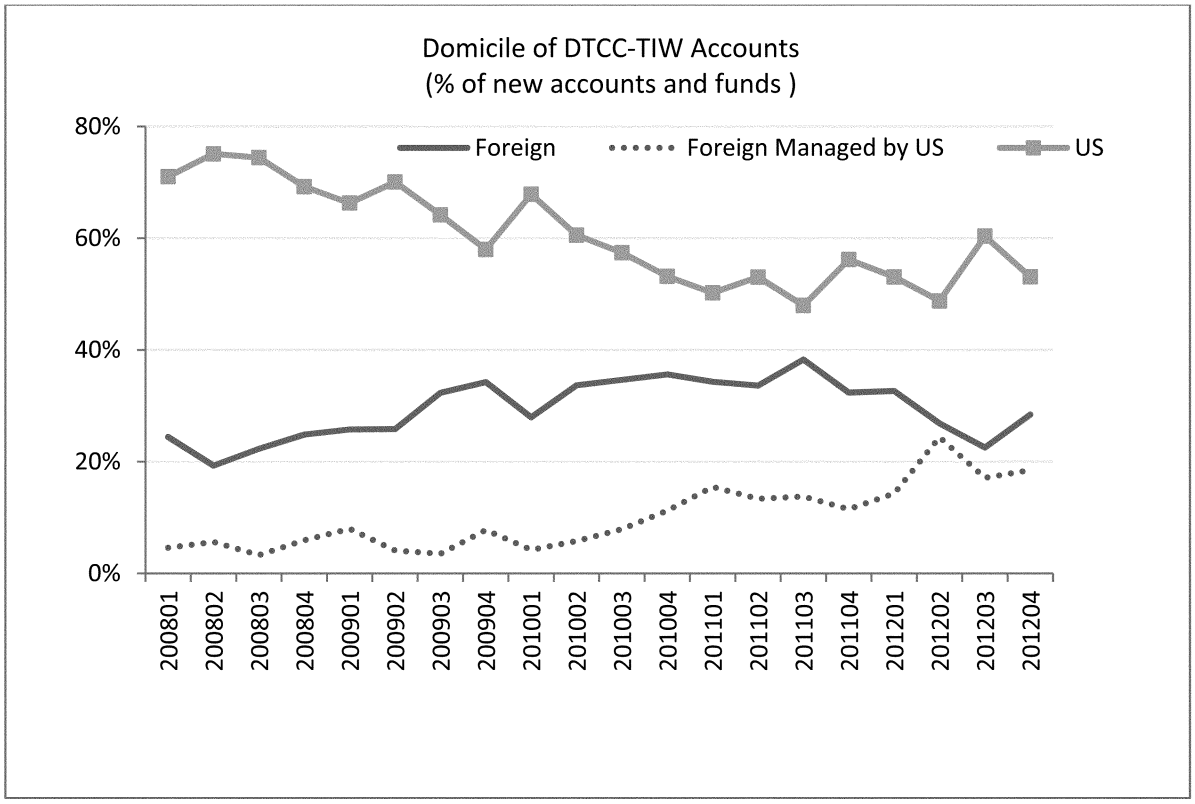
originate security-based swap transactions. For example, a U.S. bank dealer may use a sales force in its U.S. home office to originate security-based swap transactions in the United States and use separate sales forces spread across foreign branches to originate security-based swap transactions with counterparties in foreign markets.

In some situations, an entity's performance under security-based swaps may be supported by a guarantee provided by an affiliate. More generally, guarantees may take the form of a blanket guarantee of an affiliate's performance on all security-based swap contracts, or a guarantee may apply only to a specified transaction or counterparty. Guarantees may give counterparties to the dealer direct recourse to the holding company or another affiliate for its dealer-affiliate's obligations under security-based swaps for which that dealer-affiliate acts as counterparty.

(b) Participant Domiciles

The security-based swap market is global in scope, with counterparties located across multiple jurisdictions. As depicted in Figure 1, the domicile of new accounts participating in the market has shifted over time.

Figure 1: The percentage of (1) new accounts with a domicile in the United States (referred to as "US"), (2) new accounts with domicile outside the United States (referred to below as "Foreign"), and (3) new accounts outside the United States but managed by a U.S. entity, account of a foreign branch of a U.S. bank, and account of a foreign subsidiary of a U.S. entity (collectively referred to below as "Foreign Managed by US").[147] Unique, new accounts are aggregated each quarter and shares are computed on a quarterly basis, from January 2008 through December 2012.



Over time a greater share of accounts entering the market either have a foreign domicile, or have a foreign domicile while being managed by a U.S. person. The increase in foreign accounts may reflect an increase in participation by foreign accountholders while the increase in foreign accounts managed by U.S. persons may reflect the flexibility with which market participants can restructure their market participation in response to regulatory intervention, competitive pressures, and other stimuli. There are, however, alternative explanations for the shifts in new account domicile we observe in Figure 1. Changes in the domicile of new accounts through time may reflect improvements in reporting by market participants to DTCC–TIW.[148]

[147] In these instances, the fund or account lists a non-U.S. registered office location while the investment adviser, U.S. bank, or U.S. parent lists the United States as its settlement country.

[148] Consistent with the guidance on CDS data access, *see* text accompanying note 37, *supra,* DTCC–TIW surveyed market participants, asking for the physical address associated with each of their accounts (*i.e.,* where the account is incorporated as a legal entity). This is designated the registered office location. For purposes of this discussion, we have assumed that the registered office location reflects the place of domicile for the fund or account. When the fund does not report a registered office location, we assume that the settlement country reported by the investment adviser or

Continued

Additionally, because the data only include accounts that are domiciled in the United States, transact with U.S.-domiciled counterparties, or transact in single-name CDS with U.S. reference entities, changes in the domicile of new accounts may reflect increased transaction activity between U.S. and non-U.S. counterparties.

A U.S.-based holding company may conduct dealing activity through a foreign subsidiary that faces both U.S. and foreign counterparties. Similarly, foreign dealers may choose to deal with U.S. and foreign counterparties through U.S. subsidiaries. Non-dealer users of security-based swaps may participate in the market using an agent in their home country or abroad. An investment adviser located in one jurisdiction may transact in security-based swaps on behalf of beneficial owners that reside in another.

The various layers separating origination from booking by dealers, and management from ownership by non-dealer users, highlights the potential distinctions between the location where a transaction is arranged, negotiated, or executed, the location where economic decisions are made by managers on behalf of beneficial owners, and the jurisdiction ultimately bearing the financial risks associated with the security-based swap transaction that results. As a corollary, a participant in the security-based swap market may be exposed to counterparty risk from a jurisdiction that is different from the market center in which it participates.

(c) Current Estimates of Dealers and Major Participants

In the Intermediary Definitions Adopting Release, we estimated, based on an analysis of DTCC–TIW data, that out of more than 1,000 entities engaged in single-name CDS activity worldwide in 2011, 166 entities engaged in single-name CDS activity at a sufficiently high level that they would be expected to incur assessment costs to determine whether they meet the ''security-based swap dealer'' definition.[149] Analysis of those data further indicated that potentially 50 entities may engage in dealing activity that would exceed the *de minimis* threshold and thus ultimately have to register as security-based swap dealers.[150]

Analysis of more recent data regarding the single-name CDS market using the same methodology suggests comparable results that are consistent with the reduction in transaction volume noted below. In particular, single-name CDS data from 2012 indicate that out of more than 1,000 entities engaged in single-name CDS activity, approximately 145 engaged in single-name CDS activity at a level high enough such that they may be expected to perform the dealer-trader analysis prescribed under the security-based swap dealer definition.[151] These data suggest that, consistent with the Intermediary Definitions Adopting Release analysis, up to approximately 50 entities would engage in dealing activity that would exceed the *de minimis* threshold.[152]

Additionally, in the Intermediary Definitions Adopting Release, we estimated, based on position data from DTCC–TIW for 2011, that as many as 12 entities would be likely to perform substantial position and substantial counterparty exposure tests, and thus incur assessment costs, prescribed

parent entity to the fund or account is the place of domicile.

[149] Based on the *de minimis* threshold of $3 billion for single-name CDS, we estimated that there were 123 entities engaged in engaged in single-name CDS transactions in 2011 that had more than $3 billion in single-name CDS transactions over the previous 12 months. We also estimated that 43 entities with between $2 and $3 billion in transactions over the trailing 12 months may opt to engage in the dealer analysis out of an abundance of caution or to meet internal compliance guidelines, thus leading to the 166 total. *See* Intermediary Definitions Adopting Release, 77 FR 30731–32; *see also* Cross-Border Proposing Release, 78 FR 31139–40. We adopted a phase-in period during which the *de minimis* threshold will be $8 billion and during which Commission staff will study the security-based swap market as it evolves under the new regulatory framework, resulting in a report that will consider the operation of the security-based swap dealer and major security-based swap participant definitions. At the end of the phase-in period, the Commission will take into account the report, as well as public comment on the report, in determining whether to terminate the phase-in period or propose any changes to the rule implementing the *de minimis* exception, including any increases or decreases to the $3 billion threshold. *See* Intermediary Definitions Adopting Release, 77 FR 30640.

[150] In particular, we estimated that 28 entities and corporate groups had three or more counterparties that are not ISDA dealers (which we viewed as a useful proxy for application of the dealer-trader distinction) and that 25 of those entities had trailing notional transactions exceeding $3 billion. *See id.* at 30725 n.1457; SEC Staff Report, ''Information regarding activities and positions of participants in the single-name credit default swap market (''CDS Data Analysis'') (Mar. 15, 2012), available at: *http://www.sec.gov/comments/s7-39-10/s73910-154.pdf* at 14. Our additional estimate of up to 50 potential dealers reflected our recognition of the potential for growth in the security-based swap market, for new entrants into the dealing space, and the possibility that some corporate groups may register more than one entity. *See* Intermediary Definitions Adopting Release, 77 FR 30725 n.1457.

In the Cross-Border Proposing Release, we revised those estimates to reflect a more granular analysis of the data. Under this refined approach—which identified the number of entities within a corporate group that may have to register—we estimated that 46 individual firms had three or more non-ISDA dealer counterparties, and that, of those, 31 firms engaged in at least $3 billion of security-based swap activity in 2011. We further estimated that, under the cross-border provisions of proposed Exchange Act rule 3a71–3(b), 27 of those entities engaged in at least $3 billion notional activity that they would have to count against the *de minimis* threshold, and that accounting for the aggregation requirement may result in an additional two firms being required to register, for a total of 29. We also concluded that our original estimate of there being up to 50 dealers was still valid, noting that the revised estimate included individual entities within corporate groups (thus accounting for the possibility that some corporate groups may register more than one dealer), and also accounted for the likely results of the proposed aggregation requirement. *See* Cross-Border Proposing Release, 78 FR 31137–38 n.1407.

[151] Consistent with the earlier analysis, this figure is derived from the fact that 110 transacting agents had total single-name security-based swap activity above the $3 billion *de minimis* threshold, while another 35 transacting agents had activity between $2 and $3 billion and hence out of caution may be expected to engage in the dealer-trader analysis.

In calculating this estimate, Commission staff used methods identical to those used referenced in the Intermediary Definitions Adopting Release, 77 FR 30732 n.1509, aggregating the activity of DTCC accounts to the level of transacting agents and estimating the number of transacting agents with gross transaction notional amounts exceeding $2 billion in 2012. While the analysis contained in the Intermediary Definitions Adopting Release used a sample that ended in December 2011, the sample has been updated through the end of December 2012.

In connection with the economic analysis of the final cross-border dealer *de minimis* rules, we also have estimated the number of entities that may perform the dealer-trader analysis using a more granular methodology that considers data both at the account level and at the transacting agent level. *See* notes 456 through 458, *infra,* and accompanying text.

[152] As discussed below, and consistent with the methodology used in the Cross-Border Proposing Release, 78 FR 31137 n.1407, data from 2012 indicates that 40 entities engaged in the single-name security-based swap market had three or more counterparties that were not identified by ISDA as dealers, and that 27 of those entities had $3 billion or more in notional single-name CDS activity over a 12 month period. Applying the principles reflected in these final rules regarding the counting of transactions against the *de minimis* thresholds suggests that 25 of those entities would have $3 billion or more in notional transactions counted against the thresholds, and that applying the aggregation rules increases that number to 26 entities. Based on this data, we believe that it is reasonable to conclude that up to 50 entities ultimately may register as security-based swap dealers, although the number may be smaller. *See* note 444, *infra.*

In this regard it is important to note that, due to limitations in the availability of the underlying data, this analysis does not include information about transactions involving single-name CDS with a non-U.S. reference entity when neither party is domiciled in the United States or guaranteed by a person domiciled in the United States. This is because for single-name CDS with a non-U.S. reference entity, the data supplied to the Commission by the DTCC–TIW encompasses only information regarding transactions involving at least one counterparty domiciled in the United States or guaranteed by a person domiciled in the United States, based on physical addresses reported by market participants. That data exclusion introduces the possibility that these numbers may underestimate the number of persons that would engage in the dealer-trader analysis (and hence incur assessment costs) or that exceed $3 billion in dealing transactions on an annual basis (and hence would potentially be linked to programmatic costs and benefits).

under the major security-based swap participant definition. Of these 12 firms, we estimated that the number of persons with positions sufficiently large to bring them within the scope of the definition of major security-based swap participant likely would be fewer than five. Although we did not specify how the major security-based swap participant definition would apply to foreign persons in the Intermediary Definitions Adopting Release, our approach in estimating the assessment costs caused by our final definition used available single-name CDS data as a proxy for the market as a whole, and assumed that all potential major security-based swap participants would be required to include in their threshold calculations all positions with all counterparties.

Analysis of more recent data regarding the single-name CDS market suggests comparable results. In particular, single-name CDS data from 2012 indicate that out of over 1,100 DTCC–TIW firms holding positions in single-name CDS activity and not expected to register as security-based swap dealers, nine had worldwide single-name CDS positions at a level high enough such that they may be expected to perform the major security-based swap participant threshold analysis prescribed under the security-based swap dealer definition. Analysis based on these more recent data is consistent with the prior conclusion that five or fewer entities would be likely to register as major security-based swap participants.[153]

2. Levels of Security-Based Swap Trading Activity

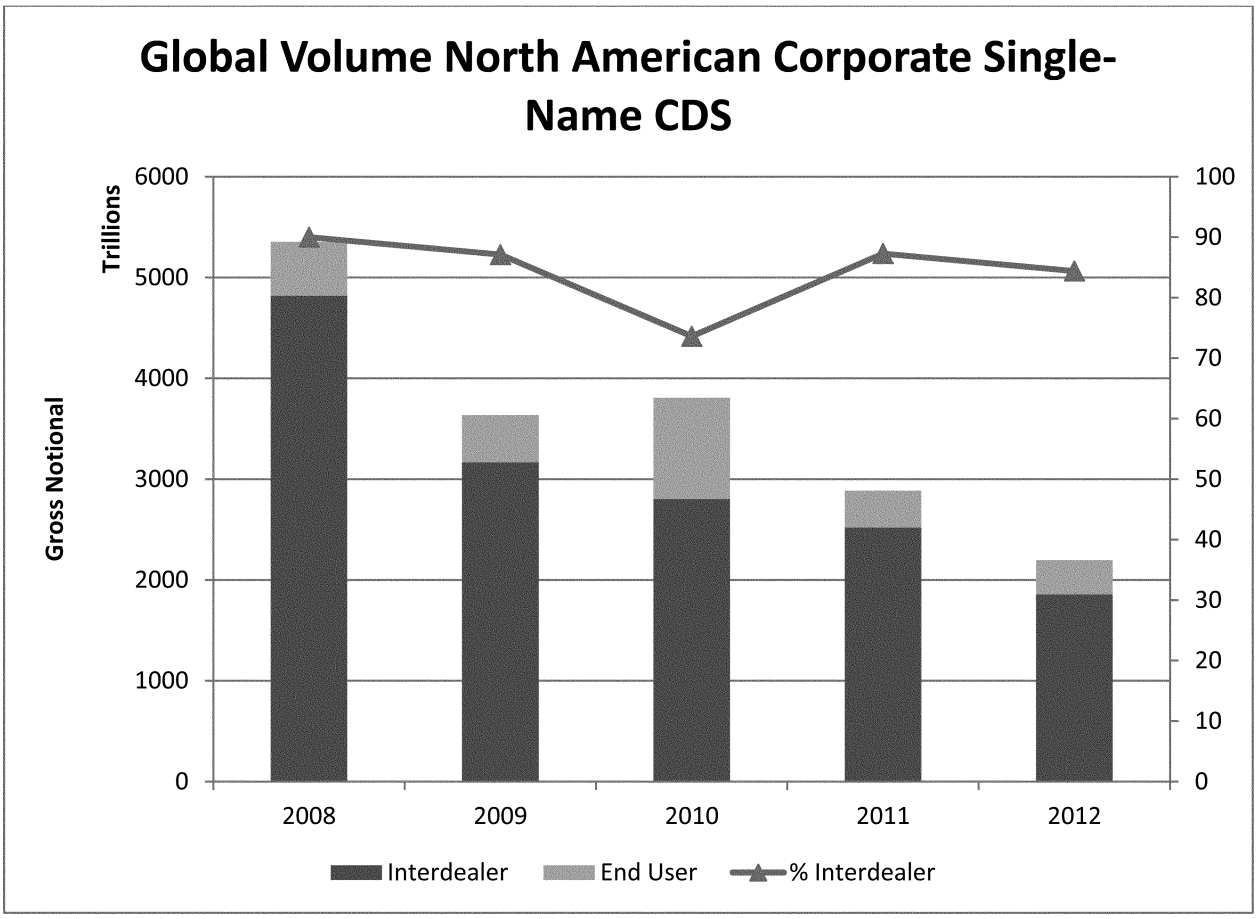
Single-name CDS contracts make up the vast majority of security-based swap products and most are written on corporate issuers, corporate securities, sovereign countries, or sovereign debt (reference entities and reference securities). Figure 2 below describes the percentage of global, notional transaction volume in North American corporate single-name CDS reported to the DTCC–TIW between January 2008 and December 2012, separated by whether transactions are between two ISDA-recognized dealers (interdealer transactions) or whether a transaction has at least one non-dealer counterparty.

The level of trading activity with respect to North American corporate single-name CDS in terms of notional volume has declined from more than $5 trillion in 2008 to approximately $2 trillion in 2012.[154] While notional volume has declined over the past five years, the share of interdealer transactions has remained fairly constant and interdealer transactions continue to represent the bulk of trading activity, whether measured in terms of notional value or number of transactions (see Figure 2).

[153] In calculating this estimate, Commission staff used methods identical to those used referenced in the Intermediary Definitions Adopting Release, 77 FR 30734, note 1529, estimating the number of participants with notional positions exceeding $100 billion in 2012. The analysis contained in the Intermediary Adopting Release used a sample that ended in December 2011, aggregated the activity of DTCC accounts to the level of transacting agents, and did not attribute positions to parent companies. For the purposes of analysis of the final rules, the sample has been updated through the end of December 2012 and positions falling short of the $100 billion threshold have been attributed to parent companies.

[154] The start of this decline predates the enactment of the Dodd-Frank Act and the proposal of rules thereunder, which is important to note for the purpose of understanding the economic baseline for this rulemaking. The timing of this decline seems to indicate that CDS market demand shrank prior to the enactment of the Dodd-Frank Act, and therefore the causes of this reduction in trading volume may be related to market dynamics and not directly related to the enactment of statutes and the development of security-based swap market regulation. If the security-based swap market experiences further declines in trading activity, it would be difficult to identify the effects of the newly developed security-based swap market regulation apart from changes in trading activity that may be due to natural market forces, or the anticipation of (or reaction to) proposed (or adopted) Title VII requirements or requirements being considered or implemented in other jurisdictions.

Figure 2: Global, notional trading volume in North American corporate single-name CDS by calendar year and the fraction of volume that is interdealer.



Against this backdrop of declining North American corporate single-name CDS activity, about half of the trading activity in North American corporate single-name CDS reflected in the set of data we analyzed was between counterparties domiciled in the United States and counterparties domiciled abroad. Basing counterparty domicile on the self-reported registered office location of the DTCC–TIW accounts, the Commission estimates that only 13 percent of the global transaction volume by notional volume between 2008 and 2012 was between two U.S.-domiciled counterparties, compared to 48 percent entered into between one U.S.-domiciled counterparty and a foreign-domiciled counterparty and 39 percent entered into between two foreign-domiciled counterparties (see Figure 3).[155]

When the domicile of DTCC–TIW accounts are instead defined according to the domicile of their ultimate parents, headquarters, or home offices (*e.g.,* classifying a foreign bank branch or foreign subsidiary of a U.S. entity as domiciled in the United States), the fraction of transactions entered into between two U.S.-domiciled counterparties increases to 29 percent, and to 53 percent for transactions entered into between a U.S.-domiciled counterparty and a foreign-domiciled counterparty.

Differences in classifications across different definitions of domicile illustrate the effect of participant structures that operate across jurisdictions. Notably, the proportion of activity between two foreign-domiciled counterparties drops from 39 percent to 18 percent when domicile is defined as the ultimate parent's domicile. As noted earlier, foreign subsidiaries of U.S. parent companies and foreign branches of U.S. banks, and U.S. subsidiaries of foreign parent companies and U.S. branches of foreign banks may transact with U.S. and foreign counterparties. However, this decrease in share suggests that the activity of foreign subsidiaries of U.S. firms and foreign branches of U.S. banks is generally higher than the activity of U.S. subsidiaries of foreign firms and U.S. branches of foreign banks.

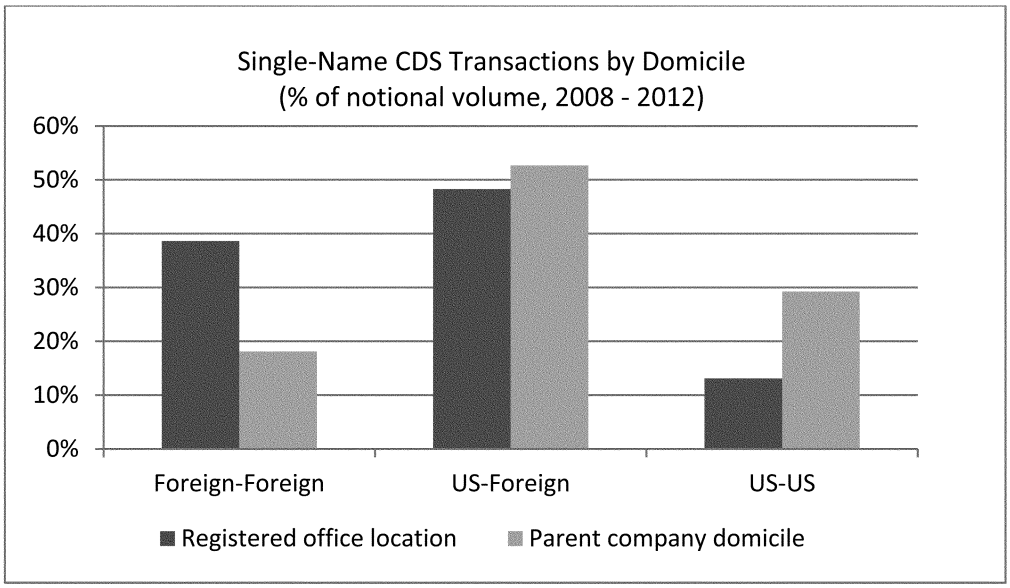
By either of those definitions of domicile, the data indicate that a large fraction of North American corporate single-name CDS transaction volume is entered into between counterparties domiciled in two different jurisdictions or between counterparties domiciled outside the United States. For the purpose of establishing an economic baseline, this observation indicates that a large fraction of security-based swap

[155] Following publication of the Warehouse Trust Guidance on CDS data access, the DTCC–TIW surveyed market participants, asking for the physical address associated with each of their accounts (*i.e.,* where the account is organized as a legal entity). This is designated the registered office location by the DTCC–TIW. When an account does not report a registered office location, we assume that the settlement country reported by the investment adviser or parent entity to the fund or account is the place of domicile. For purposes of this discussion, we have assumed that the registered office location reflects the place of domicile for the fund or account.

Changes to these estimates relative to figures presented in the proposing release represent additional data regarding new accounts in the time series as well as the use of a longer sample period.

activity would be affected by the scope of any cross-border approach we take in applying the Title VII requirements. Further, the large fraction of North American corporate single-name CDS transactions between U.S.-domiciled and foreign-domiciled counterparties also highlights the extent to which security-based swap activity transfers risk across geographical boundaries, both facilitating risk sharing among market participants and allowing for risk transmission between jurisdictions.

Figure 3: The fraction of notional volume in North American corporate single-name CDS between (1) two U.S.-domiciled accounts, (2) one U.S.-domiciled account and one non-U.S.-domiciled account, and (3) two non-U.S.-domiciled accounts, computed from January 2008 through December 2012.



B. Global Regulatory Efforts

Efforts to regulate the swaps market are underway not only in the United States but also abroad. In 2009, leaders of the G20—whose membership includes the United States, 18 other countries, and the EU—called for global improvements in the functioning, transparency, and regulatory oversight of OTC derivatives markets agreeing that ''all standardised OTC derivatives contracts should be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties (''CCPs'') by end-2012 at the latest. OTC derivatives contracts should be reported to trade repositories. Non-centrally cleared contracts should be subject to higher capital requirements.'' [156] In subsequent summits, the G20 leaders have reiterated their commitment to OTC derivatives regulatory reform and encouraged international consultation in developing standards for these markets.[157] The FSB monitors implementation of OTC derivatives reforms and provides progress reports to the G20.[158]

Pursuant to these commitments, jurisdictions with major OTC derivatives markets have taken steps toward substantive regulation of these markets, though the pace of regulation varies. This suggests that many foreign participants will face substantive regulation of their security-based swap activities that is intended to implement the G20 objectives and that may therefore address concerns similar to those addressed by rules the Commission has proposed but not yet adopted.

Foreign legislative and regulatory efforts have focused on five general areas: Requiring post-trade reporting of transactions data for regulatory purposes, moving OTC derivatives onto organized trading platforms, requiring central clearing of OTC derivatives, establishing or enhancing capital requirements, and establishing or enhancing margin requirements for OTC derivatives transactions.

The first two areas of regulation should help improve transparency in OTC derivatives markets, both to regulators and market participants. Regulatory transaction reporting requirements have entered into force in a number of jurisdictions including the EU, Hong Kong SAR, Japan, and

[156] *See* G20 Leaders' Statement cited in note 16, *supra.*

[157] See *e.g.,* G20 Leaders' St. Petersburg Declaration. *See also* G20 Meeting, Los Cabos, Mexico, June 2012, available at: *http://www.treasury.gov/resource-center/international/g7-g20/Documents/Los%20Cabos%20Leaders%27%20Declaration.pdf;* and G20 Meeting, Cannes, France, November 2011, available at: *https://www.g20.org/sites/default/files/g20_resources/library/Declaration_eng_Cannes.pdf* (''G20 Leaders' Cannes Declaration''). In the G20 Leaders' Cannes Declaration, the G20 Leaders agreed to develop standards on margin for non-centrally cleared OTC derivatives.

[158] The FSB has published seven progress reports on OTC derivatives markets reform implementation: FSB Progress Report April 2014 (available at: *http://www.financialstabilityboard.org/publications/r_140408.pdf*); September 2013 (available at: *http://www.financialstabilityboard.org/publications/r_130902b.pdf*), April 2013 (available at: *http://www.financialstabilityboard.org/publications/r_130415.pdf*), October 2012 (available at: *http://www.financialstabilityboard.org/publications/r_121031a.pdf*), June 2012 (available at: *http://www.financialstabilityboard.org/publications/r_120615.pdf*), October 2011 (available at: *http://www.financialstabilityboard.org/publications/r_111011b.pdf*) and April 2011 (available at: *http://www.financialstabilityboard.org/publications/r_110415b.pdf*) (collectively, ''FSB Progress Reports''). The ODWG prepares the FSB Progress Reports. The Commission participates in the ODWG, both on its own behalf and as the representative of IOSCO, which is co-chair of the ODWG.

Singapore, and other jurisdictions are in the process of proposing legislation and rules to implement these requirements.[159] The European Parliament has adopted legislation for markets in financial instruments that addresses trading OTC derivatives on regulated trading platforms.[160] This legislation also should promote post-trade public transparency in OTC derivatives markets by requiring the price, volume, and time of OTC derivatives transactions conducted on these regulated trading platforms to be made public in as close to real time as technically possible.

Regulation of derivatives central clearing, capital requirements, and margin requirements aims to improve management of financial risks in these markets. Japan has rules in force mandating central clearing of certain OTC derivatives transactions. The EU has its legislation in place but has not yet made any determinations of specific OTC derivatives transactions subject to mandatory central clearing. Most other jurisdictions are still in the process of formulating their legal frameworks that govern central clearing. While the EU is the only major foreign jurisdiction that has initiated the process of drafting rules to implement margin requirements for OTC derivatives transactions, we understand that several other jurisdictions anticipate taking steps towards implementing such requirements.

C. Cross-Market Participation

Persons registered as security-based swap dealers or major security-based swap participants are likely also to engage in swap activity, which is subject to regulation by the CFTC. In the release proposing registration requirements for security-based swap dealers and major security-based swap participants, we estimated, based on our experience and understanding of the swap and security-based swap markets that of the 55 firms that might register as security-based swap dealers or major security-based swap participants, approximately 35 would also register with the CFTC as swap dealers or major swap participants.[161]

This overlap reflects the relationship between single-name CDS contracts, which are security-based swaps, and index CDS contracts, which may be swaps or security-based swaps. A single-name CDS contract covers default events for a single reference entity or reference security. These entities and securities are often part of broad-based indices on which market participants write index CDS contracts. Index CDS contracts and related products make payouts that are contingent on the default of index components and allow participants in these instruments to gain exposure to the credit risk of the basket of reference entities that comprise the index, which is a function of the credit risk of the index components. As a result of this construction, a default event for a reference entity that is an index component will result in payoffs on both single-name CDS written on the reference entity and index CDS written on indices that contain the reference entity. Because of this relationship between the payoffs of single-name CDS and index CDS products, prices of these products depend upon one another. This dependence is particularly strong between index CDS contracts and single-name CDS contracts written on index components.[162]

Because payoffs associated with these single-name CDS and index CDS are dependent, hedging opportunities exist across these markets. Participants who sell protection on reference entities through a series of single-name CDS transactions can lay off some of the credit risk of their resulting positions by buying protection on an index that includes a subset of those reference entities. Participants that are active in one market are likely to be active in the other. Commission staff analysis of approximately 4,400 DTCC–TIW accounts that participated in the market for single-name CDS in 2012 revealed that approximately 2,700 of those accounts, or 61 percent, also participated in the market for index CDS. Of the accounts that participated in both markets, data regarding transactions in 2012 suggest that, conditional on an account transacting in notional volume of index CDS in the top third of accounts, the probability of the same account landing in the top third of accounts in terms of single-name CDS notional volume is approximately 62 percent; by contrast, the probability of the same account landing in the bottom third of accounts in terms of single-name CDS notional volume is only 14 percent.

In an effort to comply with CFTC rules and applicable statutory provisions in the cross-border context, swap market participants, many of whom, as discussed above, likely also participate in the security-based swap market, may have already changed some market practices.[163] Although a commenter suggested that swap market participants have already conformed their business practices to the CFTC's approach to cross-border regulation, the commenter did not supply particular details as to the scope of that operations restructuring.[164] We believe, however, based on these comments, it is likely that all participants who preliminarily believe they may be subject to the CFTC's registration requirements will have expended resources to build systems and infrastructure that will permit them to determine and then record the U.S.-person status of their counterparties consistent with applicable requirements, as interpreted by the CFTC Cross-Border Guidance.

The CFTC's rules and cross-border guidance have likely influenced the information that market participants collect and maintain about the swap transactions they enter into and the counterparties they face. For example, the CFTC's guidance describes a majority-ownership approach for collective investment vehicles that are

[159] Information regarding ongoing regulatory developments described in this section was primarily obtained from the FSB Progress Reports cited in note 158, *supra,* which reflect the input of relevant jurisdictions.

[160] *Id.*

[161] *See* Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants, Exchange Act Release No. 65543 (Oct. 12, 2011), 76 FR 65784, 65808 (Oct. 24, 2011). Based on its analysis of 2012 DTCC–TIW and the list of swap dealers provisionally-registered with the CFTC, and applying the methodology used in the Intermediary Definitions Adopting Release, the Commission estimates that substantially all registered security-based swap dealers would also register as swap dealers with the CFTC. *See also* CFTC list of provisionally registered swap dealers, available at: *http://www.cftc.gov/LawRegulation/DoddFrankAct/registerswapdealer.*

[162] ''Correlation'' typically refers to linear relationships between variables; ''dependence'' captures a broader set of relationships that may be more appropriate for certain swaps and security-based swaps. *See, e.g.,* Casella, George and Roger L. Berger, ''Statistical Inference'' (2002), at 171.

[163] *See, e.g.,* SIFMA/FIA/FSR Letter at 2–3. We understand that new capabilities have been built by swap market participants following issuance of the CFTC's guidance. To the extent that such capabilities can be transferred to these participants' security-based swap activities (*e.g.,* to the extent that a market participant's assessment practices regarding whether a counterparty would generally be considered a U.S. person for purposes of the CFTC guidance also can help determine the corresponding assessment for purposes of these final rules and guidance), such capabilities may tend to mitigate the costs that market participants otherwise would incur in connection with the Commission's final cross-border rules.

[164] *Id.* at 2–4. The commenter notes the ''technological, operational, legal and compliance systems'' necessary for complying with the Commission's proposed rules, and taking account of the CFTC Cross-Border Guidance, outlining the general categories of changes to practice necessary for compliance. The commenter further indicates a potential need to ''build[] separate systems for a small percentage of the combined swaps and SBS market instead of using the systems already built for compliance with the CFTC's cross-border approach,'' suggesting that market participants have already altered market practices to follow the CFTC Cross-Border Guidance.

offered to U.S. persons, contemplating that managers of these vehicles would assess, on an ongoing basis, the proportion of ownership by U.S. persons. As another example, the CFTC's guidance articulates an approach by which all swap transactions by a non-U.S. person that rely on guarantees from U.S. affiliates would generally count against that non-U.S. person's dealer *de minimis* exception.[165]

Thus, as discussed in more detail in sections IV.I.2 and V.H.2 below, the adoption of rules that would seek similar information from security-based swap market participants as the CFTC seeks from swap market participants, may allow such participants to use infrastructure already in place as a result of CFTC regulation to comply with Commission regulation. Among those entities that participate in both markets, entities that are able to apply to security-based swap activity new capabilities they have built in order to comply with requirements applicable to cross-border swap activity may experience lower costs associated with assessing which cross-border security-based swap activity counts against the dealer *de minimis* exception or towards the major participant threshold, relative to those that are unable to redeploy such capabilities. The Commission remains sensitive to the fact that in cases where its final rules differ from the CFTC approach, additional outlays related to information collection and storage may be required even of market participants that conformed to the CFTC's guidance regarding the applicable cross-border requirements.[166] These costs are discussed in sections IV.I.1 and V.H.1(b).

IV. Cross-Border Application of Dealer De Minimis Exception

A. Overview

The Exchange Act excepts from designation as ''security-based swap dealer'' entities that engage in a '' *de minimis''* quantity of security-based swap dealing activity with or on behalf of customers.[167] Under the final rules adopted in the Intermediary Definitions Adopting Release, a person may take advantage of that exception if, in connection with CDS that constitute security-based swaps, the person's dealing activity over the preceding 12 months does not exceed a gross notional amount of $3 billion, subject to a phase-in level of $8 billion.[168] The phase-in level will remain in place until—following a study regarding the definitions of ''security-based swap dealer'' and ''major security-based swap participant''—the Commission either terminates the phase-in period or establishes an alternative threshold following rulemaking.[169]

To apply the exception to cross-border dealing activity, the Cross-Border Proposing Release would have required that a U.S. person count against the *de minimis* thresholds all of its security-based swap dealing activity, including transactions conducted through a foreign branch of a U.S. bank.[170] Non-U.S. persons, in contrast, would have included only dealing transactions entered into with U.S. persons other than foreign branches of U.S. banks, plus dealing transactions where the transaction is ''conducted within the United States.'' [171] To implement, within the cross-border context, the existing rule that requires a person to aggregate the dealing activity of its affiliates against its own *de minimis* thresholds,[172] the proposal would have required a person to count: (i) dealing transactions by its affiliates that are U.S. persons; and (ii) dealing transactions by non-U.S. affiliates that either are entered into with U.S. persons other than foreign branches, or that are conducted within the United States.[173] The proposal further would have permitted a person to exclude, from the *de minimis* analysis, transactions by affiliates that are registered security-based swap dealers, provided that the person's dealing activity is ''operationally independent'' from the registered dealer's dealing activity.[174] The proposal, moreover, set forth definitions relevant to the application of the *de minimis* exception in the cross-border context, including proposed definitions of the terms ''U.S. person'' and ''transaction conducted within the United States.'' [175]

Commenters raised issues related to various aspects of this proposed approach to application of the *de minimis* exception in the cross-border context. As discussed below, these include issues regarding: the scope of the ''U.S. person'' definition, the proposal to require counting of certain ''transactions conducted within the United States'' between two non-U.S. persons, the treatment of the dealing activity of non-U.S. persons that is guaranteed by U.S. persons, and the application of the exception to non-U.S. persons whose counterparties are foreign branches of U.S. banks. Some commenters also urged us to more closely harmonize particular aspects of our proposal with the CFTC Cross-Border Guidance.

After considering commenters' views regarding the cross-border application of the *de minimis* exception, we are adopting final rules that have been modified from the proposal in certain important respects. While these changes are discussed in more detail below, key elements include:

- Modifications to the proposed definition of ''U.S. person'';
- Provisions to distinguish non-U.S. persons' dealing activity involving security-based swaps that are guaranteed by their U.S. affiliates from such non-U.S. persons' other dealing activity for purposes of the *de minimis* exception, by requiring a non-U.S. person to count against the *de minimis* thresholds all dealing activity involving security-based swaps for which its counterparty has rights of recourse

[165] *See* section IV.I.2(c), *supra,* for a discussion of costs to market participants that may arise from differences between the CFTC approach to guarantees and the Commission's final rules.

[166] We recognize that the CFTC Cross-Border Guidance is the subject of ongoing litigation. Our economic analysis is not intended to draw any conclusions about the ultimate outcome of that litigation; rather, the economic analysis relies on the current practices and operational abilities of firms that are, we understand, either in accordance with the CFTC Cross-Border Guidance or are in the process of adapting their systems to account for the CFTC's approach to cross-border issues.

[167] *See* Exchange Act section 3(a)(71)(D).

[168] *See* Exchange Act rule 3a71–2(a).

[169] *See* Intermediary Definitions Adopting Release, 77 FR 30640–41; *see also* note 149, *supra* (addressing process for termination of phase-in level). Lower thresholds are set forth in connection with dealing activity involving other types of security-based swaps. *See* Exchange Act rule 3a71–2(a)(1)(ii).

[170] *See* proposed Exchange Act rule 3a71–3(b)(1)(i).

[171] *See* proposed Exchange Act rule 3a71–3(b)(1)(ii).

[172] *See* Exchange Act rule 3a71–2(a)(1) (providing that, for purposes of the *de minimis* exception, a person shall count its own dealing activity plus the dealing activity of ''any other entity controlling, controlled by, or under common control with the person'').

[173] *See* proposed Exchange Act rule 3a71–3(b)(2).

[174] *See* proposed Exchange Act rule 3a71–4.

[175] The proposal also set forth definitions of ''foreign branch'' and ''transaction conducted through a foreign branch'' in connection with the *de minimis* exception. *See* proposed Exchange Act rule 3a71–3(a). The proposed definitions of ''U.S. person,'' ''transaction conducted within the United States,'' ''foreign branch,'' and ''transaction conducted through a foreign branch'' also are relevant to the Commission's proposed rules regarding the cross-border application of certain other Title VII requirements. *See, e.g.,* proposed Exchange Act regulation SBSR (regarding regulatory reporting and public dissemination).

Proposed Exchange Act rule 3a71–3 also contained a provision and associated definitions related to the cross-border application of counterparty protection requirements in connection with security-based swap activities. As discussed above, those matters are not the subject of the present rulemaking, and the Commission intends to address those matters as part of a subsequent rulemaking.

against a U.S. guarantor that is affiliated with the non-U.S. person;

- Provisions to distinguish non-U.S. persons that act as conduit affiliates (by entering into certain security-based swap transactions on behalf of their U.S. affiliates) from other non-U.S. persons for purposes of the *de minimis* exception, in that conduit affiliates are required to count all of their dealing activity against the *de minimis* thresholds regardless of counterparty;
- Modifications to the application of the *de minimis* exception to dealing activity by non-U.S. persons when the counterparty is the foreign branch of a U.S. bank.
- The addition of an exclusion related to cleared, anonymous transactions; and
- Modifications of the proposed aggregation provisions, in part by removing the ''operational independence'' condition to excluding dealing positions of affiliates that are registered dealers.

The final rules we are adopting reflect a territorial approach that is generally consistent with the principles that the Commission traditionally has followed with respect to the registration of brokers and dealers under the Exchange Act. Under this territorial approach, registration and other requirements applicable to brokers and dealers generally are triggered by a broker or dealer physically operating in the United States, even if its activities are directed solely toward non-U.S. persons outside the United States. The territorial approach further generally requires broker-dealer registration by foreign brokers or dealers that, from outside the United States, induce or attempt to induce securities transactions by persons within the United States—but not when such foreign brokers or dealers conduct their activities entirely outside the United States.[176]

In the cross-border context, moreover, the application of the ''security-based swap dealer'' definition and its *de minimis* exception remains subject to general principles that we addressed in the Intermediary Definitions Adopting Release. Accordingly, the term ''person'' as used in the ''security-based swap dealer'' definition and in the Commission's rules implementing the *de minimis* exception should be interpreted to refer to a particular legal person, meaning that a trading desk, department, office, branch or other discrete business unit that is not a separately organized legal person will not be viewed as a security-based swap dealer. As a result, a legal person with a branch, agency, or office that is engaged in dealing activity above the *de minimis* threshold is required to register as a security-based swap dealer, even if the legal person's dealing activity is limited to such branch, agency, or office.[177]

Cross-border security-based swap transactions also are subject to the principle that transactions between majority-owned affiliates need not be considered for purposes of determining whether a person is a dealer.[178]

As discussed below, these final rules and guidance do not address the proposed provisions regarding the cross-border application of the dealer definition to ''transactions conducted within the United States,'' as defined in the Cross-Border Proposing Release. We anticipate soliciting additional public comment on potential approaches for applying the dealer definition to non-U.S. persons in connection with activity between two non-U.S. persons where one or both are conducting dealing activity that occurs within the United States.[179]

B. Application of De Minimis Exception to Dealing Activities of U.S. Persons

1. Proposed Approach and Commenters' Views

Under the proposal, a U.S. person would have counted all of its security-based swap dealing activity against the *de minimis* thresholds, including transactions that it conducted through a foreign branch.[180] Although some persons who submitted comments in connection with the Intermediary Definitions Adopting Release expressed the view that dealing activity by foreign branches should not be counted as part of a U.S. person's *de minimis* calculation,[181] we did not propose such an approach.[182] Moreover, commenters to the Cross-Border Proposing Release did not specifically express opposition to this aspect of the proposal, although several commenters addressed related issues regarding the proposed scope of the ''U.S. person'' definition.[183]

2. Final Rule

Consistent with the proposal, the final rules require U.S. persons to apply all of their dealing transactions against the *de minimis* thresholds, including activity they conduct through their foreign branches.[184] Such dealing transactions must be counted regardless of where they are arranged, negotiated, or executed.

As discussed above, it is our view that any dealing activity undertaken by a U.S. person, as defined in this final rule, occurs at least in part within the United States and therefore warrants the application of Title VII regardless of where particular aspects of dealing activity are conducted.[185] Whenever a U.S. person enters into a security-based swap in a dealing capacity, it is the U.S. person as a whole—and not merely any applicable foreign branch or office of that U.S. person—that holds itself out as a dealer in security-based swaps. It is the U.S. person as a whole that seeks to profit by providing liquidity and making a market in security-based swaps, and it is the financial resources of the U.S. person as a whole that enable it to do so. Even if the U.S. person engages in dealing activity through a foreign branch or office, its dealing counterparties will look to the entire U.S. person—and not merely its foreign branch or office—for performance on the transaction, and the U.S. person as a whole assumes and stands behind the obligations arising from the security-based swap, thereby creating risk to the U.S. person and potentially to the U.S. financial system. A dealer that is organized or has its principal place of business in the United States thus cannot hold itself out as anything other than a single person, and generally cannot operate as a dealer absent the financial and other resources of that single person. Accordingly, we conclude that U.S. persons that engage in security-based swap dealing activity through foreign branches or offices should be subject to the regulatory framework for dealers even if those U.S. persons deal exclusively with non-U.S. persons.[186]

[176] *See* Cross-Border Proposing Release, 78 FR 30990; *see generally* section III.B, *supra.*

[177] *See* Intermediary Definitions Adopting Release, 77 FR 30624; *see also* Cross-Border Proposing Release at 30993.

[178] *See* Exchange Act rule 3a71–1(d).

[179] *See* section I.A, *supra.*

[180] *See* proposed Exchange Act rule 3a71–3(b)(1)(i).

[181] *See, e.g.,* ISDA Letter (Feb. 22, 2011) (''Non-U.S. entities (including non-U.S. affiliates and branches of U.S. banks) should not be required to register as Dealers when they are conducting business with non-U.S. counterparties''). This and other comments in connection with the Intermediary Definitions Adopting Release are located at: *http://www.sec.gov/comments/s7-39-10/s73910.shtml.*

[182] We considered these comments in connection with the Cross-Border Proposing Release. *See* Cross-Border Proposing Release, 78 FR 30990, 30994.

[183] We address these comments in the context of our discussion of our final definition of ''U.S. person.'' *See* notes 192–231, *infra,* and accompanying text.

[184] *See* Exchange Act rule 3a71–3(b)(1)(i). Issues regarding how the *de minimis* exception applies to a non-U.S. person whose counterparty is a foreign branch are addressed in section IV.E.2, *infra.*

[185] *See* Cross-Border Proposing Release, 78 FR 30994.

[186] The definition of ''U.S. person'' is addressed below. The definitions of ''foreign branch'' and

C. Definition of ''U.S. Person''

1. Proposed Approach

Consistent with our territorial approach to application of Title VII to cross-border security-based swap activity, our Cross-Border Proposal defined ''U.S. person'' to mean:

- Any natural person resident in the United States;
- Any partnership, corporation, trust, or other legal person organized or incorporated under the laws of the United States [187] or having its principal place of business in the United States; and
- Any account (whether discretionary or non-discretionary) of a U.S. person.[188]

The Commission also proposed that the term ''U.S. person'' would exclude the following international organizations: the International Monetary Fund (''IMF''), the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies and pension plans, and any other similar international organizations, their agencies and pension plans.[189]

This proposed definition of ''U.S. person'' generally followed an approach to defining U.S. person that is similar to that used by the Commission in other contexts,[190] though it was tailored to the specific goals of Title VII. As we noted in the proposal, we sought with the proposed definition to identify those types of individuals or entities whose security-based swap activity is likely to impact the U.S. market even if they transact with security-based swap dealers that are not U.S. persons and to identify those types of individuals or entities that are part of the U.S. security-based swap market and should receive the protections of Title VII.[191]

2. Commenters' Views

We received extensive comments on our proposed definition of ''U.S. person.'' In these comments, many commenters also expressed their views on the interpretation of ''U.S. person'' in the CFTC Cross-Border Guidance. As explained in more detail below, several commenters emphasized that we should minimize divergence from the CFTC's approach, including by adding certain elements to our definition of ''U.S. person'' that we had not proposed. Many commenters also identified specific elements of the CFTC interpretation that we should not adopt in our final rule.

(a) Definition of ''U.S. Person'' Generally

Several commenters expressed the view that our proposed definition of ''U.S. person'' was clear, objective, and territorial in scope.[192] At the same time, many commenters, including some who expressed agreement with our proposed approach, urged us to adopt, in whole or in part, a definition of ''U.S. person'' that is consistent with the interpretation of ''U.S. person'' in the CFTC Cross-Border Guidance.[193] In contrast, two

''transaction conducted through a foreign branch'' are addressed in section IV.E.2, *infra.*

This interpretation, moreover, is consistent with the goals of security-based swap dealer regulation under Title VII. Security-based swap activity that results in a transaction involving a U.S. counterparty creates ongoing obligations that are borne by a U.S. person, and thus is properly viewed as occurring within the United States. The events associated with AIG FP, described in detail in our proposal, illustrate how certain transactions of U.S. persons can pose risks to the U.S. financial system even when they are conducted through foreign operations. *See* Cross-Border Proposing Release, 78 FR 30980–81. Such risks, and their role in the financial crisis and in the enactment of Title VII, suggest that the statutory framework established by Congress and the objectives of Title VII would be undermined by an analysis that excludes from Title VII's application certain transactions involving U.S. persons solely because they involve conduct carried out through operations outside the United States, particularly when those transactions raise concerns about risk to the U.S. person and to the U.S. financial system that are similar or identical to those raised by such conduct when carried out by the U.S. person entirely inside the United States.

For the above reasons, we conclude that our approach does not apply to persons who are ''transact[ing] a business in security-based swaps without the jurisdiction of the United States,'' within the meaning of section 30(c) of the Exchange Act. *See* section II.B.2(d), *supra.* A contrary interpretation would, in our view, reflect an understanding of what it means to conduct a security-based swaps business within the jurisdiction of the United States that is divorced both from Title VII's statutory objectives and from the reality of the role of U.S. persons within the global security-based swap market. But in any event we also believe that this final rule is necessary or appropriate as a prophylactic measure to help prevent the evasion of the provisions of the Exchange Act that were added by the Dodd-Frank Act, and thus help ensure that the relevant purposes of the Dodd-Frank Act are not undermined. Otherwise, U.S. persons could simply conduct dealing activities with non-U.S. persons using foreign branches and remain outside of the application of the dealer requirements of Title VII, bringing the same risk into the United States that would be associated with such dealing activity that is conducted out of their U.S. offices.

[187] Proposed Exchange Act rule 3a71–3(a)(9) under the Exchange Act defined ''United States'' as ''the United States of America, its territories and possessions, any States of the United States, and the District of Columbia.''

[188] Proposed Exchange Act rule 3a71–3(a)(7)(i) under the Exchange Act.

[189] *See* proposed Exchange Act rule 3a71–3(a)(7)(ii).

[190] *See, e.g.,* Securities Act Release No. 6863 (''Regulation S Adopting Release'') (April 24, 1990), 55 FR 18306, 18308 (May 2, 1990), 55 FR 18308 (adopting regulation ''based on a territorial approach to [s]ection 5 of the Securities Act''). Although the proposed rule followed the approach to defining ''U.S. person'' in Regulation S in certain respects, we stated that we preliminarily believed that it was necessary to depart from Regulation S in defining ''U.S. person'' in the context of the cross-border application of Title VII. *See* Cross-Border Proposing Release, 78 FR 31007–08 (comparing the proposed definition of ''U.S. person'' with the definition of ''U.S. person'' in Regulation S). For example, Regulation S expressly excludes foreign branches of U.S. banks from the definition of ''U.S. person,'' whereas our proposed definition provided that U.S.-person status would be determined at the entity level, meaning that a foreign branch of a U.S. person would, as part of that U.S. person, share in that U.S.-person status of the entity as a whole. *See* section II.B.2(b)i, *supra.* Thus, under our proposed approach, the term ''U.S. person'' would have been interpreted to include any foreign trading desk, office, or branch of an entity that is organized under U.S. law or that has its principal place of business in the United States. *See* Cross-Border Proposing Release, 78 FR 30996.

The proposed definition of ''U.S. person'' was similar in many respects to the definition provided by CFTC staff in its October 12, 2012 no-action letter. *See* Time-Limited No-Action Relief: Swaps Only With Certain Persons to be Included in Calculation of Aggregate Gross Notional Amount for Purposes of Swap Dealer De Minimis Exception and Calculation of Whether a Person is a Major Swap Participant (Oct. 12, 2012), available at: *http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/12-22.pdf; see also* Final CFTC Cross-Border Exemptive Order, 78 FR 862 (indicating that for purposes of its temporary conditional relief the CFTC is taking a similar approach to the ''U.S. person'' definition as that set forth in the October 12, 2012 no-action letter). In July 2013, the CFTC issued its cross-border guidance, which modified its interpretation of U.S. person in certain respects, discussed in greater detail below.

[191] *See* Cross-Border Proposing Release, 78 FR 30996.

[192] *See, e.g.,* SIFMA/FIA/FSR Letter at A–6 (stating that the Commission's proposed ''U.S. person'' definition was ''clear, objective and ascertainable''); American Bar Association (''ABA'') Letter at 1–2, 4 (commending the Commission for a ''clear and objective'' approach to the ''U.S. person'' definition that is consistent with its statutory authority and respects principles of comity); IIB Letter at 5 (stating that the Commission's proposed ''U.S. person'' definition is sensible in its jurisdictional scope and is consistent with territorial principles). *But see* EC Letter at 2 (generally supporting the territorial scope of the ''U.S. person'' definition, with the exception of the ''principal place of business'' requirement, arguing that it is inconsistent with the territorial approach); ESMA Letter at 2 (supporting a definition of ''U.S. person'' that covers only persons located or incorporated in the United States).

[193] *See, e.g.,* SIFMA/FIA/FSR Letter at 2–3, A–7 (suggesting that the Commission coordinate with the CFTC in order to provide a ''consistent set of standards for determining an entity's principal place of business''); IIB Letter at 2 (noting that its recommendations are generally intended to emphasize consistency across regimes). *See also* Chris Barnard Letter at 2 (stating belief that the ''U.S. person'' definition should be aligned with the CFTC's definition, specifically with respect to commodity pools, pension plans, estates, and trusts); Japan Financial Markets Council (''JFMC'') Letter at 4 (noting that, even though JFMC does not support all aspects of the CFTC's definition, it believes the Commission should adopt the same definition as the CFTC); Japan Securities Dealers Association (''JSDA'') Letter at 3 (expressing hope

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commenters disagreed with our approach as being underinclusive and urged us to define U.S. person more broadly than the CFTC had interpreted it.[194] Two commenters addressed whether our ''U.S. person'' definition should follow the U.S. person analysis in Regulation S.[195]

(b) Treatment of Investment Vehicles

In response to our questions about whether our proposed definition of ''U.S. person'' provided sufficient guidance to investment vehicles and similar legal persons, commenters generally requested guidance but expressed a range of views as to what guidance we should provide. One commenter requested that we ensure that foreign investment vehicles with a ''U.S. nexus'' be considered U.S. persons.[196] This commenter expressed support for what it described as our ''complementary'' proposed approach that would have required legal persons, including investment vehicles, to perform a principal place of business assessment to determine whether they are U.S. persons, and would have subjected all transactions conducted within the United States to Title VII requirements.[197] One commenter conversely argued that a ''principal place of business'' test for investment vehicles would be inappropriate.[198]

Several commenters requested that we provide additional guidance regarding the application of the ''principal place of business'' test to investment vehicles. Some commenters specifically requested that we avoid diverging from the CFTC's interpretation of ''U.S. person'' in our own final definition.[199] One commenter urged us to help ensure that market participants are able to make rational and consistent determinations regarding the U.S.-person status of investment vehicles, and suggested that an appropriate test would look to the location of the person responsible for the fund's operational management, which the commenter identified as the person that establishes the investment vehicle and selects persons to carry out functions on behalf of the vehicle, as opposed to the person responsible for the fund's investment management activities.[200] Another commenter requested guidance regarding the application of the ''principal place of business'' test, while expressing support for using an approach similar to the CFTC Cross-Border Guidance.[201] One commenter requested that the location of an asset manager retained by a person not be the sole factor used to determine the person's principal place of business or U.S.-person status.[202]

A few commenters responded to our question whether the proposed definition should encompass funds that are majority-owned by U.S. persons, as the CFTC's interpretation does, with two commenters advocating against and three advocating in favor of such an approach.[203] One of the commenters that opposed such a test urged, however, that if we were to adopt such a test, the test be identical to the approach taken by the CFTC.[204]

One commenter suggested that we adopt the CFTC's approach by which collective investment vehicles that are offered publicly only to non-U.S. persons, and not offered to U.S. persons, would not generally be considered ''U.S. persons.'' [205] Another commenter urged that the definition exclude ''non-U.S. regulated funds'' that are offered publicly only to non-U.S. persons but are offered privately to U.S. persons in certain specific circumstances.[206]

(c) Treatment of Legal Persons More Generally

Two commenters urged us to include in the definition of ''U.S. person'' guaranteed subsidiaries and affiliates of U.S. persons.[207] Alternatively, these

that the Commission and the CFTC do not adopt different definitions of U.S. person); Investment Adviser Association (''IAA'') Letter at 3 (noting that, given the finalization of the CFTC Cross-Border Guidance, the Commission should modify its proposal in several respects to be more consistent with the CFTC's definition of ''U.S. person'').

[194] *See* AFR Letter I at 3, 5 (stating that the proposed definition of ''U.S. person'' is overly narrow because it does not include foreign subsidiaries of the seven largest U.S. bank holding companies); BM Letter at 5, 9, 14–15 (stating that the proposed definition of ''U.S. person'' is too narrow because it excludes guaranteed affiliates and other affiliates in a control relationship with a U.S. person; further suggesting that, should such guaranteed entities, whether they are implicitly or explicitly guaranteed, not be considered U.S. persons, they be separately ''ring-fenced'' from their U.S. affiliate in order to ensure that the U.S. affiliate does not cover any of the guaranteed affiliates obligations; further stating that such entities are within the scope of the Commission's broad authority under Exchange Act section 30(c) to regulate cross-border activity).

[195] *See* Citadel Letter at 3 (supporting our proposal to not rely on Regulation S as it would not capture certain foreign funds that the commenter believed should be considered U.S. persons); ICI Letter at 6 (recommending that our analysis be consistent with Regulation S because fund managers are accustomed to that definition). *Cf.* note 190, *supra* (describing elements of ''U.S. person'' definition contained in Regulation S).

[196] *See* Citadel Letter at 2–3 (noting further that such an approach will ensure that these entities will be subject to clearing, reporting, and other transaction-level requirements).

[197] *See id.*

[198] *See* ICI Letter at 4–5 (arguing that a ''principal place of business'' test is inappropriate for investment vehicles because they generally have no employees or offices of their own).

[199] *See* IAA Letter at 3 (urging the Commission to coordinate with the CFTC to develop a consistent definition of principal place of business); SIFMA/FIA/FSR Letter at A–8 (urging harmonization with the CFTC).

[200] *See* IIB Letter at 6. *But see* ICI Letter at 5 n.13 (requesting that the U.S.-person status of an investment vehicle not turn on the location of the vehicle's activities, employees, or the offices of its sponsor or adviser because such considerations are not relevant to whether risk is transferred to the United States).

[201] *See* Citadel Letter at 2. This commenter suggested looking to those senior personnel responsible for implementing the investment vehicle's investment and trading strategy as well as those responsible for ''investment selections, risk management decisions, portfolio management, or trade execution.'' *See id.*

[202] *See* IAA Letter at 4 (suggesting that the Commission follow the CFTC Cross-Border Guidance by specifically providing that non-U.S. persons are not U.S. persons simply by virtue of using a U.S.-person asset manager); SIFMA/FIA/FSA at A–8 (same).

[203] *Compare* ICI Letter at 7 (arguing that a majority-ownership test is not workable for non-U.S. regulated funds that are offered publicly abroad because it may be impossible or inconsistent with local law to identify or reveal investor information) and IAA Letter at 4 (explaining that a majority-ownership test would capture non-U.S. funds with minimal nexus to the United States and present implementation challenges) *with* AFR Letter I at 8 (recommending that the U.S.-person status of investment vehicles be based on majority ownership and/or actual locations of the person, regardless of the location of incorporation), and Greenberger Letter I at 6–7 (making a similar argument with respect to CFTC's interpretation of U.S. person), and BM Letter at 10 (recommending that the ''U.S. person'' definition include collective investment vehicles that are majority-owned by U.S. persons).

[204] *See* IAA Letter at 5.

[205] *See id.* at 3, 5 (noting that the CFTC Cross-Border Guidance has been finalized and urging the Commission to adopt the CFTC approach to permit market participants to operate ''under the certainty and clarity'' of consistent definitions of U.S. persons).

[206] *See* ICI Letter at 5–6 (noting that such investment vehicles have only minimal nexus to the United States and stating that institutional investors that invest in such funds would not expect U.S. law to apply to the vehicles' transactions).

[207] *See* AFR Letter I at 3, 5–7 (stating that proposed definition is too narrow and would allow U.S. entities to avoid regulation and engage in regulatory arbitrage); BM Letter at 9, 11–15 (requesting that the ''U.S. person'' definition be broadened to include any person that is ''indistinguishable'' from a U.S. person, such as by implicit or explicit guarantees from a U.S. person, including any affiliate controlling, controlled by, or under common control with a person that is headquartered, incorporated, or otherwise residing in the United States). These commenters further argued that the acknowledgement in the Cross-Border Proposing Release that guarantees of foreign entities by a U.S. person may subject the U.S. financial system to risk is inconsistent with a definition that does not include such entities in the ''U.S. person'' definition. *See id.* at 5–6; BM letter at 8, 12. *Cf.* AFR Letter II at 2 (urging CFTC to include guaranteed affiliates in of U.S. persons in the interpretation of U.S. person); Greenberger Letter II at 3, 16 (requesting that the CFTC classify foreign subsidiaries of U.S. financial institutions as U.S. persons); AFR letter to CFTC, dated August 13, 2012 (''AFR Letter III'') (stating that the CFTC's Final Exemptive Order Regarding Compliance with Certain Swap Regulation, 78 FR 858, will pose a risk to U.S. taxpayers due to the delay in applying

commenters suggested that we should require dealing transactions with such persons to be included in the dealing counterparty's security-based swap dealer *de minimis* calculation.[208] However, another commenter supported our proposed approach not to look to whether a person's transactions are guaranteed by a U.S. person for purposes of determining that person's U.S.-person status, stating that our proposal to address such risk through major security-based swap participant registration was sufficient.[209]

One commenter suggested that the Commission follow the CFTC in including in its final ''U.S. person'' definition legal persons that are directly or indirectly majority-owned by one or more U.S. persons who bear unlimited responsibility for the obligations of that legal person, stating that such a provision is necessary to prevent evasion of Title VII.[210]

One commenter expressed support for a principal place of business component to the ''U.S. person'' definition as set forth in our proposal.[211] Several commenters requested that the Commission provide additional guidance regarding relevant factors in identifying a legal person's principal place of business.[212] One commenter suggested that the location of a company's headquarters should be determinative and that a particular legal person should have only one principal place of business.[213]

Several commenters suggested that the Commission harmonize its approach to determining a person's principal place of business to the approach in the CFTC Cross-Border Guidance,[214] while at least one commenter suggested that the Commission work with the CFTC to develop a new, common definition.[215] At least two commenters, on the other hand, objected to the use of a ''principal place of business'' test.[216] One commenter suggested an alternative approach that would establish criteria for this determination, such as quantitative thresholds, and would also consider not requiring a principal place of business analysis if the jurisdiction of incorporation has an acceptable regulatory framework.[217] Another commenter stated that a U.S. branch of a person established in another jurisdiction should not be considered to have its principal place of business in the United States.[218] Another suggested that requiring a principal place of business analysis represented a departure from the Commission's stated territorial approach to U.S. person.[219]

Several commenters recommended that, if the Commission were to adopt a ''principal place'' of business test in its ''U.S. person'' definition, market participants be allowed to rely on a counterparty's representations as to the counterparty's principal place of business.[220] Another suggested that the test look to information found in the public filings of a public company or, with respect to a private company, the location of its business.[221]

(d) Accounts

One commenter supported the Commission's proposal for determining the U.S.-person status of an account, which would look to whether the owner of the account itself is a U.S. person,[222] but suggested that the Commission provide bright-line thresholds to clarify that *de minimis* ownership by U.S. persons would not cause the account to be considered a U.S. person.[223] The commenter further requested that the Commission clarify that the ''account'' prong of the ''U.S. person'' definition would not apply to collective investment vehicles but was intended to capture persons that should be considered U.S. persons even though they are conducting trades, as the direct counterparty, through an account.[224]

(e) International Organizations

A number of commenters expressed support for the Commission's proposal to exclude certain international organizations (*e.g.,* multilateral development banks, or ''MDBs'') from the ''U.S. person'' definition.[225] Three

requirements to foreign affiliates of U.S. banks) (incorporated by reference in AFR Letter I); Michael Greenberger letter to CFTC, dated August 13, 2012 (''Greenberger Letter III'') (incorporated by reference in AFR Letter I).

[208] *See* AFR Letter I at 7; BM Letter at 17 (stating that the exclusion from the *de minimis* calculation for guaranteed transactions is ''indefensible'' and ''must be eliminated''). *See also* Chris Barnard Letter at 2 (stating that Title VII should apply to transactions involving a guarantee by a U.S. person).

[209] *See* SIFMA/FIA/FSR Letter at A–11 to A–12 (stating that to treat the existence of a U.S. parent as relevant to determining whether a person is a U.S. person would disregard the legal independence of affiliates and imply that persons within the same corporate group necessarily coordinate their security-based swap activities).

[210] *See* BM Letter at 10. *Cf.* CFTC Cross-Border Guidance, 78 FR 45312.

[211] *See* Citadel Letter at 2 (stating that Commission was correct to incorporate a principal place of business determination into the ''U.S. person'' definition).

[212] *See* IIB Letter at 5 (noting the difficulty of implementing the ''principal place of business'' test without further guidance and requesting the Commission to provide workable criteria); ABA Letter at 2–3 (requesting clarification of ''principal place of business'' test and recommending that the Commission confirm that an entity may rely on its counterparty's written representations regarding the counterparty's principal place of business).

[213] *See* IIB Letter at 5–6. Another commenter suggested that the location of the personnel directing the security-based swap activity of the legal person be determinative. *See* Citadel Letter at 2.

[214] *See* JFMC Letter at 4 (notwithstanding burdensome aspects of the CFTC's interpretation, and the difficulties of the ''principal place of business'' test in particular, urging the Commission to adopt the same definition as the CFTC); SIFMA/FIA/FSR Letter at A–8 (explaining the difficulty in having to determine a counterparty's principal place of business under two different standards); Citadel Letter at 2 (requesting that the Commission provide further guidance ''to parallel the CFTC's guidance'' on principal place of business).

[215] *See* IAA Letter at 3 (urging that, if the Commission adopts a ''principal place of business'' test, it coordinate with the CFTC to develop a consistent and harmonized definition).

[216] *See* ESMA Letter at 2 (arguing that the ''U.S. person'' definition should be limited to entities that are established within the United States and should not in any case extend to an entity, such as a U.S. branch of a foreign bank, whose presence in the United States is ''complementary'' to its principal activity outside the United States and which is already regulated by a non-U.S. jurisdiction); JSDA Letter at 3 (recommending that the Commission and the CFTC eliminate the principal place of business concept from their respective criteria for identifying U.S. persons). *See also* EC Letter at 2 (supporting the territorial approach of the ''U.S. person'' definition, but suggesting that the ''principal place of business'' test is not territorial and suffers from ambiguity);

[217] *See* EC Letter at 2. *See also* ESMA Letter at 2 (requesting that the Commission provide clarity with respect to its proposed ''U.S. person'' definition, particularly the ''principal place of business'' test).

[218] *See* ESMA Letter at 2 (noting that to include such persons would place potentially duplicative and conflicting requirements on the person in the case of European persons that would also be subject to the European Market Infrastructure Regulation).

[219] *See* EC Letter at 2.

[220] *See* ABA Letter at 2–3 (stating that entities should be able to rely on their counterparty's written representations ''absent evidence to the contrary,'' regarding their principal place of business); JSDA Letter at 3 (recommending that, if the Commissions determine to keep a ''principal place of business'' test, they permit entities to rely on counterparty representations); IIB Letter at 5 n.9 (recommending that a counterparty representation as to U.S.-person status be sufficient to fulfill a person's diligence requirements). One of these commenters specifically requested that the reasonable reliance standard be limited to representations regarding principal place of business. *See* ABA letter at 3 n.2.

[221] *See* IIB Letter at 6.

[222] *See* SIFMA/FIA/FSR Letter at A–8.

[223] *See id.* at A–9. *See also* IAA Letter at 4–5 (requesting that, should the Commission adopt an ownership test, it adopt a test consistent with and no more restrictive than the CFTC test for collective investment vehicles).

[224] *See* SIFMA/FIA/FSR Letter at A–8 to A–9. Another commenter expressed disagreement with the Commission's proposed treatment of accounts in the ''U.S. person'' definition, expressing concern that inclusion of accounts in the definition may affect the U.S.-person status of funds. *See* IAA Letter at 4 (explaining that an ownership test applying to accounts would potentially capture non-U.S. funds that may have U.S. investors but whose ''purposeful activities'' such as ''marketing or offering'' are not aimed at U.S. persons, meaning the fund would have ''little nexus to the U.S.'').

[225] *See* SIFMA/FIA/FSR Letter at A–10 (supporting an exclusion for all Foreign Public

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commenters specifically requested that the Commission list all such institutions that would be excluded from the ''U.S. person'' definition, similar to the approach the CFTC took in its guidance,[226] rather than refer to ''other similar international organizations.'' [227] These commenters also argued that certain organizations have absolute immunity under federal law and should be excluded from regulation under Title VII entirely.[228] Three commenters requested that affiliates of MDBs and similar organizations also be excluded from the definition of ''U.S. person.'' [229]

(f) Status Representations

Some commenters requested that a potential dealer expressly be permitted to rely on a counterparty representation to fulfill its diligence requirements in determining whether its counterparty is a U.S. person under the final rule.[230] Several commenters, as discussed above, specifically requested that we permit reliance on representations as to a person's principal place of business.[231] Two commenters requested that market participants be permitted to rely on the representations prepared by counterparties under the CFTC Cross-Border Guidance.[232]

3. Final Rule

Consistent with the proposal, we are adopting a final definition of ''U.S. person'' that continues to reflect a territorial approach to the application of Title VII and is in most respects unchanged from the proposal.[233] In response to comments, the final definition reflects certain changes intended to clarify the scope of the definition. Also in response to comments, we are adopting a general definition of ''principal place of business'' and a specific application of the term to externally managed investment vehicles. We are also adding a prong relating specifically to the U.S.-person status of estates.

The final rule defines ''U.S. person'' to mean:

- Any natural person resident in the United States;
- Any partnership, corporation, trust, investment vehicle, or other legal person organized, incorporated, or established under the laws of the United States or having its principal place of business in the United States;
- Any account (whether discretionary or non-discretionary) of a U.S. person; or
- Any estate of a decedent who was a resident of the United States at the time of death.[234]

The final rule defines ''principal place of business'' to mean ''the location from which the officers, partners, or managers of the legal person primarily direct, control, and coordinate the activities of the legal person.'' [235] It also provides that, with respect to an externally managed investment vehicle, this location ''is the office from which the manager of the vehicle primarily directs, controls, and coordinates the investment activities of the vehicle.'' [236]

Also consistent with the proposal, the final definition excludes the following international organizations from the definition of ''U.S. person'': The IMF, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies and pension plans, and any other similar international organizations, their agencies and pension plans.[237]

To address commenters' requests,[238] the final rule also has been revised from the proposal to provide that a person may rely on a counterparty's representation regarding its status as a U.S. person, unless such person knows,

Sector Financial Institutions (including MDBs) (''FPSFIs'') and their affiliates from the ''U.S. person'' definition); JFMC Letter at 4 (supporting an exclusion from ''U.S. person'' definition for FPSFIs and their affiliates); JSDA letter at 3 (supporting the Commission's proposed exclusion from the ''U.S. person'' definition for certain ''international organizations'' and expressing support for an exclusion for FPSFIs); International Bank for Reconstruction and Development, International Finance Corporation et al. Letter (''WB/IFC Letter'') at 1, 6 (supporting an exclusion for multilateral development institutions and their affiliates from the ''U.S. person'' definition, and noting that such affiliates are excluded under Regulation S as well); IDB Letter at 1 (requesting that MDBs and their affiliates not be considered U.S. persons).

[226] *See* Sullivan and Cromwell (''SC'') Letter at 18 and n.20; WB/IFC Letter at 4–5 (suggesting that to avoid confusion, the Commission expressly include other MDBs that maintain headquarters in Washington, DC and identify those organizations which include IFC, the International Development Association, the Multilateral Investment Guarantee Agency, and the Inter-American Investment Corporation); IIB Letter at 5 (supporting an exclusion from U.S.-person status for ''international organizations'' similar to those already enumerated in the Cross-Border Proposing Release, and stating that such an exclusion would be consistent with the CFTC Cross-Border Guidance and ''well-established'' principles of international law); Inter-American Development Bank (''IDB'') Letter at 2 (stating that it shares the position of the International Finance Corporation and the International Bank for Reconstruction and Development that the Commission's approach to MDB's should be consistent with the CFTC). *See also* Intermediary Definitions Adopting Release, 77 FR 30692 n.1180 (listing international financial institutions for purposes of CFTC requirements); CFTC Cross-Border Guidance, 78 FR 45353 n.531 (incorporating list provided in Intermediary Definitions Adopting Release by reference).

[227] Proposed Exchange Act rule 3a71–3(a)(7)(ii).

[228] *See* SC Letter at 3–4, 7–9, 12–14; WB/IFC letter at 2. *See also* IDB Letter at 1 (requesting confirmation that MDBs will not be subject to Commission's requirements with respect to security-based swaps and indicating that such an approach would respect its privileges and immunities).

[229] *See* SC Letter at 19–22 (requesting that, in response to footnote 301 of the Cross-Border Proposing Release, ''controlled affiliates'' of MDBs not be treated as U.S. persons); IDB Letter at 1 (requesting that affiliates of international organizations not be treated as U.S. persons); WB/IFC Letter at 1, 6 (supporting an exclusion for multilateral development institutions and their affiliates from the ''U.S. person'' definition, and noting that such affiliates are excluded under Regulation S as well). One commenter suggested that this exclusion be made available for a ''controlled affiliate,'' defined as follows: (1) an entity subject to the MDB's governance structure; (2) all of whose activities must be consistent with and in furtherance of the MDB's purpose and mission; (3) whose governing instruments restrict it to engaging in activities in which the MDB could itself engage and provide that it is not authorized to engage in any other activities; and (4) which is under the ''control'' of the MDB as that term is used in securities laws (Securities Act Rule 405). *See also* note 225, *supra*.

[230] *See* IIB Letter at 5 n.9. This commenter suggested that we should permit reliance on a representation ''absent knowledge of facts that would cause a reasonable person to question the accuracy of the representation.'' *See also* JSDA Letter at 3.

[231] *See* note 220, *supra*.

[232] *See* SIFMA/FIA/FSR Letter at A–8 (noting that performing a separate analysis would be burdensome); IIB Letter at 5, note 9 (noting that the CFTC's interpretation of ''U.S. person'' is broader than, and encompasses the three elements of, the Commission's proposed ''U.S. person'' definition).

[233] *Cf.* note 192, *supra* (citing comment letters expressing general agreement with our territorial approach to defining U.S. person).

[234] Exchange Act rule 3a71–3(a)(4)(i). The second prong has been modified from the proposal to include an express reference to ''investment vehicle'' and to clarify that any legal person ''established'' under United States law is a U.S. person, as discussed further below. *See* Exchange Act rule 3a71–3(a)(4)(i)(B). The fourth prong has been added to include an express reference to ''estate.'' *See* Exchange Act rule 3a71–3(a)(4)(i)(D). In the text of the final rule we have made a technical change to the proposal to clarify that the ''U.S. person'' definition is met if any one of the applicable prongs is satisfied (in part by replacing ''and'' with ''or'' in connection with the enumeration of the prongs). *See* Exchange Act rule 3a71–3(a)(4)(i).

Consistent with the proposal, ''special entities,'' as defined in section 15F(h)(2)(C) of the Exchange Act, are U.S. persons because they are legal persons organized under the laws of the United States. Section 15F(h)(2)(C) of the Exchange Act defines the term ''special entity'' as: A Federal agency; a State, State agency, city, county, municipality, or other political subdivision of a State; any employee benefit plan, as defined in section 3 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002; any governmental plan, as defined in section 3 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002; or any endowment, including an endowment that is an organization described in section 501(c)(3) of the Internal Revenue Code of 1986. 15 U.S.C. 78o–10(h)(2)(C).

[235] Exchange Act rule 3a71–3(a)(4)(ii).

[236] *Id.*

[237] Exchange Act rule 3a71–3(a)(4)(iii).

[238] *See* notes 220, 230, *supra*.

or has reason to know, that the representation is inaccurate.[239]

Although one commenter requested that we use a definition of ''U.S. person'' that is consistent with Regulation S, we are declining to do so for the reasons described in our Cross-Border Proposing Release.[240] We acknowledge that many market participants are accustomed to Regulation S and may find such a definition relatively easy to implement. As we discussed in our proposal, however, Regulation S addresses different concerns from those addressed by Title VII.[241] In light of these differences, the Commission believes that adopting the definition of ''U.S. person'' in Regulation S would not achieve the goals of Title VII and that a definition of U.S. person specifically tailored to the regulatory objectives it is meant to serve, as we are adopting here, is appropriate.

(a) Natural Persons

As in our proposed definition, the final definition of ''U.S. person'' provides that any natural person resident in the United States[242] is a U.S. person. This definition encompasses persons resident within the United States regardless of the individual's citizenship status,[243] but it does not encompass individuals who are resident abroad, even if they possess U.S. citizenship.[244]

As we noted in the proposal, it is consistent with the approach we have taken in prior rulemakings relating to the cross-border application of certain similar regulatory requirements to subject natural persons residing within the United States to our regulatory framework.[245] Moreover, we believe that natural persons residing within the United States who engage in security-based swap transactions are likely to raise the types of concerns intended to be addressed by Title VII, including those related to risk, transparency, and counterparty protection.[246] We believe that it is reasonable to infer that a significant portion of such persons' financial and legal relationships are likely to exist within the United States and that it is therefore reasonable to conclude that risks arising from the security-based swap activities of such persons could manifest themselves within the United States, regardless of the location of their counterparties.

(b) Corporations, Organizations, Trusts, Investment Vehicles, and Other Legal Persons

The final definition of ''U.S. person'' as applied to legal persons has been modified to clarify certain aspects of the rule. Also, in response to comments, we are adopting a definition of ''principal place of business.'' In general, the scope of the definition as applied to legal persons does not differ materially from the scope of our proposal.[247]

i. Entities Incorporated, Organized, or Established Under U.S. Law

As with the proposed rule, the final definition provides that any partnership, corporation, trust, or other legal person organized or incorporated under the laws of the United States or having its principal place of business in the United States would be a U.S. person.[248] The final definition also includes two changes that are intended to make explicit certain concepts that were implicit in the proposed definition. First, the final rule provides that a legal person ''established'' under the laws of the United States is a U.S. person, just as if it had been ''organized'' or ''incorporated'' under the laws of the United States. This change is intended to clarify the Commission's intention that any person formed in any manner under the laws of the United States will be a U.S. person for purposes of Title VII.

Second, the final rule adds an express reference to ''investment vehicle'' in the non-exclusive list of legal persons to clarify that any such person, however formed, will be treated as a U.S. person for purposes of Title VII if it is organized, incorporated, or established under the laws of the United States or has its principal place of business in the United States.[249] Investment vehicles are commonly established as partnerships, trusts, or limited liability entities and, therefore, fall within the scope of the rule as proposed. However, given the significant role that such vehicles have played and likely will continue to play in the security-based swap market, we believe that the final rule should incorporate an express reference to such vehicles to avoid any ambiguity regarding whether the definition of ''U.S. person,'' including the principal place of business component of that definition, applies to them.

As noted in our proposal, we have previously looked to where a legal person is organized, incorporated, or established to determine whether it is a U.S. person.[250] We continue to believe that place of organization, incorporation, or establishment is relevant in the context of Title VII. In our view, the decision of a corporation, trustee, or other person to organize under the laws of the United States indicates a degree of involvement in the U.S. economy or legal system that warrants subjecting it to security-based swap dealer or major security-based swap participant registration requirements under Title VII if its security-based swap dealing activity or its security-based swap positions exceed the relevant thresholds.[251] We believe that it is reasonable to infer that an entity incorporated, organized, or established under the laws of the United States is likely to have a significant portion of its financial and legal relationships in the United States and that it is therefore reasonable to conclude that the risks arising from its security-based swap activities are likely to manifest themselves in the United States, regardless of the location of its counterparties. Accordingly, the final

[239] Exchange Act rule 3a71–3(a)(4)(iv).

[240] *See* note 195, *supra.*

[241] *See* 17 CFR 230.901(k); Regulation S Adopting Release, 55 FR 18306. *See also* Cross-Border Proposing Release, 78 FR 31007 (describing differences between policy concerns underlying Regulation S and Title VII). For example, with its exclusions for certain foreign branches and agencies of U.S. persons from the definition of ''U.S. person,'' Regulation S would not address the entity-wide nature of the risks that Title VII seeks to address. *See id.*

[242] Exchange Act rule 3a71–3(a)(5) defines ''United States'' to mean ''the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.''

[243] Exchange Act rule 3a71–3(a)(4)(i)(A).

[244] This approach to treating natural persons as U.S. persons solely based on residence, rather than citizenship, differs from the approach to legal persons, such as partnerships and corporations, discussed below.

Notwithstanding slight differences between the language of our final rule and the CFTC Cross-Border Guidance, we expect that a natural person's U.S.-person status under our final definition would be the same as under the CFTC Cross-Border Guidance. *Cf.* note 193, *supra* (citing commenters urging the Commission to harmonize its definition of ''U.S. person'' with the interpretation set forth by the CFTC).

[245] *See* Rule 15a–6 Adopting Release, 54 FR 30017 (providing that foreign broker-dealers soliciting U.S. investors abroad generally would not be subject to registration requirements with the Commission).

[246] *See* Cross-Border Proposing Release, 78 FR 30996.

[247] Moreover, we expect that a legal person's U.S.-person status under the Commission's final definition of ''U.S. person'' and under the definition ''principal place of business'' would as a general matter be the same as under similar prongs on the CFTC Cross-Border Guidance.

[248] *See* Exchange Act rule 3a71–3(a)(4)(i)(B).

[249] *Cf.* Cross-Border Proposing Release, 78 FR 30997 n.296 (using funds and special-purpose investment vehicles as examples of other legal persons that may be U.S. persons).

[250] *See* Regulation S Adopting Release, 55 FR 18316.

[251] *Cf.* EC Letter at 2 (expressing support for this approach); ESMA letter at 1 (same).

rule retains this element of the definition.

As under the proposal, the final definition determines a legal person's status at the entity level and thus applies to the entire legal person, including any foreign operations that are part of the U.S. legal person. Consistent with this approach, a foreign branch, agency, or office of a U.S. person is treated as part of a U.S. person, as it lacks the legal independence to be considered a non-U.S. person for purposes of Title VII even if its head office is physically located within the United States. We continue to believe that there is no basis to treat security-based swap transactions or positions of a foreign branch, agency, or office of a U.S. person differently from similar transactions or positions of the home office for purposes of the dealer *de minimis* or major security-based swap participant threshold calculations, given that the legal obligations and economic risks associated with such transactions or positions directly affect the entire U.S. person.

Under the final definition, the status of a legal person as a U.S. person has no bearing on whether separately incorporated or organized legal persons in its affiliated corporate group are U.S. persons. Accordingly, a foreign subsidiary of a U.S. person is not a U.S. person merely by virtue of its relationship with its U.S. parent. Similarly, a foreign person with a U.S. subsidiary is not a U.S. person simply by virtue of its relationship with its U.S. subsidiary. Although two commenters urged that most foreign affiliates of U.S. persons be treated as U.S. persons themselves,[252] we continue to believe that it is appropriate for each affiliate to determine its U.S.-person status independently, given the distinct legal status of each of the affiliates, and that such status should turn on each affiliate's place of incorporation, organization, or establishment, or on its principal place of business.[253] We recognize that certain foreign persons, including foreign persons whose security-based swap activity is subject to a recourse guarantee against a U.S. person, may create risk to persons within the United States such as counterparties or guarantors.[254] We continue to believe, however, that, to the extent that such persons are established under the laws of a foreign jurisdiction and have their principal place of business abroad, they should not be included in the definition of ''U.S. person.'' [255] As discussed in further detail below, we believe that our final rules regarding application of the dealer *de minimis* exception and the major security-based swap participant thresholds adequately address concerns about the treatment of these persons under the dealer and major participant definitions without categorizing them as U.S. persons.[256]

ii. Entities Having Their Principal Place of Business in the United States

a. In General

Consistent with our proposal, we are defining ''U.S. person'' to include persons that are organized, incorporated, or established abroad, but have their principal place of business in the United States. For purposes of this final rule, and in response to commenters' request for further guidance,[257] we are defining ''principal place of business'' generally to mean ''the location from which the officers, partners, or managers of the legal person primarily direct, control, and coordinate the activities of the legal person.'' [258] As

[252] *See* note 194, *supra* (citing AFR and BM Letters). One of these commenters argued that the final definition of ''U.S. person'' should include guaranteed foreign affiliates of U.S. persons, whether the guarantee is explicit or implicit, and that affiliates should be presumed to be receiving guarantees. *See* AFR Letter I at 3, 5–7. The other urged that the final definition of ''U.S. person'' include guaranteed foreign affiliates and ''*de facto* guaranteed'' affiliates of U.S. persons that may not be explicitly guaranteed. *See* BM Letter at 9, 11–15.

[253] *But see* section IV.F, *infra* (discussing the aggregation of affiliate positions for purposes of the *de minimis* calculation).

[254] *See* note 207 (citing AFR and BM Letters).

[255] As we noted above, our ''U.S. person'' definition is intended to identify those persons whose financial and legal relationships are likely to be located in significant part within the United States. The mere fact of an affiliate relationship with, or a guarantee from, a U.S. person does not appear to us to indicate that such person has such relationships within the United States. Similarly, the mere fact that a person's security-based swap activity poses some degree of risk to the United States does not necessarily indicate that the person has the types of financial and legal relationships within the United States that warrant treating it as a U.S. person. However, we recognize that non-U.S. persons may in fact pose risk to the United States, particularly when their security-based swap transactions are subject to a recourse guarantee against a U.S.-person affiliate, and, even though we do not include them in our ''U.S. person'' definition, we do address such risk through our final rules applying the security-based swap dealer *de minimis* exception and the major security-based swap participant thresholds.

One commenter also urged us to follow the CFTC in including within the final definition any legal person that is directly or indirectly majority-owned by one or more U.S. persons that bear unlimited responsibility for the obligations and liabilities of such legal person. *See* note 210, *supra* (citing BM Letter). *Cf.* CFTC Cross-Border Guidance, 78 FR 45312, 45317. Although we recognize that such persons give rise to risk to the U.S. financial system, as with non-U.S. persons whose security-based swap transactions are subject to explicit financial support arrangements from U.S. persons, we do not believe that it is appropriate in the context of security-based swap markets to treat such persons as U.S. persons given that they are incorporated under foreign law, unless their principal place of business is in the United States. *See* Exchange Act rule 3a71–3(a)(4)(i)(B). Moreover, to the extent that a non-U.S. person's counterparty has recourse to a U.S. person for the performance of the non-U.S. person's obligations under a security-based swap by virtue of the U.S. person's unlimited responsibility for the non-U.S. person, the non-U.S. person would be required to include the security-based swap in its own dealer *de minimis* calculations (if the transaction arises out of the non-U.S. person's dealing activity) and its major participant threshold calculations. *See* sections IV.E.1 and V.D.3, *infra.* For example, if a counterparty to a transaction is a general partnership that is not a U.S. person but has a U.S.-person general partner that has unlimited responsibility for the general partnership's liabilities, including for its obligations to security-based swap counterparties, we would view the general partner's obligations with respect to the security-based swaps of the partnership as recourse guarantees for purposes of this final rule, absent countervailing factors.

[256] *See* section IV.E.1 (describing application of *de minimis* exception to transactions of non-U.S. persons that are subject to a recourse guarantee against a U.S. person) and section V.D.3 (describing application of major security-based swap participant threshold calculations to positions of non-U.S. persons that are subject to a recourse guarantee against a U.S. person), *infra.* As discussed above, we will address the application of other Title VII requirements to these persons in subsequent releases.

[257] In the proposing release, we did not provide guidance regarding the meaning of ''principal place of business,'' but we requested comment whether such guidance was desirable, including whether it would be appropriate to adopt a definition similar to that adopted in rules under the Investment Advisers Act. *See* Cross-Border Proposing Release, 78 FR 30999 n.306 (noting that the focus of one possible definition would be similar to that of the definition used in rules promulgated under the Investment Advisers Act, which define principal place of business as ''the executive office of the investment adviser from which the officers, partners, or managers of the investment adviser direct, control, and coordinate the activities of the investment adviser'') (citing 17 CFR 275.222–1(b)). As noted above, several commenters requested that we provide guidance regarding the concept, and some provided suggested interpretations of the phrase with respect to operating companies and investment vehicles. *See, e.g.,* note 213, *supra* (citing IIB Letter). *See also* SIFMA/FIA/FSR letter at A–8; Citadel Letter at 2. Several of these commenters urged us to minimize divergence from the approach taken subsequent to our proposal by the CFTC in its July 2013 guidance (or from likely outcomes under that approach). *See* note 214, *supra* (citing letters from JFMC, SIFMA/FIA/FSR, Citadel, and IAA). Another commenter urged us to work closely with the CFTC in developing guidance regarding the meaning of principal place of business. *See* note 215, *supra* (citing IAA Letter).

[258] Exchange Act rule 3a71–3(a)(4)(ii). *Cf.* 17 CFR 275.222–1(b) (defining principal place of business for investment advisers under the Investment Advisers Act to mean ''the executive office of the investment adviser from which the officers, partners, or managers of the investment adviser direct, control, and coordinate the activities of the investment adviser'').

Because the definition of ''principal place of business'' in this final rule is tailored to the unique characteristics of the security-based swap market, it does not limit, alter, or address any guidance regarding the meaning of the phrase ''principal place of business'' that may appear in other provisions of the federal securities laws, including the Investment Advisers Act, Commission rules, regulations, interpretations, or guidance.

with the ''U.S. person'' definition more generally, our definition of ''principal place of business'' is intended to identify the location where a significant portion of the person's financial and legal relationships would be likely to exist, and we think it is reasonable to assume, for purposes of this final rule, that this location also generally corresponds to the location from which the activities of the person are primarily directed, controlled, and coordinated. In our view, to the extent that this location is within the United States, it is reasonable to conclude that the risks arising from that entity's security-based swap activity could manifest themselves within the United States, regardless of location of its counterparties.

This definition is intended to help market participants make rational and consistent determinations regarding whether their (or their counterparty's) principal place of business is in the United States.[259] Under the final rule, the principal place of business is in the United States if the location from which the overall business activities of the entity are primarily directed, controlled, and coordinated is within the United States. With the exception of externally managed entities, as discussed further below, we expect that for most entities the location of these officers, partners, or managers generally would correspond to the location of the person's headquarters or main office.[260]

Although we recognize that several commenters objected to including a ''principal place of business'' test in our definition of ''U.S. person,''[261] we believe that a definition that focused solely on whether a legal person is organized, incorporated, or established in the United States could encourage some entities to move their place of incorporation to a non-U.S. jurisdiction to avoid complying with Title VII, while maintaining their principal place of business—and thus, reasonably likely, risks arising from their security-based swap transactions—in the United States.[262] Moreover, we believe that a definition of ''U.S. person'' that did not incorporate a ''principal place of business'' element potentially would result in certain entities falling outside the Title VII regulatory framework, even though the nature of their legal and financial relationships in the United States is, as a general matter, indistinguishable from that of entities incorporated, organized, or established in the United States.[263] Given that such entities raise the types of concerns that Title VII was intended to address, we believe it is both appropriate under our territorial approach and consistent with the purposes of Title VII to treat such entities as U.S. persons for purposes of the final rule.

We also have considered the suggestion by one commenter that ''principal place of business'' be defined to incorporate certain quantitative thresholds and an exception for firms whose jurisdiction of incorporation has an acceptable regulatory framework in place.[264] However, we do not believe such thresholds are necessary. Because the analysis is applied on an entity-wide basis, consistent with our entity-based approach generally, the ''principal place of business'' analysis generally will not encompass companies incorporated, organized, or established outside the United States merely because they have an office or branch within the United States. Similarly, we do not believe that the determination whether a legal person's jurisdiction of incorporation, organization, or establishment has an acceptable regulatory framework is relevant to the question whether a specific person has its principal place of business in the United States any more than it would be relevant for a person incorporated within the United States but subject to regulation abroad. The question whether such a company should be permitted to fulfill relevant Title VII requirements by complying with the law of the jurisdiction in which it is incorporated, organized, or established is a separate issue that may

[259] *Cf.* IIB Letter at 6 (urging an approach that ''enable[s] market participants to reach rational, consistent U.S. person determinations for funds''). We also believe that our definition of ''principal place of business'' should reduce the potential that a particular entity would have a different U.S.-person status by virtue of the ''principal place of business'' prong under our definition and under the CFTC Cross-Border Guidance.

As discussed in further detail below, we also are including in our definition of ''U.S. person'' a provision permitting persons to rely on representations from a counterparty regarding whether the counterparty's principal place of business is in the United States, unless these persons know or have reason to know that the representation is false. *See* section IV.C.4, *infra. Cf.* note 220, *supra* (citing letters requesting that the Commission's final rule permit reliance on representations regarding principal place of business). This provision should further facilitate consistent application of the ''U.S. person'' to specific entities across market participants. We are not, however, specifically providing that entities may rely solely on representations prepared by counterparties under the CFTC Cross-Border Guidance, *see* note 232, *supra,* given that the CFTC has articulated a facts-and-circumstances approach to the principal place of business determination that is susceptible to significant further development and interpretation. However, depending on how market participants have applied the CFTC's facts-and-circumstances analysis, they may be able to rely on such representations. Because we are permitting persons to rely on counterparty representations, we do not think it necessary to provide guidance regarding specific factors a person may consider in determining its counterparty's principal place of business, as some commenters requested. *Cf.* note 221, *supra* (citing IIB Letter).

[260] *Cf.* note 213, *supra* (citing IIB letter suggesting that an entity's principal place of business should be the location of its headquarters). Our definition of ''principal place of business'' is in this respect similar to the guidance issued by the CFTC regarding the application of ''principal place of business'' to operating companies. *See* CFTC Cross-Border Guidance, 78 FR 45309. We expect that outcomes of our final definition of ''principal place of business'' for such entities would generally be similar to those produced under the CFTC Cross-Border Guidance.

[261] *See* note 216, *supra.*

[262] For this reason, although we believe that the definition of ''principal place of business'' set forth in the final rule is consistent with our territorial approach to application of Title VII, we also believe that it is necessary or appropriate to prevent the evasion of Title VII. *See* Exchange Act section 30(c). The final definition of ''principal place of business'' will help ensure that entities do not restructure their business by incorporating under foreign law while continuing to direct, control, and coordinate the operations of the entity from within the United States, which would enable them to maintain a significant portion of their financial and legal relationships within the United States while avoiding application of Title VII requirements to such transactions.

[263] In addition, some foreign regulators expressed concerns about our proposed inclusion of a ''principal place of business'' element in the ''U.S. person'' definition, *see* notes 216–217, *supra,* and one foreign regulator encouraged us to focus our final ''U.S. person'' definition on where a legal person is established. *See* note 216, *supra.* We note that under the European Market Infrastructure Regulation, a foreign fund is treated identically to a European financial counterparty if it is managed by a European investment manager. *See* Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, CCPs, and trade repositories, Article 2(8) (defining ''financial counterparty'' to include ''an alternative investment fund managed by [alternative investment fund managers] authorised or registered in accordance with Directive 2011/61/EU''). This appears to reflect a recognition that where legal person is established should not be treated as the sole relevant factor in determining whether legal person should be subject to such jurisdiction's rules.

We also note that limiting our definition of ''U.S. person'' to entities incorporated, established, or organized in the United States as some commenters requested would not eliminate the potential that entities would be simultaneously classified as U.S. persons and as local persons under foreign law. Even under such a definition, some persons could be classified both as U.S. persons for purposes of Title VII and as persons established in foreign jurisdictions under a foreign regulatory regime. *Cf.* EC Letter. Although we are adopting a definition of ''U.S. person'' that should mitigate this likelihood, we recognize that such entities may be subject to overlapping regulation, and we intend to address the availability of substituted compliance with respect to specific substantive requirements in subsequent releases, which should mitigate the concerns expressed by these commenters. *Cf.* note 218, *supra* (citing ESMA Letter noting possibility of duplicative and conflicting regulation of certain persons as a result of the Commission's inclusion of a principal place of business element in the ''U.S. person'' definition).

[264] *See* note 217, supra (citing EC Letter); note 216, *supra* (citing ESMA Letter urging the Commission not to include U.S. branches of foreign banks in its ''U.S. person'' definition under a ''principal place of business'' test).

be addressed in a separate substituted compliance determination.[265]

Finally, we recognize that one commenter suggested that a ''principal place of business'' test should look to the location of personnel directing the security-based swap activity of the entity,[266] but we are not convinced that the location of such personnel, without more, would necessarily correspond to the location of a significant portion of the entity's financial and legal relationships, which is the focus of our ''U.S. person'' definition. We also note that a focus on the location of personnel directing the entity's security-based swap activity would provide an incentive for market participants to move such personnel outside the United States while maintaining their executive offices, and the bulk of their operations, within the United States. Such restructuring would allow an entity to avoid application of Title VII to its security-based swap activities while continuing to maintain a significant portion of its financial and legal relationships within the United States, leaving unchanged the likelihood that risks arising from its security-based swap activity could manifest themselves within the United States while avoiding application of Title VII to such activities.[267]

b. Externally Managed Investment Vehicles

Application of the ''principal place of business'' test to externally managed investment vehicles presents certain challenges not present when determining the principal place of business of an operating company or other internally managed legal person. For example, an operating company generally will carry out key functions (including directing, controlling, and coordinating its business activities) on its own behalf and generally will have offices through which these functions are performed. Responsibility for key functions of an externally managed investment vehicle, on the other hand, generally will be allocated to one or more separate persons (such as external managers, or other agents), with few or no functions carried out through an office of the vehicle itself.[268] Further complicating the application of this definition is the organizational and operational diversity of such vehicles.

Notwithstanding these challenges, we also recognize that externally managed investment vehicle are active participants in the security-based swap market[269] and, in our view, should be treated as U.S. persons if their operations are primarily directed, controlled, and coordinated from a location within the United States. For example, we understand that a significant portion of the investment vehicles that participate in the security-based swap market are private funds such as hedge funds. We have observed that such private funds commonly may be organized under non-U.S. law—frequently in the Cayman Islands—but are managed by investment advisers headquartered in the United States.[270] We also understand that those advisers commonly manage or direct the investment activities of these vehicles, including the arrangement of security-based swaps, through locations within the United States. We further understand that a significant portion of the financial and legal relationships of such vehicles, as a general matter, are in the United States, including some combination of equity ownership by managers (or their affiliates) and outside investors, credit relationships with prime brokers and other lenders, and relationships with other market participants and service providers. These vehicles, therefore, raise concerns that are similar to those raised by the security-based swap activities of market participants that are incorporated, established, or organized in the United States. Over the past two decades, failures of investment vehicles of various types organized under foreign law, but directed, controlled, or coordinated from within the United States have had significant negative impact on U.S. financial institutions, potentially threatening the stability of the U.S. financial system more generally.[271] We believe that it is reasonable to expect that the security-based swap activities of such vehicles may pose similar risks.[272]

To address the unique characteristics of externally managed investment vehicles, we are including in our definition of ''principal place of business'' language specifying that an externally managed investment vehicle's principal place of business is ''the office from which the manager[273] of the vehicle primarily directs, controls, and coordinates the investment activities of the vehicle.'' This definition directs market participants to consider where the activities of an externally managed investment vehicle generally are directed, controlled, and coordinated, even if this conduct is performed by one or more legally separate persons.[274] For

[265] *Cf.* Cross-Border Proposing Release, 78 FR 31085–102 (setting forth proposed substituted compliance framework).

[266] *See* note 206, supra (citing Citadel Letter).

[267] As noted above, we believe that the definition of ''principal place of business'' set forth in the final rule is consistent with our territorial approach to application of Title VII. We also note, however, that for the reasons just discussed the final definition's focus on activity of the person as a whole, as opposed to a focus on the security-based swap activity of the person, is in our view necessary or appropriate to prevent the evasion of Title VII. *See* Exchange Act section 30(c).

[268] Such functions may not even be carried out in the jurisdiction in which the externally managed vehicle is incorporated, organized, or established. Indeed, many private investment funds are incorporated, organized, or established under the laws of a jurisdiction with which they have only a nominal connection.

[269] *See* Tables 1 and 2, *supra* (noting involvement of investment advisers and private funds in the security-based swap market).

[270] This observation is consistent with data reported to us by private fund managers. *See* Staff of the Division of Investment Management, U.S. Securities and Exchange Commission, Annual Staff Report Relating to the Use of Data Collected from Private Fund Systemic Risk Reports (July 25, 2013) at Appendix A (providing aggregated, non-proprietary data on percentages of reporting private funds organized under non-U.S. law and on locations of advisers to such funds).

[271] For example, Long Term Capital Management (''LTCM''), a Delaware partnership with its principal place of business in Connecticut, established a master fund, Long-Term Capital Portfolio, L.P. (''LTCP''), in the Cayman Islands. Mine Aysen Doyran, *Financial Crisis Management and the Pursuit of Power: American Pre-Eminience and the Credit Crunch* 83–84 (Ashgate 2011). LTCP attracted investments from both U.S. and foreign investors. *Id.* When it failed in 1998, fourteen domestic and foreign banks and securities firms (''the Consortium'') that were major creditors or counterparties of the fund agreed to recapitalize it. GAO, *Responses to Questions Concerning Long-Term Capital Management and Related Events* 1 n.2, (identifying these fourteen firms); *id.* at 8–9 (stating that ''[t]hese firms contributed about $3.6 billion into [LTCP]'') (available at: *http://www.gao.gov/archive/2000/gg00067r.pdf*). The Federal Reserve Board of New York played a key role in initiating discussion among the banks that ultimately formed the Consortium. *Id.* at 10.

Other, more recent, examples of risks of such entities established under foreign law manifesting themselves within the United States include the failure of two Bear Stearns hedge funds, which had significant repercussions within the United States, and the bailouts of bank-sponsored structured investment vehicles. *See, e.g.,* FCIC Report at 241, 289–90; Henry Tabe, *The Unravelling of Structured Investment Vehicles: How Liquidity Leaked Through SIVs* (2010), at 192–94.

[272] For these reasons, we are declining to follow the suggestion of one commenter that we not include a principal place of business element of the ''U.S. person'' definition for investment vehicles. *See* note 198, *supra.*

[273] Identifying the manager for purposes of this definition will depend on the structure and organizing documents of the investment vehicle under consideration.

[274] Exchange Act rule 3a71–3(a)(4)(ii). At least one commenter also recognized that differences between categories of legal persons may require different tests for determining whether a person has its principal place of business in the United States. *See* IIB Letter at 5–6 (suggesting separate ''principal place of business'' tests for operating companies and investment vehicles). The CFTC Cross-Border Guidance, which provides separate guidance for operating companies, trusts, and investment vehicles, tailored to the characteristics of each,

an investment vehicle, for example, the primary manager is responsible for directing, controlling, and coordinating the overall activity of the vehicle, such that the business of the vehicle, such as its investment and financing activity, is principally carried out at the location of the primary manager. Such an investment vehicle's principal place of business under the final rule would be the location from which the manager carries out those responsibilities.[275]

As noted above, at least one commenter suggested that a ''principal place of business'' test should look to the location of personnel directing the security-based swap activity of the vehicle.[276] Although we believe that the manager responsible for directing, controlling, and coordinating the activities of the externally managed investment vehicle also would generally be responsible for directing, controlling, and coordinating the security-based swap activity of such vehicle, we do not believe that an externally managed vehicle should be excluded from the U.S. person definition merely because the manager that otherwise directs, controls, and coordinates its activity has effectively shifted responsibility for the security-based swap activity of the externally managed vehicle to a non-U.S. person. As noted above, such an approach would provide an incentive to move responsibility for the security-based swap activity of externally managed vehicles outside the United States while retaining control of all other activities relating to management of such vehicles within the United States. As with the ''principal place of business'' definition more generally, and for similar reasons, we believe that the definition of ''principal place of business'' set forth in the final rule with respect to externally managed vehicles is consistent with our territorial approach to application of Title VII. We also note, however, that for the reasons just discussed the final definition's focus on where the activity of the vehicle as a whole is primarily directed, controlled, and coordinated, as opposed to a focus on its security-based swap activity, is in our view necessary or appropriate to prevent the evasion of Title VII.[277]

In our proposal, we stated that we did not think that the U.S.-person status of a commodity pool operator (''CPO'') or fund adviser (as opposed to the fund actually entering into the transaction) was in itself relevant in determining the U.S.-person status of an investment vehicle.[278] Although the definition of ''principal place of business'' we are adopting in this final rule may lead to similar classifications of investment vehicles for purposes of the ''U.S. person'' definition as a test that looked to the U.S.-person status of a CPO or fund adviser, we believe that the definition we are adopting is more appropriately designed to capture externally managed investment vehicles that raise the kinds of concerns that Title VII was intended to address. Moreover, we note that mere retention of an asset manager that is a U.S. person, without more, would not necessarily bring an offshore investment vehicle or other person within the scope of the ''U.S. person'' definition.[279] However, where an asset manager, whether or not a U.S. person, is primarily responsible for directing, controlling, and coordinating the activities of an externally managed vehicle and carries out this responsibility within the United States, we believe that it is reasonable to include the externally managed vehicle in the definition of ''U.S. person'' [280] and to require foreign dealers to include dealing activity with such vehicles in their *de minimis* threshold calculations.

iii. Fund Ownership

Some commenters urged us to include in the definition investment vehicles that are majority-owned by U.S. persons.[281] One of these commenters noted that the CFTC had reasoned that '''passive investment vehicles''' designed to '''achieve the investment objectives of their beneficial owner''' were distinguishable from majority-owned entities that are '''separate, active operating businesses.' '' [282] We are not persuaded, however, that this distinction between investment vehicles and operating companies warrants treating ownership interests in these two types of entities differently for purposes of the ''U.S. person'' definition, particularly given that the exposure of investors in a collective investment vehicle engaging in security-based swap transactions typically is capped at the amount of their investment and such investors generally are unlikely to seek to make the investment vehicle's counterparties whole for reputational or other reasons in the event of a default.[283] We do not believe risks created through ownership interests in collective investment vehicles are the types of risks that Title VII is intended to address with respect to security-based swaps.[284]

Because we are not adopting an ownership test for funds, we are also not following the suggestion of some commenters that we exclude from the ''U.S. person'' definition investment vehicles that are offered publicly only to non-U.S. persons and are not offered to

appears to reflect this distinction. *See* CFTC Cross-Border Guidance, 78 FR 45309–311.

[275] As noted above, one commenter suggested that we adopt a definition of ''principal place of business'' that looked to where the operational management activities of the fund are carried out. *Cf.* note 200, *supra.* We are not convinced, however, that the location of such activities (which the commenter identified as including ''establishing the fund and selecting its investment manager, broker, and underwriter/placement agent''), absent an ongoing role by the person performing those activities in directing, controlling, and coordinating the investment activities of the fund, generally will be as indicative of activities, financial and legal relationships, and risks within the United States of the type that Title VII as the location of a fund manager.

[276] *See* note 213, *supra* (citing Citadel Letter).

[277] *See* Exchange Act section 30(c).

[278] *See* Cross-Border Proposing Release, 78 FR 31144 n.1454.

[279] *Cf.* note 195, *supra* (citing IAA letter urging the Commission to follow the CFTC in clarifying that retention of an asset manager that is a U.S. person alone would not bring a person within the scope of the ''U.S. person'' definition).

[280] We also noted in our proposal that a transaction by an adviser on behalf of a fund could be a ''transaction conducted within the United States'' as defined in the proposal and thus fall within the scope of Title VII. See Cross-Border Proposing Release, 78 FR 31144 n.1454. As noted above, we are not addressing the ''transaction conducted within the United States'' element of our proposal in the final rule and instead intend to address this element of the proposed dealer *de minimis* threshold calculations in a subsequent reproposal.

[281] *See* note 203, *supra* (citing BM Letter and AFR Letter). The CFTC also incorporated a majority-ownership inquiry in its interpretation of ''U.S. person'' as it applies to funds. *See* CFTC Cross-Border Guidance, 78 FR 45313.

[282] BM Letter at 10 (quoting CFTC Cross-Border Guidance, 78 FR 45314).

[283] *See* Cross-Border Proposal, 78 FR 31144 (noting that losses arising from investments in investment vehicles ''are generally limited to their investments in the form of equity or debt securities'' and that these risks are ''addressed by other provisions of U.S. securities law pertaining to issuances and offerings of equity or debt securities'').

[284] Several commenters also argued that a majority-ownership test, including any look-through requirements, may be difficult to implement in this context. *See* note 203, *supra* (citing ICI Letter and IAA Letter). We believe that our definition of ''principal place of business'' with respect to externally managed entities should help to ensure that the ''U.S. person'' definition encompasses investment vehicles that may generally have a significant portion of their financial and legal relationships within the United States and that may therefore raise the types of risk concerns within the United States that Title VII was intended to address.

We note that, because we are not following a majority-ownership approach for collective investment vehicles as part of the ''U.S. person'' definition, the U.S.-person status of accounts investing in such investment vehicles will not affect the U.S.-person status of such vehicles. *Cf.* IAA Letter at 4 (explaining that a majority-ownership test would capture non-U.S. funds with minimal nexus to the United States and present implementation challenges).

U.S. persons.[285] Although we recognize that the CFTC reasoned that such investment vehicles would generally not be within its interpretation of ''U.S. person,'' [286] we do not believe that it would be relevant under our final definition, which does not focus on an investment vehicle's ownership by U.S. persons.[287]

(c) Accounts

The final definition of ''U.S. person'' continues to mean ''any account (whether discretionary or not) of a U.S. person,'' irrespective of whether the person at which the account is held or maintained is a U.S. person.[288] As a general matter, we expect that market participants will determine their U.S.-person status under the prongs of that definition relating to natural persons or to legal persons.[289] This ''account'' prong of the definition is intended to clarify that a person's status for purposes of this rule generally does not differ depending on whether the person enters into security-based swap transactions through an account, or depending on whether the account is held or maintained at a U.S. person or a non-U.S. person intermediary or financial institution.[290]

Consistent with the overall approach to the definition of ''U.S. person,'' our focus under the ''account'' prong of this definition is on the party that actually bears the risk arising from the security-based swap transactions.[291] Accordingly, an account owned solely by one or more U.S. persons is a U.S. person, even if it is held or maintained at a foreign financial institution or other person that is itself not a U.S. person; an account owned solely by one or more non-U.S. persons is not a U.S. person, even if it is held or maintained at a U.S. financial institution or other person that is itself a U.S. person. For purposes of this ''account'' prong of the ''U.S. person'' definition, account ownership is evaluated only with respect to direct beneficial owners of the account. Because the status of an account turns on the status of the account's beneficial owners, the status of any nominees of an account is irrelevant in determining whether the account is a U.S. person under the final rule.

Where an account is owned by both U.S. persons and non-U.S. persons, the U.S.-person status of the account, as a general matter, should turn on whether any U.S.-person owner of the account incurs obligations under the security-based swap.[292] Consistent with the approach to U.S.-person and non-U.S.-person accounts described above, neither the status of the fiduciary or other person managing the account, nor the discretionary or non-discretionary nature of the account, nor the status of the person at which the account is held or maintained are relevant in determining the account's U.S.-person status.

(d) Estates

The final rule incorporates a new prong that expressly includes certain estates within the definition of ''U.S. person.'' Under the final rule any estate of a natural person who was a resident of the United States at the time of death is itself a U.S. person.[293] Our proposed rule did not expressly address estates because we did not believe that they typically engage in security-based swap activity and, to the extent that they do, their U.S.-person status would have been determined under the standard applicable to any legal person under our proposed rule. We received no comments in response to our questions regarding whether we should adopt a final rule that expressly addresses estates or that reflects the CFTC's proposed approach.[294]

We continue to believe that estates are not likely to be significant participants in the security-based swap market, but we also believe that, given the unique characteristics of estates, it is appropriate to include in the ''U.S. person'' definition an express reference to estates of decedents who were residents of the United States at the time of death. This element of our final definition reflects similar considerations to those that informed our inclusion of natural persons who are residents of the United States within the scope of that definition. We noted above that the security-based swap activity of a natural person who is a resident of the United States raises the types of risks that Title VII is intended to address, given that person's residence status and likely financial and legal relationships, and we expect that the estate of a natural person who was a resident of the United States at the time of his or her death is likely to operate within the same relationships that warranted subjecting such transactions to Title VII during the life of the decedent.

(e) Certain International Organizations

As under the proposal, the final rule expressly excludes certain international organizations from the definition of U.S. person.[295] This list includes ''the [IMF], the International Bank for Reconstruction and Development, the Inter-American Development Bank, the

[285] *See* note 205, *supra* (citing IAA Letter). *Cf.* CFTC Cross-Border Guidance, 78 FR 45314, 45317. One commenter suggested that the exclusion apply to funds offered publicly only to non-U.S. persons and are regulated in a foreign jurisdiction. *See* note 205, *supra* (citing ICI Letter, which suggested that funds regulated under foreign law be excluded from the ''U.S. person'' definition if they are (1) offered publicly only to non-U.S. persons; (2) offered publicly only to non-U.S. persons but offered privately to U.S. persons; or (3) authorized to offer publicly within the United States. but elect to offer only privately to non-U.S. institutional investors).

[286] *See* CFTC Cross-Border Guidance, 78 FR 45314.

[287] We also note that our guidance regarding the meaning of ''principal place of business'' is designed to identify, among other entities, investment vehicles that may pose risks to the United States, regardless of where they may be offered.

[288] Exchange Act rule 3a71–3(a)(4)(i)(C). Thus, if a partnership, corporation, trust, investment vehicle, or other legal person is a U.S. person, any account of that person is a U.S. person.

[289] *See* Exchange Act rule 3a71–3(a)(4)(i)(A) and (B).

[290] As we noted in the Cross-Border Proposing Release, this approach is consistent with the treatment of managed accounts in the context of the major security-based swap participant definition, whereby the swap or security-based swap positions in client accounts managed by asset managers or investment advisers are not attributed to such entities for purposes of the major participant definitions, but rather are attributed to the beneficial owners of such positions based on where the risk associated with those positions ultimately lies. *See* Intermediary Definitions Adopting Release, 77 FR 30690.

[291] In other words, the U.S.-person status of an account is relevant under our final rule to the extent that the security-based swap activity is carried out by or through the account. Because our final definition of ''U.S. person'' does not include investment vehicles that are majority-owned by U.S. persons, the underlying ownership of an investment vehicle that engages in security-based swap activity through an account is not relevant in determining the U.S.-person status of an account. *Cf.* note 224, *supra* (citing IAA Letter expressing concern about the relationship between the definition of accounts and treatment of funds).

[292] Two commenters urged us to exclude from the definition of ''U.S. person'' any account with a *de minimis* level of ownership by a U.S. person. *See* note 223, *supra* (citing letters from IAA and SIFMA/FIA/FSR). We, however, do not believe it would be appropriate to incorporate this concept wholesale into the definition of ''U.S. person,'' as a *de minimis* level of ownership by a U.S. person in the account does not necessarily indicate that such a U.S. person incurs only a *de minimis* level of risk or obligations under the security-based swap transactions entered into through the account. For example, the U.S. person may be jointly and severally liable with all of the other account owners for obligations incurred under a security-based swap. We recognize that account ownership may take different forms and that security-based swap transactions may impose risks and obligations on account holders in different ways. The approach we are taking here is intended to take into account the concerns expressed by commenters regarding *de minimis* U.S.-person interests in such accounts, while also recognizing that security-based swap transactions carried out through such accounts may pose risks to U.S. persons and to the U.S. financial system.

[293] *See* Exchange Act rule 3a71–3(a)(4)(i)(D).

[294] The CFTC subsequently issued an interpretation of ''U.S. person'' that expressly incorporates estates. *See* CFTC Cross-Border Guidance, 78 FR 45314.

[295] Exchange Act rule 3a71–3(a)(4)(iii).

Asian Development Bank, the African Development Bank, the United Nations, and their agencies and pension plans, and any other similar international organizations, their agencies and pension plans.'' [296] Although these organizations may have headquarters in the United States, the Commission continues to believe that their status as international organizations warrants excluding them from the definition of ''U.S. person.'' [297]

4. Representations Regarding U.S.-Person Status

Our proposed definition of ''U.S. person'' did not expressly provide that parties could rely on representations from their counterparties as to their counterparties' U.S.-person status, although we did anticipate that parties likely would request such representations.[298] On further consideration, we believe that market participants would benefit from an express provision permitting reliance on such representations.[299] Accordingly, under the final rule, a person need not consider its counterparty to be a U.S. person for purposes of Title VII if that person receives a representation from the counterparty that the counterparty does not satisfy the criteria set forth in Exchange Act rule 3a71–3(a)(4)(i), unless such person knows or has reason to know that the representation is not accurate. For purposes of the final rule a person would have reason to know the representation is not accurate if a reasonable person should know, under all of the facts of which the person is aware, that it is not accurate.[300]

Expressly permitting market participants to rely on such representations in the ''U.S. person'' definition should help mitigate challenges that could arise in determining a counterparty's U.S.-person status under the final rule. It permits the party best positioned to make this determination to perform an analysis of its own U.S.-person status and convey, in the form of a representation, the results of that analysis to its counterparty. In addition, such representations should help reduce the potential for inconsistent classification and treatment of a person by its counterparties and promote uniform application of Title VII.[301]

The final rule reflects a constructive knowledge standard for reliance. Under this standard, a counterparty is permitted to rely on a representation, unless the person knows or has reason to know that the representation is inaccurate. A person would have reason to know the representation is not accurate for purposes of the final rule if a reasonable person should know, under all of the facts of which the person is aware, that it is not accurate.[302] We believe that this ''know or have reason to know'' standard should help ensure that potential security-based swap dealers and major security-based swap participants do not disregard facts that call into question the validity of the representation.

D. Application of De Minimis Exception to Dealing Activities of Conduit Affiliates

1. Proposed Approach and Commenters' Views

The Cross-Border Proposing Release did not include requirements specific to ''conduit affiliates'' or other non-U.S. persons that enter into security-based swap transactions on behalf of their U.S. affiliates. Instead, the proposal would have treated those entities like other non-U.S. persons, and required them to count, against the *de minimis* thresholds, only their dealing transactions with U.S. persons other than foreign branches, and their dealing transactions conducted in the United States.[303] The proposal also noted that the general rule implementing the *de minimis* exception excludes transactions between majority-owned affiliates from the analysis.[304]

The proposal acknowledged the difference between its approach and the CFTC's approach in its proposed cross-border guidance, which encompassed special provisions for foreign affiliates that act as conduits for U.S. persons.[305] We thus cited the CFTC's proposed approach toward conduit affiliates in requesting comment regarding whether the Commission should follow a similar approach.[306] We also requested comment as to whether the Commission should, consistent with the CFTC's proposed approach, require a person that operates a ''central booking system''—whereby security-based swaps are booked to a single legal person—be subject to applicable dealer registration requirements as if the person had entered into the security-based swaps directly.[307] More generally, we requested comment as to whether foreign affiliates of U.S. persons, such as majority-owned subsidiaries of U.S.

[296] *Id.* Although three commenters requested that we list all such organizations that are excluded from U.S. persons, *see* note 226, *supra,* we do not believe it appropriate to attempt to enumerate an exclusive list of entities that may be eligible for such exclusion.

[297] Although three commenters requested that the final rule also exclude ''controlled affiliates'' of these international organizations from the definition of ''U.S. person,'' *see* note 229, *supra* (citing SC Letter, WB/IFC Letter, and IDB Letter), our final rule does not incorporate such an exclusion, as commenters did not provide us with information that leads us to change our view that we should not treat such affiliates' security-based swap or other activities differently from other persons that are incorporated, organized, or established in the United States or have their principal place of business here.

[298] *See* Cross-Border Proposing Release, 78 FR 31140.

[299] *Cf.* note 230, *supra* (citing IIB Letter requesting the Commission to confirm that, as a general matter, a representation is sufficient to fulfill diligence requirements under these rules).

[300] *See* Exchange Act rule 3a71–3(a)(4)(iii). This provision applies to each prong of the ''U.S. person'' definition, including the principal place of business prong. *Cf.* note 220, *supra.* As noted above, we are not providing that persons may rely solely on representations from counterparties that have been developed for purposes of the CFTC's interpretation of U.S. person. However, depending on how market participants have applied the CFTC's general facts-and-circumstances inquiry, they may be able to rely on such representations.

As we noted in the proposal, for purposes of the *de minimis* threshold, the U.S.-person status of a non-U.S. person's counterparty would be relevant only at the time of a transaction that arises out of the non-U.S. person's dealing activity. *See* Cross-Border Proposing Release, 78 FR 30994 n.264. Any change in a counterparty's U.S.-person status after the transaction is executed would not affect the original transaction's treatment for purposes of the de minimis exception, though it would affect the treatment of any subsequent dealing transactions with that counterparty. See also Product Definitions Adopting Release, 77 FR 48286 (''If the material terms of a Title VII instrument are amended or modified during its life based on an exercise of discretion and not through predetermined criteria or a predetermined self-executing formula, the Commissions view the amended or modified Title VII instrument as a new Title VII instrument'').

[301] The final rule permitting reliance on representations with respect to a counterparty's U.S.-person status applies only to the definition of ''U.S. person'' as used in this final rule and does not apply to any determinations of a person's U.S.-person status under any other provision of the federal securities laws, including Commission rules, regulations, interpretations, or guidance.

[302] *Cf.* IIB Letter at 5 n.9 (urging the Commission to permit reliance on counterparty representations, ''absent knowledge of facts that would cause a reasonable person to question the accuracy of the representation''). To the extent that a person has knowledge of facts that would lead a reasonable person to believe that a counterparty may be a U.S. person under the final definitions it may need to conduct additional diligence before relying on the representation.

We recognize that one commenter urged us to limit a reasonable reliance standard for such representations to representations concerning whether a person had its principal place of business in the United States. *Cf.* note 220, *supra* (citing ABA Letter). However, we believe that applying a single standard of reliance to all representations regarding a person's U.S.-person status will reduce the potential complexity of establishing policies and procedures associated with identifying the U.S.-person status of counterparties.

[303] *See* proposed Exchange Act rule 3a71–3(b)(1)(ii).

[304] *See* Cross-Border Proposing Release at 31006 (citing Exchange Act rule 3a71–1(d)).

[305] *See id.* at 31006 n.356.

[306] *See id.* at 31024.

[307] *See id.* at 31007.

parents, should be considered to be U.S. persons.[308]

One commenter took the view that the Commission's rules should not make use of the conduit affiliate concept notwithstanding its use in the CFTC Cross-Border Guidance, stating that the concept lacks any statutory or regulatory authority, would not advance efforts to reduce systemic risk, and, if applied to end-users, would interfere with internal risk allocations within a corporate group.[309] In contrast, one commenter depicted conduit affiliates as being a type of person that is subject to a *de facto* guarantee by a U.S. affiliate and that should thus be treated as a U.S. person, and also argued that the dealer registration requirement should apply to other types of entities subject to a *de facto* guarantee.[310]

One commenter further opposed the adoption of an approach that would require a ''central booking system'' or any other affiliate to register as a security-based swap dealer based solely on its inter-affiliate security-based swap transactions, arguing that such an approach would tie registration requirements to firms' internal risk management practices, and would hamper the ability to manage risk across a multinational enterprise.[311]

2. Final Rule

The final rule distinguishes ''conduit affiliates'' from other non-U.S. persons by requiring such entities to count all of their dealing transactions against the *de minimis* thresholds, regardless of the counterparty.[312] As discussed below, for these purposes a ''conduit affiliate'' is a non-U.S. affiliate of a U.S. person that enters into security-based swaps with non-U.S. persons, or with certain foreign branches of U.S. banks, on behalf of one or more of its U.S. affiliates (other than U.S. affiliates that are registered as security-based swap dealers or major security-based swap participants), and enters into offsetting transactions with its U.S. affiliates to transfer the risks and benefits of those security-based swaps.

After careful consideration, we believe that requiring such conduit affiliates to count their dealing transactions against the *de minimis* thresholds is appropriate to help ensure that non-U.S. persons do not facilitate the evasion of registration requirements under Dodd-Frank by participating in arrangements whereby a non-U.S. person engages in security-based swap activity outside the United States on behalf of a U.S. affiliate that is not a registered security-based swap dealer or major security-based swap participant,[313] and the U.S. affiliate assumes economic risks and benefits of those positions by entering into offsetting transactions with the non-U.S. affiliate. Absent such a requirement that conduit affiliates count their dealing transactions for purposes of the *de minimis* exception, a U.S. person may be able to effectively engage in unregistered dealing activity involving non-U.S. persons by having a non-U.S. affiliate enter into dealing transactions with other non-U.S. persons (which would not be counted against the *de minimis* thresholds because both counterparties are non-U.S. persons) or with foreign branches of U.S. banks that are registered as security-based swap dealers (which would not be counted against the *de minimis* thresholds because of an exclusion for dealing transactions with foreign branches of U.S. banks that are registered as security-based swap dealers). The U.S. person could enter into offsetting transactions with those non-U.S. affiliates, and those offsetting transactions would not be counted against the *de minimis* thresholds due to the inter-affiliate exception to the dealer analysis.[314]

Accordingly, in our view, requiring conduit affiliates to count their dealing transactions against the thresholds is necessary or appropriate to prevent the evasion of any provision of the amendments made to the Exchange Act by Title VII for the reasons given above.[315] We believe that this requirement is appropriately tailored to prevent the evasion of the dealer requirements,[316] while preserving participants' flexibility in managing risk exposures through inter-affiliate transactions.[317]

In light of the anti-evasion rationale for this use of the conduit affiliate concept, which is consistent with our statutory anti-evasion authority, we are not persuaded by a commenter's view that the use of the concept is outside of our authority.[318] We also are not persuaded by that commenter's suggestion that the use of the conduit affiliate concept would not advance risk-mitigation goals, given that the concept can be expected to help ensure that the provisions of Title VII

[308] *See id.* at 30998–99.

[309] *See* CDEU Letter at 3–5 (adding that if the conduit concept is not rejected, at a minimum it should exclude non-dealers and should not be applied to security-based swaps in which neither party is a dealer or a major participant).

[310] *See* BM Letter at 3, 14–15.

[311] *See* SIFMA/FIA/FSR Letter at A–16 to A–17 (also stating that the final CFTC cross-border guidance does not include the central booking system concept). *See also* CDEU Letter at 3–5 (raising concerns that the regulation of conduit affiliates may have the potential to interfere with the use of centralized treasury units that corporate groups may use as a market-facing entity for a non-dealer's corporate group).

[312] *See* Exchange Act rule 3a71–3(b)(1)(ii).

[313] As discussed below, the ''conduit affiliate'' definition does not encompass persons that engage in such offsetting transactions solely with U.S. persons that are registered with the Commission as security-based swap dealers or major security-based swap participants because we do not believe that such transactions raise the types of evasion concerns that the conduit affiliate concept is designed to address.

[314] The rule requires that a conduit affiliate count all of its dealing activity, and is not limited to the conduit affiliate's dealing transactions that specifically are linked to offsetting transactions with a U.S. affiliate. This is because there may not be a one-to-one correspondence between dealing transactions and their offsets for reasons such as netting.

[315] *See* Exchange Act section 30(c); section II.B.2(d), *supra.* In noting that this requirement is consistent with our anti-evasion authority under Exchange Act section 30(c), we are not taking a position as to whether such activity by a conduit affiliate otherwise constitutes a ''business in security-based swaps without the jurisdiction of the United States.''

[316] We recognize that not all dealing structures involving conduit affiliates may be evasive in purpose. We believe, however, that the anti-evasion authority of section 30(c) permits us to prescribe prophylactic rules to conduct without the jurisdiction of the United States, even if those rules would also apply to a market participant that has been transacting business through a pre-existing market structure established for valid business purposes, so long as the rule is designed to prevent possible evasive conduct. *See* Cross-Border Proposing Release, 78 FR 30987; *see also* section II.B.2(d), *supra* (discussion of anti-evasion authority); *Abramski* v. *United States,* No. 12–1493, slip op. at 14 (S. Ct. June 16, 2014) (noting ''courts' standard practice, evident in many legal spheres and presumably known to Congress, of ignoring artifice when identifying the parties to a transaction'').

We also note that while this requirement appears consistent with the views of a commenter that supported the use of the conduit affiliate concept, we take no position on that commenter's view that conduit affiliates represent a type of entity that is subject to a de facto guarantee by a U.S. person. *See* note 310, *supra.* Indeed, in our view the conduit affiliate concept will serve as a useful anti-evasion tool even in the situation where the conduit affiliate's counterparty does not consider the U.S. person's creditworthiness in determining whether to enter into a security-based swap with the conduit affiliate.

[317] For example, one potential alternative anti-evasion safeguard could be to narrow the inter-affiliate exception to counting dealing transactions against the *de minimis* thresholds, such as by making the exception unavailable in the context of transactions between non-U.S. persons and their U.S. affiliates. We believe, however, that such an approach would be less well-targeted than the use of the conduit affiliate concept, as that alternative could impact a corporate group's ability to use specific market-facing entities to facilitate the group's security-based swap activities (given that the market-facing entities would arguably be acting as a dealer on behalf of its affiliates).

[318] *See* CDEU Letter at 3 (''The concept of a conduit affiliate is not based on statutory or regulatory authority, and does not decrease the potential for systemic risk.''). *See also* note 309, *supra.*

applicable to dealers (including risk mitigation provisions such as margin and capital requirements) are implemented, which can be expected to produce risk mitigation benefits.

At the same time, we recognize the significance of commenter concerns that the use of the ''conduit affiliate'' concept or the use of a ''central booking system'' approach to registration could impede efficient risk management practices.[319] The conduit affiliate concept serves as a prophylactic anti-evasion measure, and we do not believe that any entities currently act as conduit affiliates in the security-based swap market, particularly given that a framework for the comprehensive regulation of security-based swaps did not exist prior to the enactment of Title VII, suggesting that market participants would have had no incentives to use such arrangements for evasive purposes.

Moreover, in light of this anti-evasion purpose, the definition of ''conduit affiliate'' does not include entities that may otherwise engage in relevant activity on behalf of affiliated U.S. persons that are registered with the Commission as security-based swap dealers or major security-based swap participants, as we do not believe that transactions involving these types of registered entities and their foreign affiliates raise the types of evasion concerns that the conduit affiliate concept is designed to address.[320]

In addition, in the context of the dealer *de minimis* exception, the relevant rules would require the conduit affiliate to count only its dealing transactions. The rules accordingly distinguish dealing activity by a conduit affiliate from a corporate group's use of affiliates for non-dealing purposes, such as a corporate group's use of a single affiliated person to enter into transactions with the market for risk management not involving dealing activity (accompanied by offsetting inter-affiliate transactions that place the economic substance of the instrument into another person within the group). The requirement we are adopting here—under which a conduit affiliate will count only its dealing transactions against the *de minimis* thresholds—is not expected to impact persons that enter into security-based swaps with affiliates for non-dealing purposes.[321]

Consistent with these goals, the final rule defines ''conduit affiliate'' in part as a non-U.S. person that directly or indirectly is majority-owned by one or more U.S. persons.[322] To be a conduit affiliate, moreover, such a person must in the regular course of business enter into in security-based swaps with one or more other non-U.S. persons or with foreign branches of U.S. banks that are registered as security-based swap dealers,[323] for the purposes of hedging or mitigating risks faced by, or otherwise taking positions on behalf of, one or more U.S. persons [324] (other than U.S. persons that are registered as security-based swap dealers or major security-based swap participants) that control, are controlled by, or are under common control with the potential conduit affiliate, and enter into offsetting security-based swaps or other arrangements with such affiliated U.S. persons to transfer risks and benefits of those security-based swaps.[325]

E. Application of De Minimis Exception to Dealing Activities of Other Non-U.S. Persons

As noted above, the proposal would have required non-U.S. persons to count, against the *de minimis* thresholds, only their dealing transactions involving U.S. persons other than foreign branches, and their dealing transactions conducted within the United States.[326]

Aside from issues related to conduit affiliates, addressed above, commenters discussed other issues regarding the application of the *de minimis* exception to the dealing activities of non-U.S. persons, particularly relating to: (i) Dealing transactions of non-U.S. persons that are guaranteed by their U.S. affiliates; (ii) activities within the United States; and (iii) dealing activities of other non-U.S. persons whose counterparties are U.S. persons (including foreign branches of U.S. banks) or non-U.S. persons guaranteed by U.S. persons. We are addressing those groups of issues separately, given the distinct issues relevant to each.[327] As discussed below, the final rule requires non-U.S. persons (apart from the conduit affiliates addressed above) to count all of their dealing transactions where: (1) The transaction is subject to a recourse guarantee against a U.S. affiliate of the non-U.S. person; or (2) the counterparty to the transaction is a U.S. person, other than the foreign branch of a registered security-based swap dealer.

[319] *See* note 311, *supra* (citing CDEU Letter).

[320] As discussed below, we also are applying the conduit affiliate concept to the major participant analysis to help guard against evasive practices. *See* section V.C, *infra.*

[321] One commenter particularly suggested that the conduit affiliate concept, if implemented, should exclude non-dealers. *See* CDEU Letter. As the requirement related to counting by conduit affiliates for purposes of the *de minimis* dealer exception is relevant only to the extent that a conduit affiliate engages in dealing activity, however, we do not believe that it is necessary to otherwise tailor the requirement to address the possibility that a conduit affiliate is acting on behalf of an affiliated U.S. non-dealer for risk management or other non-dealing purposes.

Moreover, as discussed above, over a recent six-year period, entities that are recognized as dealers are responsible for almost 85 percent of transactions involving single-name CDS. *See* Table 1, section III.A.1, *supra.*

[322] *See* Exchange Act rule 3a71–3(a)(1)(i)(A).

For purposes of the definition, the majority-ownership standard is met if one or more U.S. persons directly or indirectly own a majority interest in the non-U.S. person, where ''majority interest'' is the right to vote or direct the vote of a majority of a class of voting securities of an entity, the power to sell or direct the sale of a majority of a class of voting securities of an entity, or the right to receive upon dissolution, or the contribution of, a majority of the capital of a partnership. *See* Exchange Act rule 3a71–3(a)(1)(ii). This parallels the majority-ownership standard in the inter-affiliate exclusion from the dealer analysis. *See* Exchange Act rule 3a71–1(d).

[323] The definition does not require a conduit affiliate to exclusively transact with such non-U.S. persons and foreign branches. Accordingly, transactions with other types of U.S. persons would not cause a person to fall outside the ''conduit affiliate' definition.

[324] For these purposes, it would not be necessary that the non-U.S. person transfer the risks and benefits of all of its security-based swaps. It also would not be necessary that the non-U.S. person transfer all of the risks and benefits of any particular security-based swap; for example, the non-U.S. person may retain the credit risk associated with a security-based swap with a non-U.S. counterparty, but transfer to its U.S. affiliate the market risk associated with the instrument.

[325] *See* Exchange Act rule 3a71–3(a)(1)(i)(B).

The reference to ''other arrangements'' to transfer the risks and benefits of security-based swaps, as an alternative to entering into offsetting security-based swaps, may encompass, for example, the use of swaps to transfer risks and benefits of the security-based swaps (for example, two CDS based on slightly different indices of securities could be used to approximately replicate a security-based swap such as a CDS based on a single reference entity).

We note that while the CFTC Cross-Border Guidance also states the view that as a general matter conduit affiliates should count their dealing activity against the *de minimis* thresholds (*see* 78 FR 45318–19), the CFTC's interpretation of what constitutes a ''conduit affiliate'' differs in certain ways from our final rule. For example, the CFTC's approach takes into account whether the conduit affiliate's financial results are consolidated in the U.S. person's financial statements, and the CFTC states that it did not ''intend that the term 'conduit affiliate' would include affiliates of swap dealers.'' *See* CFTC Cross-Border Guidance, 78 FR 45359; *see also id.* at 45318–19 n.258.

In our view, the final rule's definition—including its prerequisite that the conduit affiliate be majority-owned by non-natural U.S. persons—appropriately focuses the meaning of the term ''conduit affiliate'' on persons who may engage in security-based swap activity on behalf of U.S. affiliates in connection with dealing activity (and, as discussed below, *see* section V.C, *infra,* in connection with other security-based swap activity in the context of the major participant definition).

[326] *See* proposed Exchange Act rule 3a71–3(b)(1)(ii).

[327] In addition, some commenters requested an exclusion for transactions that are executed anonymously and cleared. Those comments—and our incorporation of an exception for certain cleared anonymous transactions—are addressed below. *See* section IV.G, *infra.*

1. Dealing Transactions of Non-U.S. Persons That Are Subject to Recourse Guarantees by Their U.S. Affiliates

(a) Proposed Approach and Commenters' Views

Under the proposal, a non-U.S. person's transactions involving security-based swaps guaranteed by its U.S. affiliate would have been treated the same as other transactions of non-U.S. persons for purposes of the *de minimis* exception. In other words, the non-U.S. guaranteed affiliate would have counted, against the *de minimis* thresholds, only its dealing transactions involving U.S. persons other than foreign branches, and its dealing transactions otherwise conducted within the United States.[328]

In the Cross-Border Proposing Release, we solicited comment regarding whether the ''U.S. person'' definition should incorporate foreign entities that are guaranteed by their U.S. affiliates.[329] We also expressed the preliminary view that the primary risk related to such guaranteed transactions of non-U.S. persons was the risk posed to the United States via the guarantee from a U.S. person, rather than the dealing activity occurring between two non-U.S. persons outside the United States, and sought to address this risk via the proposed attribution principles in the ''major security-based swap participant'' definition, and we also expressed the view that the use of the major participant definition effectively would address those regulatory concerns.[330]

Two commenters supported an alternative approach to require such guaranteed non-U.S. persons to count all of their dealing transactions against the thresholds. One commenter stated that non-U.S. persons that receive guarantees from U.S. persons should count all of their dealing transactions toward the *de minimis* thresholds, arguing that the failure to do so would be inconsistent with the resulting flow of risk to the United States and that major participant regulation was not the appropriate means of addressing those risks.[331] Another commenter took the position that the proposed approach would provide a loophole whereby U.S. entities trading in security-based swaps could avoid regulation under the Dodd-Frank Act.[332] Both commenters further suggested that affiliates of U.S. persons be presumed to be beneficiaries of guarantees,[333] with the presumption potentially subject to rebuttal if there is notice that no guarantee would be provided.[334]

One comment letter did not explicitly address this issue, but did support the Commission's proposed approach not to require non-U.S. persons to aggregate the dealing transactions of their U.S.-guaranteed affiliates against the *de minimis* thresholds, stating that this would pose too tenuous a nexus with the U.S. to justify registration.[335]

(b) Final Rule

Under the final rule, a non-U.S. person (other than a conduit affiliate, as discussed above) must count, against the *de minimis* thresholds, any security-based swap transaction connected with its dealing activity for which, in connection with that particular security-based swap, the counterparty to the security-based swap has rights of recourse against a U.S. person that is controlling, controlled by, or under common control with the non-U.S. person.[336] For these purposes, the counterparty would be deemed to have a right of recourse against a U.S. affiliate of the non-U.S. person if the counterparty has a conditional or unconditional legally enforceable right, in whole or in part, to receive payments from, or otherwise collect from, the U.S. affiliate in connection with the non-U.S. person's obligations under the security-based swap.

We understand that such rights may arise in a variety of contexts. For example, a counterparty would have such a right of recourse against the U.S. person if the applicable arrangement provides the counterparty the legally enforceable right to demand payment from the U.S. person in connection with the security-based swap, without conditioning that right upon the non-U.S. person's non-performance or requiring that the counterparty first make a demand on the non-U.S. person. A counterparty also would have such a right of recourse if the counterparty itself could exercise legally enforceable rights of collection against the U.S. person in connection with the security-based swap, even when such rights are conditioned upon the non-U.S. person's insolvency or failure to meet its obligations under the security-based swap, and/or are conditioned upon the counterparty first being required to take legal action against the non-U.S. person to enforce its rights of collection.

The terms of the guarantee need not necessarily be included within the security-based swap documentation or even otherwise reduced to writing (so long as legally enforceable rights are created under the laws of the relevant jurisdiction); for instance, such rights of recourse would arise when the counterparty, as a matter of law in the relevant jurisdiction, would have rights to payment and/or collection that may arise in connection with the non-U.S. person's obligations under the security-based swap that are enforceable.[337] We would view the transactions of a non-U.S. person as subject to a recourse guarantee if at least one U.S. person (either individually or jointly and severally with others) bears unlimited responsibility for the non-U.S. person's obligations, including the non-U.S. person's obligations to security-based

[328] *See* proposed Exchange Act rule 3a71–3(b)(1)(ii).

[329] *See* Cross-Border Proposing Release, 78 FR 30998.

[330] *See id.* at 31006. As part of the proposal, we also expressed the preliminary view that dealer regulation of such persons would not materially increase the programmatic benefits of the dealer registration requirement, and that such an approach would impose programmatic costs without a corresponding increase in programmatic benefits to the U.S. security-based swap market. *See id.* at 31146–47. For the reasons discussed below, however, we have concluded that it is appropriate to require non-U.S. guaranteed affiliates of U.S. persons to count, against the *de minimis* thresholds, their dealing transactions that are subject to a right of recourse against a U.S. person. *See* IV.E.1(b) (discussing the final rule's changes to the preliminary view).

[331] *See* BM Letter at 17–18.

[332] *See* AFR Letter I at 7–8, 14.

[333] *See id.* at 14 (''In cases where a guarantee is implicit, the use of a rebuttable presumption of a guarantee will put the burden on the foreign affiliate in question to demonstrate to regulators that it is not guaranteed.''); BM Letter at 14 (suggesting in part that support should be presumed if a foreign affiliate incorporates a ''de facto guarantor's name in its own'').

[334] *See* AFR Letter I at 7 (''This presumption could be rebutted by showing clear evidence that counterparties were informed of the absence of a guarantee.''); BM Letter at 14–15 (suggesting that presumptions of support might be rebutted by explicit statements within trade documentation accompanied by explicit counterparty waivers, and discussing the potential additional use of associated public filing requirements and of possible ''ring-fence'' systems for determining which affiliates should be considered U.S persons).

[335] *See* SIFMA/FIA/FSR Letter at A–17.

[336] *See* Exchange Act rule 3a71–3(b)(1)(iii)(B). Consistent with the rule generally requiring a person to consider its affiliates' dealing activities for purposes of the *de minimis* exception (Exchange Act rule 3a71–2(a)(1)), the Commission interprets control to mean the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract or otherwise. *See* Intermediary Definitions Adopting Release, 77 FR 30631 n.437.

[337] For purposes of the dealer *de minimis* exception, rights of recourse would not be present if legally enforceable rights were to arise by operation of law following the transaction, such as due to later actions that evidence the disregard of corporate form by a party to the transaction and its affiliate. Rights of recourse, in contrast, would encompass rights existing at the time of the transaction but conditioned upon the non-U.S. person's insolvency or failure to meet its obligations under the security-based swap or conditioned upon the counterparty first being required to take legal action against the non-U.S. person to enforce its right of collection.

swap counterparties. Such arrangements may include those associated with foreign unlimited companies or unlimited liability companies with at least one U.S.-person member or shareholder, general partnerships with at least one U.S.-person general partner, or entities formed under similar arrangements such that at least one U.S. persons bears unlimited responsibility for the non-U.S. person's liabilities. In our view, the nature of the legal arrangement between the U.S. person and the non-U.S. person—which makes the U.S. person responsible for the obligations of the non-U.S. person—is appropriately characterized as a recourse guarantee, absent countervailing factors. More generally, a recourse guarantee is present if, in connection with the security-based swap, the counterparty itself has a legally enforceable right to payment or collection from the U.S. person, regardless of the form of the arrangement that provides such a legally enforceable right to payment or collection.

Accordingly, the final rule clarifies that for these purposes a counterparty would have rights of recourse against the U.S. person ''if the counterparty has a conditional or unconditional legally enforceable right, in whole or in part, to receive payments from, or otherwise collect from, the U.S. person in connection with the security-based swap.'' [338]

In revising the proposal, we have been influenced by commenter concerns that the proposed approach could allow non-U.S. persons to conduct a dealing business involving security-based swaps that are guaranteed by a U.S. affiliate without being regulated as a dealer, even though the guarantee exposes the U.S. person guarantor to risk in connection with the dealing activity.[339]

This final rule also reflects our conclusion that a non-U.S. person—to the extent it engages in dealing activity involving security-based swaps subject to a recourse guarantee by its U.S. affiliate—engages in dealing activity that occurs, at least in part, within the United States. As discussed above, the economic reality is that by virtue of the guarantee the non-U.S. person effectively acts together with its U.S. affiliate to engage in the dealing activity that results in the transactions, and the non-U.S. person's dealing activity cannot reasonably be isolated from the U.S. person's activity in providing the guarantee. The U.S. person guarantor together with the non-U.S. person whose dealing activity it guarantees jointly may seek to profit by providing liquidity and otherwise engaging in dealing activity in security-based swaps, and it is the U.S. guarantor's financial resources that enable the guarantor to help its affiliate provide liquidity and otherwise engage in dealing activity. It is reasonable to assume that the counterparties of the non-U.S. person whose dealing activity is guaranteed look to both the non-U.S. person and the U.S. guarantor for performance on the security-based swap. Moreover, the U.S. guarantor bears risks arising from any security-based swap between the non-U.S. person whose dealing activity it guarantees and that affiliate's counterparties, wherever located.

This approach is consistent with the purposes of Title VII. The exposure of the U.S. guarantor creates risk to U.S. persons and potentially to the U.S. financial system via the guarantor to a comparable degree as if that U.S. person had directly entered into the transactions that constituted dealing activity by the affiliate. In many cases the counterparty to the non-U.S. person whose dealing activity is guaranteed may not enter into the transaction with that non-U.S. person, or may not do so on the same terms, absent the guarantee. The U.S. guarantor usually undertakes obligations with respect to the security-based swap regardless of whether that non-U.S. person ultimately defaults in connection with the security-based swap.[340]

In requiring non-U.S. persons whose dealing involves security-based swaps that are guaranteed by a U.S. person to apply those dealing transactions against the *de minimis* thresholds, the final rule further reflects the fact that the economic reality of an offshore dealing business using such non-U.S. persons may be similar or identical to an offshore dealing business carried out through a foreign branch. In both cases the risk of the dealing activity has directly been placed into the United States, and non-U.S. counterparties generally may be expected to look to a U.S. person's creditworthiness in deciding whether to enter into the transaction with the guarantor's non-U.S. affiliate or the foreign branch (and on what terms). The final rule thus should help apply dealer regulation in similar ways to differing organizational structures that serve similar economic purposes, and help avoid disparities in applying dealer regulation to differing arrangements that pose similar risks to the United States.[341]

We believe, moreover, that this final rule is necessary or appropriate as a prophylactic measure to help prevent the evasion of the provisions of the Exchange Act that were added by the Dodd-Frank Act, and thus help ensure that the relevant purposes of the Dodd-Frank Act are not undermined. Without this rule, U.S. persons may have a strong incentive to evade dealer regulation under Title VII simply by conducting their dealing activity via a guaranteed affiliate, while the economic reality of transactions arising from that activity—including the risks these transactions introduce to the U.S. market—would be no different in most respects than transactions directly entered into by U.S. persons. In other words, for example, if a U.S. entity engaged in security-based swap dealing wanted to either avoid registration or otherwise have its security-based swap transactions with foreign counterparties be outside the various Title VII requirements with respect to those transactions, it could establish an overseas affiliate and simply extend a

[338] *See* Exchange Act rule 3a71–3(b)(1)(B). This approach of looking to the presence of rights of recourse to identify guarantees is consistent with our prior views in connection with Title VII implementation. *See generally* Intermediary Definitions Adopting Release, 77 FR 30689 (stating that in connection with the application of the major participant definition, ''positions in general would be attributed to a parent, other affiliate or guarantor for purposes of the major participant analysis to the extent that the counterparties to those positions would have recourse to that other entity in connection with the position''); Cross-Border Proposing Release, 78 FR 30977 (noting that a guarantee would typically give the counterparties to a U.S. non-bank dealer direct recourse to a holding company, as though the guarantor had entered into the transactions directly).

[339] *See* BM Letter at 12, 17–18 (stating that the ''proposed exemption has the potential to create a large loophole for foreign market participants, while leaving the risk with the American taxpayer,'' also stating that ''*de facto* guaranteed affiliates'' should be classified as U.S. persons ''under the SEC's territorial or anti-evasion authority''); AFR Letter I at 5 (suggesting that the proposed treatment of U.S.-guaranteed affiliates, as well as certain other aspects of the proposal, could result in regulatory arbitrage).

[340] We understand that, in practice, a guarantor's obligation to a derivatives counterparty of a person whose security-based swap activity is guaranteed may be based on the same terms as that of the guaranteed person, and that the guarantor's obligation to make payments under the contract may not be contingent upon the guaranteed person's default. Moreover, we understand that margin payments under a contract at times may be made directly by a U.S. guarantor to the counterparty of the guaranteed person, particularly when the corporate group uses a consolidated back office located within a parent guarantor, or when the derivative is denominated in U.S. dollars. We further understand that a counterparty may, for risk management purposes, use a single credit limit for all transactions guaranteed by a parent, regardless of which particular affiliate may be used for booking the transaction with that counterparty.

[341] For the above reasons, we conclude that this final rule is not being applied to persons who are ''transact[ing] a business in security-based swaps without the jurisdiction of the United States,'' within the meaning of Exchange Act section 30(c). *See* section II.B.2(a), *supra.*

payment guarantee. The purpose for doing so would be to evade the requirements of Title VII and the incentives to do so could be high, making it necessary and appropriate to invoke our Title VII authority, because the economic reality of these transactions would be no different in most respects, including the risks these transactions could introduce to the U.S. market. Arrangements between a U.S. person and a non-U.S. person that, as a matter of law in the relevant jurisdiction, make the U.S. person responsible for the non-U.S. person's liabilities may create similarly strong incentives to restructure business operations to avoid the application of Title VII by providing the economic equivalent of an express guarantee through an arrangement that under relevant law provides the non-U.S. person counterparty with direct recourse against the U.S. person. For these reasons, we believe that it is necessary and appropriate to adopt this rule pursuant to our anti-evasion authority under Exchange Act section 30(c).[342]

Compared to the proposal, this approach also more fully accounts for differences between the regulatory regimes applicable to security-based swap dealers and major security-based swap participants. The definition of ''major security-based swap participant'' focuses on systemic risk issues, in that it particularly targets persons that maintain ''substantial positions'' that are ''systemically important,'' or that pose ''substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets.'' [343] The thresholds associated with the major participant definition reflect that systemic risk focus.[344] The dealer definition, in contrast, is activity-focused, addresses the significance of a person's dealing activity only via the *de minimis* exception, and addresses regulatory interests apart from risk.[345] Accordingly, upon further consideration, we believe that availability of major participant regulation does not mitigate the above considerations regarding risk and regulatory treatment of similar business models, and those considerations are better addressed by counting dealing activities guaranteed by U.S. affiliates against the *de minimis* thresholds of the non-U.S. persons whose transactions are subject to the guarantees.[346]

In adopting these provisions, we acknowledge that the final rule does not go as far as some commenters have requested, in that it does not require a non-U.S. person to count its dealing transactions involving security-based swaps that do not grant its counterparty a recourse guarantee against the U.S. affiliate of that non-U.S. person, even if the U.S. affiliate is subject to a recourse guarantee with respect to other security-based swaps of the same non-U.S. person. The final rule also does not incorporate the suggestion from certain commenters that we should treat U.S. entities and their affiliates as equivalent for purposes of the cross-border implementation of Title VII.[347] The final rule further does not incorporate the suggestion that affiliates of a U.S. person should be presumed to be recipients of *de facto* guarantees, which could be rebutted via disclosure.[348]

Those commenters raise important concerns regarding the possibility that, even absent explicit financial support arrangements, U.S. entities that are affiliated with non-U.S. persons for reputational reasons may determine that they must support their non-U.S. affiliates at times of crisis. In those commenters' view, such considerations impose risks upon U.S. markets even absent explicit legal obligations. As a result, the commenters suggest that foreign affiliates of U.S. entities should have to count all their dealing transactions against the *de minimis* thresholds, or that such foreign affiliates should be deemed to be ''U.S. persons'' for purposes of Title VII.[349]

Our modification requiring these non-U.S. persons to count certain of their dealing transactions with non-U.S. persons against the *de minimis* thresholds partially addresses those commenter concerns.[350] We also recognize that there may be circumstances in which a U.S. person provides its foreign affiliate with non-recourse support that is not specifically linked to particular instruments or to derivatives activities generally. Our final rule, however, targets recourse-based arrangements whereby the counterparties to the non-U.S. affiliate would be particularly likely to look to the U.S. person for satisfaction of some or all of the obligations arising under the security-based swap. On balance, we believe that an approach that focuses on the presence of recourse arrangements appropriately addresses dealing activities that have a particularly direct effect on the U.S. market, as well as the ability of a U.S. person to use such guarantees to conduct a security-based

[342] Exchange Act section 30(c) particularly provides that ''[n]o provision of [Title VII] . . . shall apply to any person insofar as such person transacts a business in security-based swaps without the jurisdiction of the United States,'' unless that business is transacted in contravention of rules prescribed to prevent evasion of Title VII.

[343] *See* Exchange Act section 3(a)(67).

[344] For example, for cleared security-based CDS, a person would have to write $200 billion notional of CDS protection to meet the relevant $2 billion ''potential future exposure'' threshold that is used as part of the major participant analysis. *See* Intermediary Definitions Adopting Release, 77 FR 30671 n.914.

[345] *See id.* at 30629 (''The statutory requirements that apply to swap dealers and security-based swap dealers include requirements aimed at the protection of customers and counterparties, . . . as well as requirements aimed at helping to promote effective operations and transparency of the swap and security-based swap markets.''; footnotes omitted).

[346] This is consistent with the view of one commenter that highlighted the differences in purpose between dealer and major participant regulation. *See* BM Letter.

[347] *See id.* at 14, 17–18 (''Thus, regardless of whether an affiliate is 'guaranteed' by a U.S. person, that affiliate may be effectively guaranteed, having the same connection with and posing the same risks to the United States.''). *See also* AFR Letter I at 7–8.

[348] *See* notes 333 and 334, *supra* and accompanying text. We note that any U.S. person that is subject to the reporting requirements of section 13(a) or section 15(d) of the Exchange Act, 15 U.S.C. 78m(a) or 15 U.S.C. 78o(d) respectively, regardless of whether that person provides a recourse guarantee relating to its non-U.S. affiliates' obligations, must consider whether there are disclosures that must be made in its periodic reports regarding any of its obligations. These disclosures would include any known trends, events, demands, commitments and uncertainties that are reasonably likely to have a material effect on the financial condition or operating performance of the U.S. person that would be required to be disclosed pursuant to Item 303 of Regulation S–K. As required by Item 303 of Regulation S–K, the disclosures are presented with regard to the registrant (the U.S. person) and its subsidiaries on a consolidated basis. *See* Item 303 of Regulation S–K, 17 CFR 229.303, and *Commission's Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations,* Securities Act Release No. 8350 (Dec. 19, 2003), 68 FR 75056 (Dec. 29, 2003). *See also* Item 305 of Regulation S–K, 17 CFR 229.305.

[349] *See* AFR Letter I at 7 (stating that ''[b]oth explicit and implicit guarantees of support from the parent institution should be counted,'' with a rebuttable presumption that a subsidiary of a U.S. entity is guaranteed, and that ''[s]hould the SEC not include guaranteed affiliates and subsidiaries in the definition of 'U.S. person', at the very least SBS with such entities should count toward entities *de minimis* calculation''); BM Letter at 12, 17 (stating that guaranteed affiliate should be defined ''to include those affiliates that are de factor guaranteed, even though not explicitly subject to a guarantee agreement,'' and that transactions with non-U.S. persons that receive guarantees from U.S. persons should be included in the *de minimis* calculation).

[350] This final rule regarding the *de minimis* exception does not encompass non-U.S. persons who receive a guarantee from an *unaffiliated* U.S. person. We do not expect that U.S. persons would use guarantees of unaffiliated persons as a substitute for dealing activity via a foreign branch, and we do not believe such arrangements comprise a significant part of dealing activity in the market. Our final rules do, however, generally require such non-affiliate arrangements to be included in the major security-based swap participant threshold calculations. *See* section V.D.3, *infra*.

swap dealing business as an alternative to using a foreign branch.

This is not to say that more general financial support arrangements do not also pose risks to U.S. persons and potentially to the U.S. financial system, including risks posed by the activity of non-U.S. persons to their U.S. parents or affiliates. However, we believe that this focus on recourse guarantees appropriately addresses the most direct risks posed by such guarantee arrangements to U.S. persons and potentially to the U.S. financial system. We also note that Congress has provided additional regulatory tools apart from Title VII to address such risks. Indeed, in enacting the Dodd-Frank Act, Congress provided general tools—not merely tools focusing on derivatives activities—to address the risks associated with U.S.-based financial groups as a whole, including the risks posed by such groups' non-guaranteed foreign affiliates engaged in financial services business. This holistic approach to risks that could flow back to the United States may reflect the fact that financial services activities apart from security-based swaps constitute the great majority of such groups' overall financial activities outside the United States that can produce such risks. The regulatory tools substantially enhanced by the Dodd-Frank Act to better address these cross-border risks posed by financial services activities other than security-based swaps and such tools include globally consolidated capital requirements (including enhanced capital and leverage standards, group-wide single-counterparty credit limits, and capital surcharges for firms with particularly high levels of risk), and globally consolidated liquidity and risk management standards (including stress testing, debt-to-equity limitations, living will requirement, and timely remediation measures). By accounting for risks at the consolidated level, these tools address risks posed by guaranteed and non-guaranteed subsidiaries within U.S.-based financial groups, regardless of whether the subsidiaries are based in the United States or outside the United States.[351] Our focus on recourse guarantees appropriately targets the concerns raised by security-based swap activity that Title VII was intended to address, recognizing that Congress has established other regulatory tools that are specifically intended, and better suited, to address risks to bank holding companies and financial holding companies, arising from the financial services activities of a foreign affiliate of those holding companies where the foreign affiliate does not engage in security-based swap activity in the United States.

Conversely, one commenter implicitly appeared to oppose any requirement that non-U.S. persons count their guaranteed transactions carried out in a dealing capacity with non-U.S. person counterparties against their *de minimis* thresholds.[352] For the reasons discussed above, however, we believe that the targeted counting required by the final rule is appropriate to reflect activity involving security-based swaps that occurs in the United States and presents risks to U.S. persons and potentially to the U.S. financial system.

Finally, in adopting these provisions we recognize that the CFTC Cross-Border Guidance appears to broadly opine that non-U.S. persons who receive any express guarantee from a U.S. affiliate should, as a general matter, count all of their dealing activity against the *de minimis* thresholds, regardless of whether a counterparty has recourse against the U.S. person in connection with the swap.[353] Our final rule is more targeted than the CFTC approach, in that our final rule requires a non-U.S. guaranteed affiliate to count only those dealing transactions for which the counterparty to the security-based swap has recourse against a U.S. person that is affiliated with the non-U.S. person. This reflects our decision to focus the application of the *de minimis* exception on recourse arrangements involving security-based swaps, while recognizing that some non-recourse arrangements could influence a U.S. person to provide financial support to non-U.S. persons and thereby present risk to the U.S. person and potential risk to the U.S. financial system.

2. Dealing Transactions of Non-U.S. Persons Involving U.S. and Other Counterparties

(a) Proposed Approach and Commenters' Views

Under the proposal, non-U.S. persons also would be required to count their dealing transactions entered into with a U.S. person, other than a foreign branch.[354] As discussed below, this proposed exclusion for transactions in which the counterparty is a foreign branch reflected concerns regarding U.S. banks being limited in their access to foreign counterparties when conducting dealing activity through their foreign branches.

The proposal solicited comment regarding whether non-U.S. persons should be required to count, towards their *de minimis* thresholds, transactions with U.S. persons or with foreign branches of U.S. banks. It also solicited comment regarding whether non-U.S. persons should be required to count the dealing transactions they enter into with registered security-based

[351] *See, e.g.,* Public Law 111–203, sections 165–166 of the Dodd Frank Act, 124 Stat. 1376, 1423–32 (2010). In the Cross-Border Proposing Release, in connection with our preliminary view that the risks posed by guarantees could be adequately addressed via the regulation of major security-based swap participants, we referenced the Bank Holding Company Act of 1956, and the provisions of Title I of the Dodd-Frank Act regarding the regulation of certain nonbank financial companies and bank holding companies that pose a threat to the financial stability of the United States. *See* Cross-Border Proposing Release, 78 FR 31006 n.360.

For the reasons discussed above, however, we have concluded that the presence of those particular regulatory safeguards do not warrant the conclusion that non-U.S. guaranteed affiliates of U.S. persons should not have to count, against the *de minimis* thresholds, their dealing activity involving other non-U.S. persons when the transaction is subject to a right of recourse against the U.S. affiliate. Although those provisions encompass regulatory safeguards that can be expected to address the risks associated with U.S.-based financial groups, upon further consideration we conclude that it is appropriate for the application of the *de minimis* test to directly account for those specific security-based swap transactions that are subject to recourse guarantees, as opposed to more generalized risks arising from the range of activities conducted by non-guaranteed foreign affiliates, given the U.S. person's participation in the security-based swap transaction through the guarantee.

[352] *See* note 335, *supra,* and accompanying text.

[353] *See* CFTC Cross-Border Guidance, 78 FR 45319. For those purposes, the CFTC Cross-Border Guidance interprets guarantees generally to include ''not only traditional guarantees of payment or performance of the related swaps, but also other formal arrangements that, in view of all the facts and circumstances, support the non-U.S. person's ability to pay or perform its swap obligations with respect to its swaps,'' and also refers to ''keepwells and liquidity puts, certain types of indemnity agreements, master trust agreements, liability or loss transfer or sharing agreements, and any other explicit financial support arrangements'' as being types of guarantees notwithstanding that that they ''may provide for different third-party rights and/or address different risks than traditional guarantees.'' *See id.* at 45319–20.

[354] *See* proposed Exchange Act rule 3a71–3(b)(1)(ii). For those purposes, ''foreign branch'' was defined to mean any branch of a U.S. bank if: the branch is located outside the United States; the branch operates for valid business reasons; and the branch is engaged in the business of banking and is subject to substantive banking regulation in the jurisdiction where it is located. *See* proposed Exchange Act rule 3a71–3(a)(1). The proposal also included a definition of ''transaction conducted through a foreign branch'' that encompassed transactions solicited, negotiated, or executed through a foreign branch where the foreign branch is the counterparty to the transaction, and the transaction was not solicited, negotiated, or executed by a person within the United States. *See* proposed Exchange Act rule 3a71–3(a)(4).

Under the CFTC's cross-border guidance, as a general matter non-U.S. persons may exclude their dealing activities involving foreign branches of U.S. persons only if the U.S. person is registered with the CFTC as a swap dealer. *See* CFTC Cross-Border Guidance, 78 FR 45319.

swap dealers, and regarding whether non-U.S. persons should be able to conduct dealing transactions within the United States without registering if their transactions are with a registered security-based swap dealer.[355]

Two commenters took the position that non-U.S. persons should have to count their transactions with foreign branches of U.S. banks against the *de minimis* thresholds, noting that those foreign branches themselves fall within the ''U.S. person'' definition,[356] and stating that excluding those transactions would serve as a loophole from regulation.[357] In contrast, one commenter stated that such transactions should be excluded from the *de minimis* analysis even if U.S. personnel are involved in soliciting, negotiating, executing or booking the transaction.[358]

Commenters also addressed the application of the exception to non-U.S. persons' dealing activities involving counterparties that are guaranteed affiliates of non-U.S. persons. The proposal did not require such transactions to be counted. One commenter expressed support for the fact that our proposal, unlike the CFTC's guidance, did not require non-U.S. persons to count certain transactions with non-U.S. counterparties that are guaranteed by U.S. persons.[359] On the other hand, one commenter stated that non-U.S. persons should count against the thresholds security-based swaps entered into with guaranteed affiliates and subsidiaries of U.S. persons if those affiliates and subsidiaries are not included within the ''U.S. person'' definition.[360] Also, as noted above, that commenter and one other commenter generally suggested that the presence of explicit or implicit guarantees of foreign affiliates should trigger application of the Exchange Act.[361]

(b) Final Rule

The final rule has been modified from the proposal to require non-U.S. persons (other than conduit affiliates[362]) to count, against the *de minimis* thresholds, their dealing transactions with U.S. persons other than certain transactions with the foreign branches of registered security-based swap dealers.[363] The proposal would have excluded all of the non-U.S. person's transactions with a foreign branch (other than ''transactions conducted within the United States'') regardless of the branch's registration status.

The requirement that such non-U.S. persons must count their dealing transactions with U.S. persons against the *de minimis* thresholds reflects the fact that dealing activity involving counterparties who are U.S. persons necessarily involves the performance, at least in part, of dealing activity within the United States. As discussed above, a non-U.S. person engaged in dealing activity with U.S. persons in an amount sufficient to implicate the *de minimis* thresholds reasonably can be concluded to constitute dealing activity within the United States by virtue of indicating that the non-U.S. person is commonly known in the trade as a security-based swap dealer within the United States, and that the non-U.S. person is regularly entering into security-based swaps as an ordinary course of business within the United States.[364] Similarly, that non-U.S. person seeks to profit by, among other things, providing liquidity within the United States and engaging in market making in security-based swaps within the United States, and its decision to engage in dealing activity with U.S. persons affects the liquidity of the security-based swap market within the United States. U.S. persons incur risks arising from this dealing activity, which in turn potentially creates risk to the U.S. financial system more generally. Transactions with U.S. persons further raise market transparency and counterparty protection concerns that Title VII is intended to address. Accordingly, the dealing activity of such a non-U.S. person is best characterized as occurring, at least in part, within the United States to the extent that the dealing activity involves a U.S. person.[365] No commenters to the Cross-

[355] *See* Cross-Border Proposing Release, 78 FR 30995.

[356] *See* AFR Letter I at 6 (supporting the premise that offices and branches of U.S. persons are ''an integral part of the U.S. person'' but arguing that it is inconsistent to treat such foreign branches different from their U.S. parent institutions); BM Letter at 18 (noting that the foreign branch of a U.S. person should be treated no differently than the U.S. person).

[357] *See* AFR Letter I at 6–7 (''With these incentives [related to transactions with foreign branches, offices and guaranteed subsidiaries and affiliates of U.S. persons], it is unlikely that any foreign entities will choose to trade within the United States directly, and quite likely that U.S. financial institutions will simply advise their clients to trade with their foreign branches if they want to avoid Dodd-Frank''); BM Letter at 3, 18–19 (''This exception is no more than a loophole based upon a scare tactic, which will cause U.S. firms to operate their SBS business through offshore branches.'').

[358] *See* SIFMA/FIA/FSR Letter at A–15 to A–16 (supporting the proposed approach and urging the Commission to extend the exclusion to transactions between non-U.S. persons and foreign branches even if they are conducted within the United States).

[359] *See* SIFMA/FIA/FSR Letter at A–17. Under the CFTC's guidance, non-U.S. persons would generally count certain dealing transactions involving counterparties that are guaranteed affiliates of U.S. persons, subject to exceptions. *See* CFTC Cross-Border Guidance, 78 FR 45319.

[360] *See* AFR Letter I at 7–8 and note 28 (stating that the proposal ''incentivizes U.S. institutions to execute SBS indirectly by using foreign affiliates, subsidiaries, branches and offices,'' and thus lead U.S. institutions to incur risks ''by trading with foreign entities without the full regulatory protections of Dodd-Frank''; also acknowledging that U.S. guarantors would count those trades for determining whether the guarantor is a major participant, but adding that major participants are subject to fewer requirements than dealers ''so this is not a satisfactory method for addressing the risks presented by U.S. parent institutions guaranteeing the swaps of foreign subsidiaries and affiliates'').

[361] *See* note 333, *supra.*

[362] The separate counting requirements applicable to conduit affiliates are addressed above. *See* section IV.D, *supra.*

[363] *See* Exchange Act rule 3a71–3(b)(1)(iii)(A). ''Foreign branch'' is defined in Exchange Act rule 3a71–3(a)(2).

[364] *See* section II.B.2(b)iii, *supra.* We also note that the Commission's traditional approach toward the registration of securities brokers and dealers under the Exchange Act generally requires registration of foreign brokers or dealers that, from outside the United States, induce or attempt to induce securities transactions by persons within the United States. *See* Cross-Border Proposing Release, 78 FR 30990 n.213 and accompanying text.

In this regard we recognize that Exchange Act rule 15a-6, which provides an exemption for the activities of certain foreign broker-dealers, includes an exemption for transactions in securities with or for persons ''that have not been solicited by the foreign broker or dealer.'' Exchange Act rule 15a-6(a)(1). In adopting this provision, the Commission stated that it ''does not believe, as a policy matter, that registration is necessary if U.S. investors have sought out foreign broker-dealers outside the United States and initiated transactions in foreign securities markets entirely of their own accord.'' *See* 54 FR 30013, 30017 (Jul. 18, 1989). The Commission further stated that a narrow construction of ''solicitation'' would be inconsistent with the Exchange Act. *See id.* at 30018. We do not believe that a similar unsolicited exception—which reflects a policy decision rather than a matter of statutory scope—would be appropriate in this context, particularly given that situations in which non-U.S. persons engage in dealing activity with U.S. persons in an amount that is significant enough to implicate the *de minimis* thresholds would not appear consistent with a policy allowing non-U.S. persons to accommodate transactions which U.S. persons initiate ''entirely of their own accord.'' Moreover, we note that the definition of ''security-based swap dealer'' includes persons that hold themselves out as security-based swap dealers or that are commonly known in the trade as security-based swap dealers. *See* Exchange Act section 3(a)(71)(A). Such persons may not actively solicit transactions from particular customers, and nothing in the statutory definition suggests that active solicitation on the part of such persons is required for them to fall within the definition of ''security-based swap dealer.''

[365] For the above reasons, we conclude that this final rule is not being applied to persons who are ''transact[ing] a business in security-based swaps without the jurisdiction of the United States,'' within the meaning of Exchange Act section 30(c). *See* section II.B.2(b)iii, *supra.* We also believe, moreover, that this final rule is necessary or appropriate as a prophylactic measure to help prevent the evasion of the provisions of the Exchange Act that were added by the Dodd-Frank Act, and thus help ensure that the relevant purposes of the Dodd-Frank Act are not undermined. Without this rule, market participants could engage in dealing activity with persons

Border Proposing Release expressed opposition to generally requiring non-U.S. persons to count their dealing transactions with U.S. persons (other than comments regarding transactions with foreign branches, as discussed below).

The final rule permits such non-U.S. persons not to count certain dealing transactions conducted through a foreign branch of a counterparty that is a U.S. bank as part of the *de minimis* analysis. For this exclusion to be effective, persons located within the United States cannot be involved in arranging, negotiating, or executing the transaction. Moreover—and in contrast to the proposal—the counterparty bank must be registered as a security-based swap dealer,[366] unless the transaction occurs prior to 60 days following the effective date of final rules providing for the registration of security-based swap dealers.[367] Registration of the counterparty U.S. bank would not be required for the exclusion to be effective before then, given that the non-U.S. person would not be able to know with certainty whether the U.S. bank in the future would register with the Commission as a security-based swap dealer.[368]

As we noted in the proposal, although a foreign branch is part of a ''U.S. person,'' and dealing transactions with foreign branches pose risk to the U.S. financial system, requiring non-U.S. persons to count transactions with foreign branches ''could limit access of U.S. banks to non-U.S. counterparties when they conduct their foreign security-based swap dealing activity through foreign branches because non-U.S. persons may not be willing to enter into transactions with them in order to avoid being required to register as a security-based swap dealer.''[369] We continue to believe that generally permitting a non-U.S. person not to count those types of transactions that do not involve U.S. personnel against the thresholds thus should help avoid the disparate treatment of foreign branches that engage in security-based swap dealing activity and that seek to access offshore dealing services, compared to other persons that engage in security-based swap dealing activities outside the U.S.

The final rule differs from the proposal in that the final rule permits a non-U.S. person not to count its transactions with a foreign branch of a U.S. person against the *de minimis* thresholds only when the foreign branch is part of a registered security-based swap dealer (or for a temporary period of time prior to 60 days prior to the effectiveness of the dealer registration requirements), rather than transactions with any foreign branch. This tailoring of the proposal seeks to balance the above concerns that the proposed approach would result in disparate treatment of foreign branches and U.S. persons having inadequate access to liquidity located outside the United States, against the purposes of dealer regulation under Title VII. This consideration of competing interests results in an approach that will help to focus the application of the *de minimis* exception in such a way as to ensure that a registered security-based swap dealer is involved in the transaction, and thus that relevant Title VII provisions applicable to dealers (such as margin requirements) will apply to the transaction.[370] This manner of focusing the exclusion also is consistent with the approach taken by the CFTC in its cross-border guidance.[371]

In adopting an exclusion for certain transactions with foreign branches, we recognize that some commenters opposed having any such exclusion for a non-U.S. person's transactions with a foreign branch, stating that the breadth of the proposed exclusion would facilitate the avoidance of the Dodd-Frank Act even while U.S. entities incur the risks of transactions with foreign entities, and that the exclusion would be based on a ''scare tactic.''[372] We nonetheless believe that this approach is justified by concerns about disparate treatment, along with associated liquidity concerns.[373] We also note that the modification of the proposal—such that transactions with foreign branches are excluded only if the foreign branch is part of a registered dealer—should help address concerns that the exclusion would promote evasion of the dealer requirements.[374] Also, as discussed below, a transaction would not constitute a ''transaction conducted through a foreign branch'' if personnel located in the United States were responsible for arranging, negotiating or executing the transaction.

We also recognize that commenters took the view that such an exclusion is inconsistent with the fact that foreign branches fall within the ''U.S. person'' definition.[375] In our view, the exclusion does not disregard the U.S.-person status of foreign branches. Instead, as discussed above, we believe that this exclusion is appropriate to address market concerns regarding disparate treatment of the dealing activity of foreign branches, notwithstanding that U.S.-person status.

We also have considered the view of one commenter that all of a non-U.S. person's transactions with foreign

within the U.S. market, causing the U.S. person counterparties to incur associated risks simply by using non-U.S. persons to engage in those transactions with U.S. counterparties.

[366] *See* Exchange Act rule 3a71–3(b)(1)(iii)(A)(1).

As addressed in the Cross-Border Proposing Release, the ability of U.S. banks to conduct security-based swap activity potentially will be limited by section 716 of the Dodd-Frank Act, which in part prohibits certain federal assistance to security-based swap dealers, and by section 619 of the Dodd-Frank Act, which in part prohibits banking entities from engaging in proprietary trading. *See* Cross-Border Proposing Release, 78 FR 31002 n.326. The prohibitions of section 619 do not extend to certain market making activities. *See* Dodd-Frank Act section 619(d)(1)(B). In December of 2013, the Commission, together with the Office of the Comptroller of Currency, the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the CFTC, issued final rules implementing section 619 of the Dodd-Frank Act. *See* 79 FR 5536 (Jan. 31, 2014). In addition, based on our understanding of changes in the way major U.S. dealers engage with non-U.S. counterparties in the single-name CDS market following the issuance of the CFTC Cross-Border Guidance, we believe that few, if any, U.S. persons currently may participate in the single-name CDS market through their foreign branches.

[367] *See* Exchange Act rule 3a71–3(b)(1)(iii)(A)(2).

[368] In other words, this provision will help to avoid requiring non-U.S. persons to speculate whether their counterparties would register, and to face the consequences of their speculation being wrong.

[369] Cross-Border Proposing Release, 78 FR 31003.

[370] We note that the mere involvement of a registered dealer in a transaction by itself would not implicate the above concerns regarding disparate treatment and liquidity that balance against the purposes of dealer regulation when it is not acting through a foreign branch, and thus by itself would not be sufficient to justify a more general exception to these counting principles (*e.g.,* an exception for a non-U.S. person's dealing transactions involving any U.S. person that is registered as a security-based swap dealer).

[371] *See* CFTC Cross-Border Guidance, 78 FR 45319.

[372] *See* note 357, *supra.*

[373] In this regard we recognize that dealing activity involving foreign branches of U.S. banks does pose risks to the U.S. bank of which the foreign branch is a part and potentially to the U.S. financial system. Such risks are mitigated in part, however, in that foreign branches of banks that are registered security-based swap dealers will be subject to a number of Title VII regulatory requirements, including capital and margin requirements, that are designed to protect the system against those risks. Furthermore, this limitation is designed to help preserve liquidity throughout the system, given that absent the exclusion non-U.S. dealers may have reasons to favor non-U.S. counterparties to avoid the regulatory requirements of Title VII, which could threaten to fragment liquidity across geographical or jurisdictional lines.

[374] This modification—in conjunction with the fact that dealing transactions conducted through the foreign branch of a U.S. bank will have to be counted against the bank's *de minimis* thresholds regardless of counterparty (as was proposed)—will limit the possibility that U.S. banks could engage in a significant amount of security-based swap business through their foreign branches without either the banks or their non-U.S. counterparties being subject to dealer regulation.

[375] *See* note 356, *supra.*

branches should be excluded from the analysis, even if U.S. personnel are involved in soliciting, negotiating, executing or booking the transaction.[376] As discussed elsewhere, we conclude that a non-U.S. person's dealing transactions within the United States should be counted against the thresholds.[377] More generally, for the reasons addressed above we conclude that the proposed exclusion related to a non-U.S. person's transactions with a foreign branch should be narrowed—not widened.

The final rule retains the proposed definition of ''foreign branch,'' which encompasses any branch of a U.S. bank that is located outside the United States, operates for valid business reasons, and is engaged in the business of banking and is subject to substantive banking regulation in the jurisdiction where it is located.[378] As discussed in the Cross-Border Proposing Release, we believe these factors appropriately focus on the location of the branch, the nature of its business and its regulation in a foreign jurisdiction.[379]

The final rule modifies the proposed definition of ''transaction conducted through a foreign branch'' to provide that the definition addresses transactions that are arranged, negotiated, and executed by a U.S. person through a foreign branch if both: (a) The foreign branch is the counterparty to the transaction; and (b) the security-based swap transaction is arranged, negotiated, and executed on behalf of the foreign branch solely by persons located outside the United States.[380] We believe that this definition identifies the functions associated with foreign branch activity in a manner that appropriately focuses the exclusion for non-U.S. person's transactions toward situations in which the branch performs the core dealing functions outside the United States.[381]

Similar to the proposal, the final definition of ''transaction conducted through a foreign branch'' also states that a person need not consider its counterparty's activities in connection with the transaction—*i.e.,* where its counterparty's personnel arranged, negotiated and executed the transaction—if the person received a representation from the counterparty that the transaction is arranged, negotiated, and executed on behalf of the branch solely by persons located outside the United States, unless the person knows or has reason to know that the representation is not accurate. For these purposes a person would have reason to know the representation is not accurate if a reasonable person should know, under all of the facts of which the person is aware, that it is not accurate.[382] This is intended to help address operational difficulties that a non-U.S. person otherwise could face in investigating the activities of its counterparty to ensure compliance with the rule.

Separately, the final rule, consistent with the proposal, does not require such non-U.S. persons to count, against the *de minimis* thresholds, their dealing transactions with non-U.S. persons whose security-based swap transactions are guaranteed by a U.S. person. We recognize the significance of commenter concerns regarding the risk posed to the United States by such security-based swaps, and regarding the potential use of such guaranteed affiliates to evade the Dodd-Frank Act.[383] We nonetheless believe that such concerns are adequately addressed by the requirement that guaranteed affiliates count their own dealing activity against the *de minimis* thresholds when the counterparty has recourse to a U.S. person. Although there can remain residual risk to U.S. markets associated with the security-based swaps involving such non-U.S. guaranteed affiliates, we do not believe that such risk is significant enough to warrant a requirement that non-U.S. persons count all of their dealing activity involving such non-U.S. guaranteed affiliates against their own *de minimis* thresholds. In this regard we note that such a requirement would necessitate certain non-U.S. persons to incur compliance costs associated with assessing whether their counterparties are guaranteed affiliates.[384] For similar reasons, the final rule does not require such non-U.S. persons to count, against the thresholds, their dealing transactions involving non-U.S. persons that are conduit affiliates.

F. Application of the Exception's Aggregation Principles to Cross-Border Dealing Activity

1. Proposed Approach and Commenters' Views

The Cross-Border Proposing Release also addressed the cross-border

[376] *See* note 358, *supra.*

[377] *See* section II.B.2(b)iii, *supra.*

[378] *See* Exchange Act rule 3a71–3(a)(2).

[379] *See* Cross-Border Proposing Release, 78 FR 31002. No commenters specifically addressed the proposed definition of ''foreign branch.''

We are adopting this definition as proposed while recognizing that it differs from the CFTC's interpretation of ''foreign branch'' in its cross-border guidance. *See* CFTC Cross-Border Guidance, 78 FR 45329 (interpreting ''foreign branch'' in part by reference to designation by banking regulators, and by reference to the accounting of profits and losses). However, we believe that any foreign branch of a U.S. bank that would generally be considered a foreign branch under the CFTC Cross-Border Guidance also likely would be a foreign branch under our final rule.

[380] *See* Exchange Act rule 3a71–3(a)(3)(i). No commenters specifically addressed the proposed definition.

[381] The proposed definition would have addressed transactions that are ''solicited, negotiated, or executed'' by persons outside the United States. The final rule refers to ''arranged'' in lieu of ''solicited'' to reflect the fact that a person may engage in dealing activity not only through transactions that the person actively solicits, but also through transactions that result from counterparties reaching out to the person. *See generally* Exchange Act section 3(a)(71)(A)(i) (defining ''security-based swap dealer'' in part to encompass any person who ''holds themselves out as a dealer in security-based swaps'').

Under the proposed rule, ''transaction conducted through a foreign branch'' was defined, in part, to exclude any transaction solicited, negotiated, *or* executed by a person within the United States on behalf of the foreign branch. *See* proposed Exchange Act rule 3a71–3(a)(4)(i)(B). Under the final rule, this element of the definition is set forth in the affirmative and provides that the transaction must be arranged, negotiated, *and* executed on behalf of the foreign branch solely by persons located outside the United States. *See* Exchange Act Rule 3a71–3(a)(3)(i)(B). Consistent with the proposed rule, the final definition requires all relevant activity to be performed outside the United States for a transaction to fall within the definition of ''transaction conducted through a foreign branch.''

[382] *See* Exchange Act rule 3a71–3(a)(3)(ii). This representation provision within the final definition also contains certain clarifying changes from the proposal, in part to reflect the reference to ''arranged'' in lieu of ''solicited.'' *See* note 364, *supra.* The final rule has been modified from the proposal to reflect the change in the definition of ''transaction conducted through a foreign branch'' described above. *See* note 382, *supra.* Also, consistent with the analogous representation provisions of the ''U.S. person'' definition, the final rule also changes the proposal to reflect that the non-U.S. person may not rely on the representation if it knows that the representation is not accurate, or has reason to know that the representation is not accurate; for these purposes a person would have reason to know the representation is not accurate if a reasonable person should know, under all of the facts of which the person is aware, that it is not accurate. This ''know or have reason to know'' standard should help ensure that potential security-based swap dealers and major security-based swap participants do not disregard facts that may call into question the validity of the representation. *See* note 302, *supra,* and accompanying text. In addition, applying a single standard of reliance to all representations regarding the status of a person or transaction for purposes of the final rule will reduce the potential complexity of establishing policies and procedures associated with reliance on such representations. *See* section IV.C.4, *supra.*

[383] *See* note 360, *supra.*

[384] In taking this position we also recognize that the CFTC takes a different approach in its cross-border guidance, which generally considers it appropriate for such non-U.S. persons to count their dealing transactions with guaranteed affiliate counterparties, subject to certain exceptions. *See* CFTC Cross-Border Guidance, 78 FR 45319, 45324 (stating there generally is no need for non-U.S. persons to count such dealing transactions with a counterparty that is a registered dealer, an affiliate of a registered dealer whose own dealing activities are below the relevant *de minimis* thresholds, or is guaranteed by a U.S. person that is not a financial entity).

implementation of a previously adopted rule requiring a person to count dealing transactions by its affiliates against its own *de minimis* thresholds.[385] Under the proposal, a person engaged in dealing activity would have had to count: (i) Dealing transactions by its U.S. affiliates, including transactions conducted through a foreign branch; and (ii) all dealing transactions of its non-U.S. affiliates where the counterparty is a U.S. person other than a foreign branch, or where the transaction is conducted within the United States.[386]

In the Cross-Border Proposing Release we took the view that the approach would be consistent with the Dodd-Frank Act's statutory focus on the U.S. security-based swap market, in that the dealing of a person's U.S. affiliates would impact the U.S. financial system regardless of the location of the affiliate's counterparty, but that the dealing of a person's non-U.S. affiliates with other non-U.S. persons outside the United States would not impact the U.S. financial system to the same extent. We also took the view that the aggregation approach would minimize the opportunity for a person to evasively engage in large amounts of dealing activity, and that the approach would be in accordance with other aspects of the proposal governing which transactions would be applied against the thresholds.[387]

The proposal separately would have permitted a person not to include, as part of the *de minimis* analysis, transactions by an affiliate that is registered as a security-based swap dealer, so long as the person's dealing activity is ''operationally independent'' of the dealer's activity.[388] For these purposes, the person and its registered dealer affiliate would be considered to be ''operationally independent'' if the two entities maintained separate sales and trading functions, operations (including separate back offices) and risk management.[389]

This aspect of the proposal recognized that any person affiliated with a registered dealer otherwise would have to count the registered affiliate's dealing activity against the person's own *de minimis* thresholds, which likely would require the person to register as a dealer if it engages in any dealing activity. We stated in the Cross-Border Proposing Release that, in our preliminary view, this outcome of preventing all affiliates of a dealer from taking advantage of the *de minimis* exception would not be consistent with the statutory purpose of the exception. We noted, moreover, that this scenario would not appear to raise the anti-evasion concerns at the core of the aggregation provisions, given that it would apply only where a corporate group already included a registered dealer subject to Commission oversight.[390]

A number of commenters opposed the operational independence condition to the proposed exclusion, arguing that it would hinder operational efficiency—including the use of group-wide risk management—without any countervailing benefit,[391] and that the requirement was vague and would impede the growth of different business models.[392] Commenters also pointed out that, in the parallel discussion in the CFTC's cross-border guidance, the CFTC did not interpret its cross-border statute as requiring operational independence.[393] One of these commenters further opposed the use of any aggregation requirement in connection with the *de minimis* exception.[394] One commenter expressed particular concerns regarding the application of aggregation principles in connection with joint venture arrangements involving dealer shareholders.[395] One commenter supported the proposed approach as an anti-evasion safeguard.[396] One commenter suggested we eliminate the ''operationally independent'' requirement but, to prevent evasion of the dealer requirements, prohibit a registered dealer from using an unregistered affiliate as a booking vehicle.[397]

2. Final Rule

The final rule governing aggregation, like the proposal, generally applies the principles that govern the counting of a person's own dealing activity to also determine how the person must count its affiliates' dealing activities for purposes of the *de minimis* exception. Accordingly, the rule has been modified from the proposal to be consistent with changes to the proposed provisions regarding the counting of a person's dealing activity.

Moreover, the final rule modifies the exclusion from having to aggregate the dealing transactions of a person's registered dealer affiliate from the proposal, both to remove the operational independence condition and to address situations in which a person's affiliate has exceeded the *de minimis* thresholds but is in the process of registering as a dealer.

(a) General Provisions Regarding Aggregation of Cross-Border Transactions

The final rule, like the proposal, provides in part that if a person engages in dealing transactions counted against the *de minimis* thresholds, the person also must count all dealing transactions in which any U.S. person controlling, controlled by, or under common control with the person engages, including transactions conducted through a foreign branch.[398] The final rule has been revised from the proposal to further provide that the person should

[385] *See* Exchange Act rule 3a71–2 (requiring that a person count against the thresholds its dealing activity plus that of ''any other entity controlling, controlled by, or under common control with the person'').

[386] *See* proposed Exchange Act rule 3a71–3(b)(2).

[387] *See* Cross-Border Proposing Release, 78 FR 31004.

[388] *See* proposed Exchange Act rule 3a71–4.

[389] *See* Cross-Border Proposing Release, 78 FR 31005.

[390] *See id.*

[391] *See* SIFMA/FIA/FSR Letter at A–13 to A–15 (stating that the operational independence condition is overbroad and unnecessary to achieve the statutory goals in that it ''would have the effect of tying registration requirements to firms' internal risk management strategies or limited efficient leverage of back office functions'' without any regulatory benefit and noting that the requirement would be burdensome for smaller market participants who would need to register solely due to their affiliation with larger entities); IIB Letter at 14–15 (stating that preventing the sharing of group-wide risk management and other resources would have the effect of nullifying the exclusion from the aggregation requirement for affiliates that are registered security-based swap dealers); JSDA Letter at 4–5 (stating that the ''operationally independent'' condition would discourage efficient global management of transactions).

[392] *See* JFMC Letter at 6–7.

[393] *See* SIFMA/FIA/FSR Letter at A–15; JFMC Letter at 6–7; IIB Letter at 14.

[394] *See* SIFMA/FIA/FSR Letter at A–12 to A–13 (stating that the aggregation requirement ''effectively disregards the legal independence of entities'' and that the Commission's existing anti-evasion capabilities are sufficient to guard against abuses; also stating that had the aggregation requirement been proposed as part of the underlying definitional rules SIFMA would have objected to the requirement).

[395] *See* JSDA Letter at 5 (requesting that aggregation not be required of the minority shareholder of a joint venture); *see also* MUFJ Letter at 2–8 (generally opposing aggregation for such joint venture arrangements).

[396] *See* BM Letter at 17 (stating that the condition is a safeguard that addresses evasion concerns while promoting the purpose of the *de minimis* exception).

[397] IIB Letter at 14–15.

[398] *See* Exchange Act rule 3a71–3(b)(2)(i). Consistent with our position in the Intermediary Definitions Adopting Release (*see* 77 FR 30631 n.437) and in the Cross-Border Proposing Release (*see* 78 FR 31004), and with our position regarding the *de minimis* exception when there is a right of recourse against a U.S. person (*see* note 336, *supra*) for purposes of determining whether a person is controlling, controlled by, or under common control with another person (*i.e.,* an affiliate), we interpret control to mean the direct or indirect power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract or otherwise.

count all dealing transactions of its conduit affiliates.[399] Finally, the final rule has been modified from the proposal to provide that the person must count all dealing transactions of non-U.S. person affiliates that: (a) Are entered into with U.S. persons other than the foreign branches of registered dealers; or (b) constitute dealing activity subject to a guarantee giving the non-U.S. person's counterparty rights of recourse against a U.S. person affiliated with the non-U.S. person.[400]

These modifications from the proposal are consistent with similar modifications made to the rules regarding the counting of a person's own transactions for purposes of the *de minimis* exception, and reflect the risk concerns and interests discussed above. The aggregation requirement serves to prevent evasion of the dealer registration requirements by persons that otherwise may seek to avoid dealer registration by simply dividing up dealing activity in excess of the *de minimis* thresholds among multiple affiliates.[401] In keeping with that purpose, in the cross-border context it is appropriate to require a person's affiliates to count the same dealing transactions that the person itself would be required to count for purposes of the *de minimis* exception—unless, as discussed below, the person is registered as a dealer.[402] Because this approach incorporates the direct counting standards discussed above, we believe that the approach implements the *de minimis* exception in a manner that is consistent with the Dodd-Frank Act's focus on the U.S. security-based swap market.[403]

(b) Application to Dealing Activities of Registered Affiliates

In addition, we are adopting an exception which provides that a person need not count against the *de minimis* thresholds the security-based swap transactions of an affiliate that either is: (1) Registered with the Commission as a dealer; or (2) deemed not to be a dealer pursuant to the provisions of Exchange Act rule 3a71–2(b), which addresses persons who have exceeded the *de minimis* thresholds but are in the process of registering.[404]

In part, this final rule has been modified from the proposal by removing the proposed operational independence condition. After considering the views of several commenters that the proposed operational independence condition would tend to inhibit operational efficiencies,[405] we are persuaded that excluding the condition from the final rule would help facilitate efficiency and avoid deterring beneficial group-wide risk management practices. In this regard we also note that even with the removal of the proposed operational independence condition, the aggregation provisions would prevent a corporate group from cumulatively engaging in aggregate relevant dealing activity—outside of its registered dealers—in excess of the *de minimis* thresholds.[406]

The final rule also has been modified from the proposal to permit a person to rely on this provision if its affiliate is in the process of registering as a dealer. The *de minimis* rule generally provides that a person that is not registered as a dealer but that no longer falls below the applicable *de minimis* thresholds nonetheless will be deemed not to be a dealer until the earlier of the date in which it submits a complete application for registration as a dealer, or two months after the end of the month that it becomes no longer able to take advantage of the exception.[407] That provision was intended to avoid market disruption in conjunction with the registration process.[408] Upon further consideration, we similarly believe that the provision at issue here should allow a person not to count the transactions of its affiliates that are in the process of registering as dealers, to avoid market disruption that may otherwise result due to the prospect of a person intermittently exceeding the *de minimis* thresholds when its affiliates are in the process of registering. Such situations, moreover, would not appear to provide practical opportunities for corporate groups to evade dealer registration by

[399] *See* Exchange Act rule 3a71–3(b)(2)(ii).

[400] *See* Exchange Act rule 3a71–3(b)(2)(iii) (cross-referencing the direct counting provisions of paragraph (b)(1)(iii), applicable to non-U.S. persons other than conduit affiliates); *see also* Sections IV.E, *supra* (addressing counting by non-U.S. persons engaged in dealing activity whose counterparties are U.S. persons); and IV.E.1 (addressing counting by non-U.S. persons engaged in dealing activity when their counterparties have recourse against a U.S. person).

[401] *See* Intermediary Definitions Adopting Release, 77 FR 30631.

[402] As noted above, one commenter questioned whether any aggregation principles should be applied in the *de minimis* context, arguing that the requirement disregards the legal independence of entities and disregards the possibility that two entities under common control may operate independently of each other. The comment further stated that the Commission's existing anti-evasion capacities are sufficient to guard against abuse without requiring aggregation. *See* note 391, *supra.* In our view, however, the aggregation provision is tailored appropriately to prevent evasion of the limits of the *de minimis* exception. *See* Intermediary Definitions Adopting Release, 77 FR 30631 (discussing the use of the aggregation principles in light of the ''increased notional thresholds of the final [definitional] rules, and the resulting opportunity for a person to evasively engage in large amounts of dealing activity if it can multiply those thresholds''; and addressing the use of the common control standard ''as a means reasonably designed to prevent evasion of the limitations of that exception''). We further believe that this aggregation approach would be more effective at implementing the *de minimis* exception than a case-by-case approach, because the aggregation provision would provide upfront objective standards regarding which affiliate transactions must be counted against the thresholds, and thus help avoid uncertainty. Moreover, as discussed below, we are revising the aggregation provisions to allow the exclusion of the positions of affiliates that are registered as dealers (or that are in the process of registering), in response to comments.

[403] In short, we believe that this final rule is necessary or appropriate as a prophylactic measure to help prevent the evasion of the provisions of the Exchange Act that were added by the Dodd-Frank Act, and thus help ensure that the relevant purposes of the Dodd-Frank Act are not undermined. Without this rule, corporate groups may engage in dealing activity above the *de minimis* thresholds within the United States while avoiding dealer regulation under Title VII by dividing up the dealing activity among multiple affiliated entities, none of which individually engages in dealing activity above the thresholds.

[404] *See* Exchange Act rule 3a71–4. This exception, when available, applies to all of the dealing of a person's registered dealing affiliate (or affiliate deemed not to be a dealer pursuant to the provisions of Exchange Act rule 3a71–2(b)), regardless of the counterparty or the location of the transaction, and regardless of whether the dealing transaction otherwise implicates cross-border issues.

[405] *See* notes 391 and 392, *supra.*

[406] We recognize that one commenter supported the proposed operational independence condition, stating that the condition would address evasion concerns while promoting the statutory purpose of the *de minimis* exception. *See* note 396, *supra.* After further consideration, however, we believe that the fact that the aggregation provision will still limit cumulative group-wide dealing activity by unregistered entities to no more than the *de minimis* thresholds should suffice as a safeguard against evasive activity. This is particularly true given that those thresholds are significantly below the amounts of dealing typically engaged in by persons above the thresholds. *See* Intermediary Definitions Adopting Release, 77 FR 30636 (noting that, out of 28 potential dealers that had three or more counterparties that themselves were not recognized as dealers by ISDA, 15 of those exceeded a notional transaction threshold of $100 billion and accounted for over 98 percent of the total activity of all 28 entities).

We also note that certain commenters raised concerns about the application of the aggregation provisions generally in the context of joint ventures, particularly in the context of minority shareholders. *See* note 395, *supra.* Those issues regarding the scope of the aggregation provisions that the Commission previously adopted are not unique to the cross-border context, and in our view are outside the scope of this release. We note generally, however, that in the Intermediary Definitions Adopting Release we concluded that a common control standard is more appropriate than a majority-ownership standard in the context of the anti-evasive purposes of the aggregation requirement. *See* Intermediary Definitions Adopting Release, 77 FR 30631 n.437.

[407] *See* Exchange Act rule 3a71–2(b).

[408] *See* Intermediary Definitions Adopting Release, 77 FR 30643.

dividing dealing activities among multiple affiliates.

G. Exception for Cleared Anonymous Transactions

1. Proposed Approach and Commenters' Views

Three commenters expressed the view [409] that the Commission's final rules should include a provision similar to an aspect of the CFTC Cross-Border Guidance, which stated the CFTC's view that certain dealing transactions that are executed anonymously and cleared generally would not be counted against the *de minimis* thresholds.[410] One commenter particularly emphasized that market participants would not have information available regarding a counterparty's identity in an anonymous transaction, and suggested that the prospect of becoming subject to dealer registration could deter non-U.S. liquidity providers from participating on security-based swap markets that provide access to U.S. persons.[411]

2. Final Rule

After considering commenter views we have concluded that this type of exception is appropriate, particularly given that the final *de minimis* rules turn in part on the domicile of the counterparty to the non-U.S. person, and this information would be unavailable to the non-U.S. person that is a counterparty to a cleared anonymous transaction. Absent such an exception, it is possible that execution facilities would exclude U.S. market participants to prevent their non-U.S. members from having to face the prospect of dealer regulation, which could impair market liquidity and increase costs and risks.[412]

For those reasons, the final rule has been revised from the proposal to except, from having to be counted against the *de minimis* thresholds, certain security-based swap transactions that a non-U.S. person enters into anonymously on an execution facility or national securities exchange and that are cleared through a clearing agency.[413]

In particular, the final rule in part provides that a non-U.S. person need not count such cleared anonymous transactions against the threshold, unless the non-U.S. person is a conduit affiliate.[414] In addition, the final rule permits an affiliate (that itself may be a U.S. or non-U.S. person) of such a non-U.S. person not to count such transactions of the non-U.S. person against the affiliate's own thresholds for purposes of the aggregation provisions, unless the non-U.S. person is a conduit affiliate.[415]

The exception is not available when the non-U.S. person is a conduit affiliate because conduit affiliates are required to count all of their dealing transaction against the thresholds regardless of whether their counterparty is a U.S. or a non-U.S. person. As a result, the anonymous nature of the transaction would not cause implementation issues for conduit affiliates.

For purposes of the exception, a transaction would be ''anonymous'' only if the counterparty to the transaction in fact is unknown to the non-U.S. person prior to the transaction. The transaction would not be ''anonymous'' if, for example, a person submitted the transaction to an execution facility after accepting a request for quotation from a known counterparty or a known group of potential counterparties, even if the process of submitting the transaction itself did not involve a named counterparty.

H. Additional Issues

1. Particular Activities and Entities

Commenters to the Cross-Border Proposing Release raised issues regarding the application of the dealer registration requirement to limited security-based swap activities by certain ''run-off'' entities,[416] and in the context of portfolio compression.[417] Those

[409] *See* IIB Letter at 13–14; JSDA Letter at 4; JFMC Letter at 5.

[410] *See* CFTC Cross-Border Guidance, 78 FR 45325 (stating that when a non-U.S. person that is not a guaranteed or conduit affiliate enters in to swaps anonymously on CFTC-registered platforms, and the swaps are cleared, the non-U.S. person would generally not have to count those swaps against the applicable thresholds, noting that, in such circumstances, the non-U.S. person would not have any prior information regarding its counterparty; also interpreting the CFTC's cross-border jurisdiction such that, with respect to such cleared and anonymously executed swaps, the non-U.S. person would generally satisfy certain transaction-level requirements).

The Cross-Border Proposing Release generally requested comment as to whether the proposed *de minimis* approach would place market participants at a competitive advantage or disadvantage, and as to whether there are other measures the Commission should consider to implement the *de minimis* exception. *See* Cross-Border Proposing Release, 78 FR 30996. More generally, the Commission also requested comment regarding the proposals as whole, and regarding consistency with the CFTC's cross-border approach, including comments regarding the impact of differences between the two approaches, and comments regarding whether the Commission's proposed approach should be modified to conform with that taken by the CFTC. *See id.* at 31102.

[411] *See* IIB Letter at 13–14.

[412] The exclusion for cleared anonymous transactions is intended to avoid placing market participants in a position where counterparty-related information needed for compliance would be unavailable, which may in turn lead execution facilities to exclude U.S. persons. We also note that the exclusion would strengthen incentives for shifting activity to transparent trading venues, which is a key goal of Title VII. While these transactions may pose risks to U.S. persons and to the U.S. financial system as a whole, those risks may be offset by the liquidity and transparency benefits that occur due to trading on transparent venues. Furthermore, the characteristics expected to be associated with central clearing (*e.g.,* the daily exchange of mark-to-market margin) have parallels to the capital and margin requirements for registered dealers in terms of helping to protect the financial system against the risks introduced by particular transactions. On the other hand, such risk mitigation may be absent to the extent that the relevant clearing agency—which under the exception is not required to be registered with the Commission—does not follow standards consistent with the Title VII requirements applicable to registered clearing agencies.

[413] *See* Exchange Act rule 3a71–5. This exception solely addresses the issue of whether a particular transaction needs to be counted against the *de minimis* thresholds. It does not address the issue of when a particular execution facility or clearing agency needs to register with the Commission. The Cross-Border Proposing Release separately addressed cross-border issues regarding when an execution facility or clearing agency would have to register with the Commission. *See* Cross-Border Proposing Release, 78 FR 31054–58 (regarding security-based swap execution facility registration), 78 FR 31038–40 (regarding clearing agency registration); *see also* Registration and Regulation of Security-Based Swap Execution Facilities, Exchange Act Release No. 63825 (Feb. 2, 2011), 76 FR 10948 (Feb. 28, 2011) (proposed rules regarding registration and other requirements applicable to security-based swap execution facilities).

This exception also does not address the application of section 5 of the Securities Act to such transactions. Rule 239 under the Securities Act (17 CFR 230.239) provides an exemption under the Securities Act for certain security-based swap transactions involving an eligible clearing agency. This exemption does not apply to security-based swap transactions not involving an eligible clearing agency, such as the anonymous transactions entered into on the execution facility or national securities exchange, regardless of whether the security-based swaps subsequently are cleared by an eligible clearing agency. *See* Exemptions for Security-Based Swaps Issued By Certain Clearing Agencies, Securities Act Release No. 9308 (Mar. 30, 2012), 77 FR 20536 (Apr. 5, 2012).

[414] *See* Exchange Act rule 3a71–5(a). This exception applies regardless of whether the execution facility on which the transaction is entered into, or the clearing agency through which it is cleared, needs to be registered with the Commission. This is because the exclusion of U.S. market participants from an overseas execution or clearing facility—a result this exception is intended to guard against—could impair the markets regardless of whether the facility from which U.S. persons are excluded in fact are registered, and thus lead to increased costs and risks.

[415] *See* Exchange Act rule 3a71–5(a)(2), (b).

[416] *See* SIFMA/FIA/FSR Letter at A–18 (addressing entities that are consolidating U.S.-facing dealing activities worldwide into one or a few registered dealers, but that may not be able to transfer or terminate their legacy security-based swap portfolios and thus may need to enter into new transactions in connection with those legacy portfolios); JSDA Letter at 4 (suggesting that including contract cancellations, alternations and transfers within the *de minimis* calculation ''might invite a rush of cancellation before the enforcement of the proposed rules and make it difficult to cancel or transfer contracts for reducing risks'').

[417] *See* TriOptima Letter at 3–4 (explaining that portfolio compression services do not involve any

Continued

issues are not unique to the cross-border context, and are outside of the scope of this release. We generally note, moreover, that in the Intermediary Definitions Adopting Release we considered and rejected certain requests for categorical exclusions from dealer definition. With regard to issues regarding the relevance of those or other activities to the *de minimis* analysis, we generally note that the dealer registration requirement necessarily distinguishes between a person's dealing and non-dealing activities.[418]

2. Foreign Public Sector Financial Institutions and Government-Related Entities

As discussed above, the final rule defining ''U.S. person'' (like the proposed definition of that term) specifically excludes several foreign public sector financial institutions and their agencies and pension plans, and more generally excludes any other similar international organization and its agencies and pension plans.[419] Certain commenters requested that we take further action to address the application of the dealer definition and its *de minimis* exception to security-based swap activities involving such foreign public sector financial institutions. Those commenters in part stated that such organizations should not be required to register as security-based swap dealers, and that those organizations' affiliates should be considered immune from domestic regulation to the same extent as the organizations themselves.[420] In our view, however, such issues are outside the scope of this release, given that the source of any such privileges and immunities is found outside of the Dodd-Frank Act and the federal securities laws.

Separately, commenters stated that non-U.S. persons should not have to count their dealing transactions involving those organizations against the non-U.S. persons' dealer *de minimis* thresholds, on the grounds that counting such transactions would constitute the impermissible regulation of such organizations even if those were ''transactions conducted within the United States.''[421] As noted below, we have determined not to include the ''transaction conducted within the United States'' provisions in this final rule. With that said, we do not concur with the suggestion that counting a person's dealing transactions with such organizations against the *de minimis* thresholds—when otherwise provided for by the rules—involves the regulation of such organizations. Requiring a person to count, against the *de minimis* thresholds, the person's dealing transactions involving such an international organization as counterparty simply reflects the application of the federal securities laws to that person and its dealing activities, and does not constitute the regulation of the international organization. A person's security-based swap dealing transaction with such an international organization accordingly are considered the same, for purposes of applying the *de minimis* thresholds and other Title VII requirements, as a dealing transaction with some other non-U.S. person counterparty.

Finally, two commenters stated that they should not be subject to the possibility of dealer regulation for comity reasons, on the grounds that they are arms of a foreign government.[422] We believe that such issues best are addressed on a case-by-case basis, but we generally note that the prospect of dealer regulation is relevant only to the extent that a person engages in dealing activity.

I. Economic Analysis of the Final Cross-Border Dealer De Minimis Rule

These final rules and guidance regarding the cross-border implementation of the *de minimis* exception to the ''security-based swap dealer'' definition will affect the costs and benefits of dealer regulation by determining which dealing transactions will be counted against the exception's thresholds.[423] The cross-border rules have the potential to be important in determining the extent to which the risk mitigation and other benefits of Title VII (such as market transparency and customer protection) are achieved, given the core role that dealers play within the security-based swap market and the market's cross-border nature.[424]

Commenters addressed the associated cost-benefit issues from a variety of perspectives. Some directly addressed the link between the cross-border scope of the dealer definition and the associated costs and benefits, by arguing that cost-benefit principles warranted greater harmonization with approaches taken by the CFTC or foreign regulators.[425] Commenters also

of the enumerated factors that the Commission has identified as indicators of dealing activity).

[418] *See generally* Intermediary Definitions Adopting Release, 77 FR 30616–20 (discussing application of the dealer-trader distinction to security-based swap transactions).

[419] *See* section IV.C.2(e), *supra.*

[420] *See, e.g.,* WB/IFC Letter at 2–4, 6–7 (also stating that such organizations should not be required to register as major participants or to clear security-based swaps, and that affiliates of such organizations should be excluded from the ''U.S. person'' definition); SC Letter at 16–24 (contending that the privileges and immunities afforded such organizations would be violated by their direct regulation as dealers or major participants, or by direct regulation equivalents, and that affiliates of such organizations also are immune from regulation); IDB Letter at 5. *See also* notes 225 and 229, *supra.*

[421] *See* SC Letter at 18–19 (stating that the inclusion of such transactions against a counterparty's *de minimis* thresholds would be ''tantamount to regulation of the operations of the World Bank and the IFC, in violation of their privileges and immunities''); WB/IFC Letter (incorporating SC Letter). These comments did not object to the inclusion of transactions between a U.S. person and an FPSFI, because the Commission would have jurisdiction to regulate that ''U.S. person'' for other reasons and it would not be regulated simply because it does business with the FPSFI. *See* SC Letter at note 21.

[422] *See* KfW Letter; FMS–WM Letter.

[423] As we noted in the Intermediary Definitions Adopting Release, because the *de minimis* exception will determine which entities engaged in security-based swap dealing activity ultimately will be regulated as dealers under Title VII, the exception will have an effect on the burdens and benefits associated with dealer regulation. *See* Intermediary Definitions Adopting Release, 77 FR 30628–30. The thresholds used in the *de minimis* exception accordingly were set at a level that sought to meet the goals of Title VII while appropriately minimizing the costs to market participants by providing for the regulation, as dealers, ''of persons responsible for the vast majority of dealing activity within the market.'' *See id.* at 30638–40.

[424] *See* section III.A, *supra.*

[425] *See, e.g.,* IIB Letter (stating that cost-benefit considerations warrant harmonization to the CFTC and foreign regulatory authorities with regard to cross-border rules, and that divergence generally would be warranted only if the Commission's rules are more flexible, and thence would not preclude the voluntary adoption of consistent practices).

Although we have considered those comments that expressed complete or partial support in favor of consistency with the CFTC guidance, these final rules nonetheless follow approaches that differ from those taken by the CFTC in certain regards, generally by taking approaches that are narrower in scope than those adopted by the CFTC. *See supra* note 255 (Commission's definition of ''U.S. person'' differs from the CFTC approach in part by not including investment companies that beneficially are majority-owned by U.S. persons); note 353 and accompanying text (Commission's rules regarding the treatment of guaranteed affiliates of U.S. persons focuses on the presence of recourse against a U.S. guarantor, in contrast to the CFTC approach that more generally accounts for financial support commitments regardless of recourse rights), note 325(Commission's definition of ''conduit affiliate'' differs from the CFTC's approach in part by not considering financial statement treatment); note 379 (discussing expectation that any foreign branch of a U.S. bank that generally would be considered a foreign branch under the CFTC Cross-Border Guidance also likely would be a foreign branch under our final rule).

We also have considered initiatives by foreign regulators related to the regulation of OTC derivatives. In that regard, we note that the regulatory regimes in certain other jurisdictions do not provide for the registration of persons who function as dealers, in contrast to the approach Congress took in Title VII. Also, we expect to take into account the regulatory frameworks followed in other jurisdictions as we assess requests for substituted compliance in connection with the substantive requirements applicable to security-based swap dealers and other market participants.

addressed the need for cost-benefit analysis,[426] or questioned the adequacy of the Cross-Border Proposal's cost-benefit assessment.[427] Other comments that addressed the dealer definition implicate the tradeoff between the costs and benefits associated with the definition's scope, even when the commenters did not directly address the economic analysis in the Cross-Border Proposing Release or otherwise explicitly raise cost-benefit considerations.[428]

We have taken economic effects into account in adopting these final cross-border rules and providing guidance. In doing so, we believe that a narrow application of dealer regulation under Title VII—such as one that is limited to dealing activity that might be viewed as occurring solely within the United States—would not be sufficient to achieve the purposes of Title VII in light of the attributes of the security-based swap market, including the market's global nature, the concentration of dealing activity, the key role played by dealers and the risks posed by dealers via their legal and financial relationships. At the same time, we recognize that the cross-border application of Title VII has the potential to reduce liquidity within the U.S. market to the extent it increases the costs of entering into security-based swaps or provides incentives for particular market participants to avoid the U.S. market by operating wholly outside the Title VII framework.

The cross-border rules applying the ''security-based swap dealer'' definition to cross-border dealing activity implicate two categories of costs and benefits. First, certain current and future participants in the security-based swap market will incur assessment costs in connection with determining whether they fall within the ''security-based swap dealer'' definition and thus would have to register with the Commission.

Second, the registration and regulation of some entities as security-based swap dealers will lead to programmatic costs and benefits arising as a consequence of the Title VII requirements that apply to registered security-based swap dealers, such as the capital, margin, and business conduct requirements.[429] These requirements may be expected to impose certain costs on participants acting as dealers, but also to produce benefits to the market and its participants, including counterparty protections and risk-mitigation benefits.

We discuss the programmatic and assessment costs and benefits associated with the final rules more fully below. We also discuss the economic impact of certain potential alternatives to the approach taken by the final rules.

1. Programmatic Costs and Benefits

(a) Cost-Benefit Considerations of the Final Rules

Exchange Act rules 3a71–3, 3a71–4, and 3a71–5 will permit market participants to exclude certain dealing transactions from their *de minimis* calculations, and thus may cause particular entities that engage in certain dealing activities not to be regulated as security-based swap dealers. The rules accordingly may be expected to affect the programmatic costs and benefits associated with the regulation of security-based swap dealers under Title VII, given that those costs and benefits are determined in part by which persons will be regulated as security-based swap dealers.[430]

This does not mean that there is a one-to-one relationship between a person not being a ''security-based swap dealer'' as a result of these cross-border rules, and the resulting change to programmatic benefits and costs. Indeed, although these rules may determine which particular entities will be regulated as dealers, it does not follow that total programmatic costs and benefits will vary by an amount proportional to the volume of those entities' dealing activity. As the Commission explained in the Intermediary Definitions Adopting Release, some of the costs and benefits of regulating dealers may be fixed, while others may be variable depending on a particular person's security-based swap dealing activity.[431] In practice, the programmatic benefits associated with the regulation of persons engaged in security-based swap dealing activity—in other words, the expected transparency, customer protection and market efficiency objectives associated with dealer regulation—likely will vary depending on the type and nature of those persons' dealing activity, including the degree to which those persons engage in security-based swap dealing activity within the United States or in a manner likely to give rise to Title VII concerns within the United States.

We believe that the cross-border rules we are adopting today will focus the regulation of security-based swap dealers under Title VII upon those entities that engage in security-based swap transactions that occur in the United States, or on the prevention of evasion. Our definition of ''security-based swap dealer'' seeks to capture those entities for which regulation of security-based swap activity is warranted due to the nature of their activities with other market participants.[432] Specifically, we have focused the rules on those market participants that are likely to have financial and legal relationships within the United States. This set of entities includes those that currently provide liquidity to U.S. persons as market makers in the OTC security-based swap market and those that trade with U.S. persons as market makers for security-based swaps on organized trading venues. Regulation of these entities will

Those substituted compliance assessments are geared to promote Title VII in a way that fairly accounts for other regimes by assessing the requirements of those regimes on a function-by-function basis.

[426] *See* BM Letter, note 28, *supra.* As stated above, the Commission in fact is sensitive to the economic consequences of its rules, and has taken the costs and benefits into account in adopting these rules.

[427] *See* CDEU Letter, note 28, *supra.* This commenter particularly expressed the view that the Commission's proposal had failed to engage in an adequate consideration of cost-benefit principles, and instead stated that the Commission should ''conduct a direct cost-benefit analysis of the conflicting rule regimes (*e.g.,* with the European Market Infrastructure Regulation and the CFTC's cross-border guidance).'' That commenter further expressed the view that, in requesting comment on the proposal's cost-benefit analysis, the Commission actually ''asks the public to conduct such an analysis for the SEC'' in lieu of the Commission having conducted its own analysis. *See id.*

In actuality, our request for comment simply gave the public the opportunity to address our economic analysis. The economic assessment in this release specifically addresses those economic impacts in a context where many entities may have taken steps to follow the CFTC's cross-border guidance, and also recognizes that market participants may seek to structure their activities to avoid Title VII given differences between Title VII regulation and the regulation present in foreign regimes.

[428] For example, one comment in opposition to the proposed ''operational independence'' condition to the exception to the aggregation requirement for positions of affiliates that are registered as security-based swap dealers in part addressed the extra costs that would be associated with such a provision. *See* SIFMA/FIA/FSR Letter, note 391, *supra.* As discussed above, that proposed condition has been removed. *See* section IV.F, *supra.*

[429] *See* Cross-Border Proposing Release, 78 FR 31135.

[430] *See* Intermediary Definitions Adopting Release, 77 FR 30724.

[431] *See id.* (''Some of the costs of regulating a particular person as a dealer or major participants, such as costs of registration, may largely be fixed. At the same time, other costs associated with regulating that person as a dealer or major participant (*e.g.,* costs associated with margin and capital requirements) may be variable, reflecting the level of the person's security-based swap activity. Similarly, the regulatory benefits that would arise from deeming that person to be a dealer or major participant (*e.g.,* benefits associated with increased transparency and efficiency, and reduced risks faced by customers and counterparties), although not quantifiable, may be expected to be variable in a way that reflects the person's security-based swap activity.'').

[432] *See id.* at 30617.

mitigate risk and promote stability for U.S. persons and potentially the U.S. financial markets by increasing the likelihood that they are able to meet their obligations under security-based swap contracts against counterparties with ties to the U.S. financial system once they are subject to the final adopted rules regarding the requirements applicable to dealers (rules establishing capital and margin requirements for registered security-based swap dealers). Furthermore, regulation of these entities as dealers may enable them to continue to provide liquidity to their counterparties, particularly in times when the markets are under financial stress and their counterparties may struggle to meet their financial obligations. We also believe that regulation of these entities will further other goals of Title VII, particularly as we consider future substantive regulation of the security-based swap market. In other words, these requirements will direct the application of the *de minimis* thresholds—which themselves are the product of cost-benefit considerations—toward those dealing activities in U.S. financial markets that most directly implicate the purposes of Title VII. As such, these rules reflect our assessment and evaluation of those programmatic costs and benefits:

• *Dealing by U.S. persons*—The ''U.S. person'' definition captures entities whose security-based swap activities pose risks to the United States that may raise the concerns intended to be addressed by Title VII, regardless of the status of their counterparty.[433] The requirement that U.S. persons, including foreign branches, count all of their dealing transactions against the *de minimis* thresholds reflects the domestic nature of their dealing activity, particularly given that it is the financial resources of the entire person that enable it to engage in dealing activity.[434]

• *Dealing by guaranteed affiliates of U.S. persons*—The requirement that non-U.S. persons count all their dealing transactions that are subject to a recourse guarantee by a U.S. affiliate, even when the counterparty is another non-U.S. person, reflects the domestic nature of that activity and the risks that those recourse guarantees pose to U.S. persons and potentially to the U.S. financial system via the U.S. person guarantor.[435]

• *Dealing by other non-U.S. persons with U.S.-person counterparties*—The general requirement that non-U.S. persons count their dealing transactions with counterparties that are U.S. persons reflects the domestic nature of that activity and the concerns raised by the performance of dealing activity within the United States, impacts on U.S. market liquidity, risks that this dealing activity poses to U.S. persons and potentially toward the U.S. financial system as a whole, and counterparty and market transparency concerns.[436] This general requirement is limited, however, as it does not extend to transactions with foreign branches of U.S. banks that are registered as dealers, or to certain cleared anonymous transactions. While those excluded transactions also involve the performance, at least in part, of relevant dealing activity within the United States, implicate Title VII concerns, and import risk into the United States—and their counting against the thresholds thus would be consistent with achieving the programmatic benefits of dealer regulation—their exclusion is nevertheless warranted by considerations regarding market access by U.S. persons (in the case of transactions with certain foreign branches of U.S. banks)[437] and by considerations regarding information availability and market liquidity (in the case of the exclusion for cleared anonymous transactions).[438]

• *Anti-evasion provisions*—The requirement that conduit affiliates count all of their dealing activities against the thresholds, and the cross-border application of the aggregation requirements related to the *de minimis* exception, both reflect targeted efforts to prevent evasion of the security-based swap dealer requirements of Title VII.[439] We are adopting a definition of ''conduit affiliate'' that excludes affiliates of registered security-based swap dealers and major security-based swap participants to avoid imposing costs on registered persons in situations where the types of evasion concerns that the conduit affiliate definition is intended to address are minimal.

In short, these final rules apply the *de minimis* thresholds—which themselves reflect cost-benefit considerations[440]—to cross-border security-based swap activity in a way that directs the focus of dealer regulation toward those entities whose security-based swap dealing activities most fully implicate the purposes of Title VII, or that is reasonably designed to prevent evasion of dealer regulation under Title VII.

In the Cross-Border Proposing Release, we concluded that ''[t]o the extent that an entity engaged in dealing activity wholly outside the United

[433] *See* section IV.C.3, *supra.*

[434] *See* section IV.B.2, *supra.*

[435] *See* section IV.E.1(b), *supra.* In the Cross-Border Proposing Release we preliminarily concluded that the risks associated with such guarantees could be adequately addressed through major participant regulation. We have reconsidered that view for the reasons discussed above.

[436] *See* section IV.E.2(b), *supra.*

[437] *See* section IV.E.2(b), *supra.* Although dealing activity involving foreign branches of U.S. banks does pose risks to the U.S. bank of which the foreign branch is a part and potentially to the U.S. financial system, foreign branches of registered security-based swap dealers will be subject to a number of Title VII regulatory requirements, including capital and margin requirements, that are designed to protect the system against those risks. Furthermore, this limitation is guided in part by the desire to preserve liquidity throughout the system, given that absent the exclusion non-U.S. dealers may have reasons to favor non-U.S. counterparties to avoid the regulatory requirements of Title VII, which could threaten to fragment liquidity across geographical or jurisdictional lines.

[438] *See* section IV.G.2, *supra.* As noted above, *see* note 412, *supra,* the exclusion for cleared anonymous transactions is driven by concerns about counterparty-related information needed for compliance being unavailable, which in turn may lead U.S. persons to be excluded from certain execution facilities. The exclusion for such transactions also would be expected to have the effect of strengthening incentives for shifting activity to transparent trading venues, a key goal of Title VII. While these transactions of non-U.S. persons may pose risks to the U.S. bank of which the foreign branch is a part and potentially to the U.S. financial system as a whole, those risks may be offset by the liquidity and transparency benefits that occur due to trading on transparent venues. Furthermore, certain of the characteristics we expect to be associated with central clearing (*e.g.,* the daily exchange of mark-to-market margin) serve similar functions as the capital and margin requirements for registered dealers in terms of helping to protect the financial system against the risks introduced by particular transactions. Of course, such risk mitigation may be absent to the extent that the relevant clearing agency—which under the exception is not required to be registered with the Commission—does not follow standards consistent with the Title VII requirements applicable to registered clearing agencies. As noted above, moreover, *see* note 413, *supra,* we are not addressing the registration requirements for such clearing agencies in this release.

[439] *See* sections IV.D.2 and IV.F.2, *supra.*

[440] Based on an analysis of dealing activity within the security-based swap market, we concluded that a *de minimis* threshold of $3 billion for dealing activity involving security-based swaps would capture over 99 percent of dealing activity within the single-name CDS market under the ambit of dealer regulation. *See* Intermediary Definitions Adopting Release, 77 FR 30639. We also concluded that this amount constituted a reasonable threshold, though not the only such threshold, for addressing the relevant competing factors—including the fact that the economic benefits provided by dealer requirements in large part will depend on the proportion of security-based swaps that are transacted subject to those requirements, while certain of the costs associated with dealer regulation would include costs that are independent of the amount of a person's dealing activity. *See* Intermediary Definitions Adopting Release, 77 FR 30629, 30639.

As noted above, in application the general *de minimis* threshold currently is subject to an $8 billion phase-in level, and that phase-in level will remain in place until the Commission, following a study, either determines to terminate the phase-in level or adopts a different threshold. *See* part IV.A, *supra.*

States poses risks to the U.S. financial system, we preliminarily believe that subjecting it to dealer registration and the related requirements would not generate the types of programmatic benefits that Title VII dealer regulation is intended to produce, as the dealing activity of such entity poses risks to counterparties outside the United States.'' [441] These final rules and guidance regarding which transactions are to be counted against the *de minimis* thresholds are consistent with that principle, although in part they reflect a further assessment of the programmatic benefits resulting from the application of dealer regulation to non-U.S. persons when there is a recourse guarantee against a U.S. affiliate, including the benefits resulting from the application of financial responsibility requirements imposed upon registered security-based swap dealers. In this regard, the final rules and guidance reflect a reconsideration of our earlier conclusion that the risks to U.S. persons arising from such guarantees could adequately be addressed by the regulation of major security-based swap participants. In addition, these final rules and guidance more fully account for anti-evasion concerns associated with the potential for a U.S. person to engage in dealing activity using a guaranteed non-U.S. affiliate that is economically equivalent to the U.S. person itself entering into those dealing transactions.

(b) Evaluation of Programmatic Impacts

In setting the *de minimis* thresholds as part of the Intermediary Definitions Adopting Release, we attempted to identify a level of dealing activity that would identify and capture the entities for which the Title VII dealer requirements are most appropriate, without imposing the costs of Title VII on those entities for which regulation currently may not be justified in light of the purposes of the statute.[442] We particularly took into account data regarding the activities of participants in the security-based swap market, including data regarding activity suggestive of dealing. Based on this analysis, we estimated that up to 50 entities in the security-based swap market might register as security-based swap dealers.[443] Those estimates—made outside of the context the cross-border application of the dealer definition—provide a baseline against which the Commission can analyze the programmatic costs and benefits and assessment costs of the final rules applying the *de minimis* exception to cross-border activities.

We believe the methodology used in the Intermediary Definitions Adopting Release also is appropriate for considering the potential programmatic costs and benefits associated with the final cross-border rules. This methodology particularly can help provide context as to how rules regarding the cross-border application of the *de minimis* exception may change the number of entities that must register as security-based swap dealers, and thus help provide perspective regarding the corresponding impact on the programmatic costs and benefits of Title VII. Applying that methodology to 2012 data regarding the single-name CDS market suggests that under these final rules approximately 50 entities may have to register as dealers—a number that is consistent with our estimates as part of the Intermediary Definitions Adopting Release.[444]

We recognize that there are limitations to using this methodology to consider the potential programmatic impact of the cross-border rules. These include limitations associated with the fact that the available data does not extend to all types of security-based swaps,[445] and challenges in extrapolating transaction data into inferences of dealing activity.[446] Also, the available single-name CDS data in certain regards potentially may lead the impact of these rules to be underestimated or overestimated:

- The Commission's access to data on CDS that are written on non-U.S. reference entities does not extend to data regarding transactions between two counterparties that are not domiciled in the United States, or guaranteed by a person domiciled in the United

[441] *See* Cross-Border Proposing Release, 77 FR 31137.

[442] *See* Intermediary Definitions Adopting Release, 77 FR 30724–25.

[443] *See* section III.A.1, *supra; see also* Intermediary Definitions Adopting Release, 77 FR 30635.

We stated that this was a ''conservative'' estimate. *See* Intermediary Definitions Adopting Release, 77 FR 30725 and n.1457. In establishing the *de minimis* threshold, we analyzed the percentage of the market activity that would likely be attributable to registered security-based swap dealers under various thresholds and various screens designed to identify entities that are engaged in dealing activity. *See id.* at 30636. Our analysis placed particular weight on the screen that identified entities that engaged in security-based swap transactions with three or more counterparties that themselves were not identified as dealers by ISDA. *See id.* at 30636. Of the 28 firms and corporate groups that satisfied this criterion, 25 also engaged in activity over the $3 billion threshold. *See id.* Based on this analysis, together with our expectation that some of the included corporate groups would register more than a single security-based swap dealer and that new entrants may be likely to enter the market, we estimated that as many as 50 entities would ultimately be required to register as a security-based swap dealer. *See id.* at 30725 n.1457.

[444] While these revised figures are based on methodology similar to what Commission staff employed in the Intermediary Definitions Adopting Release, they make use of newer data and also account for the final rules' approach to counting dealing transactions against the *de minimis* thresholds.

Consistent with that methodology regarding the use of market data to identify entities that may be engaged in dealing activity pursuant to the dealer-trader distinction (*see id.* 30636 n.478), the data indicated that in 2012, 40 entities engaged in the single-name security-based swap market had three or more counterparties that were not identified by ISDA as dealers. Of those 40 entities, 27 had $3 billion or more in notional single-name CDS activity over a 12 month period. Applying the principles reflected in these final rules regarding the counting of transactions against the *de minimis* thresholds suggests that 25 of those entities would have $3 billion or more in notional transactions counted against the thresholds. Applying the aggregation rules (by aggregating the transactions, that are subject to counting, of other affiliates within a corporate group that individually do not have $3 billion in transactions subject to counting) increases that number to 26 entities. Based on this data, we believe that it is reasonable to conclude that up to 50 entities ultimately may register as security-based swap dealers, although fewer dealers also is possible.

To apply the counting tests of these final rules to the data, Commission staff identified DTCC–TIW accounts associated with foreign branches and foreign subsidiaries of U.S. entities and counted all transaction activity in these accounts against the firm's *de minimis* threshold. Commission staff further counted non-U.S. persons' activity against U.S. persons and foreign branches and subsidiaries of U.S. persons against the *de minimis* thresholds.

[445] In these assessments, we have taken into account data obtained from DTCC–TIW regarding the activity of participants in the single-name CDS market. *See* Intermediary Definitions Adopting Release, 77 FR 30635. The present assessments use data from 2012, rather than the 2011 period used in connection with the Intermediary Definitions Adopting Release.

As part of the Intermediary Definitions Adopting Release we also considered more limited publicly available data regarding equity swaps. *See id.* at 30636 n.476, and 30637 n.485. The lack of market data is significant in the context of total return swaps on equity and debt, in that we do not have the same amount of information regarding those products as we have in connection with the present market for single name CDS. *See id.* at 30724 n.1456. Although the definition of security-based swaps is not limited to single-name CDS, we believe that the single-name CDS data are sufficiently representative of the market to help inform the analysis. *See id.* at 30636.

[446] As we noted in the Intermediary Definitions Adopting Release, the data incorporates transactions reflecting both dealing activity and non-dealing activity, including transactions by persons who may engage in no dealing activity whatsoever. *See id.* at 30635–36. For these purposes we have identified potential dealers based on whether an entity engaged in the single-name security-based swap market had three or more counterparties that were not identified by ISDA as dealers. We recognize that this may be imperfect as a tool for identifying dealing activity, given that the presence or absence of dealing activity ultimately turns upon the relevant facts and circumstances of an entity's security-based swap transactions, as informed by the dealer-trader distinction.

States.[447] More generally, the Commission's access to data also does not extend to transactions among affiliated entities. The available data thus does not extend to the activities of non-U.S. conduit affiliates, to the extent that they engage in transactions with non-U.S. persons (that themselves are not the subject of a guarantee), and potentially makes the assessment underinclusive to the extent that conduit affiliates engaged in dealing activity during the relevant period.

- The available data also does not specifically distinguish those transactions of non-U.S. persons that are subject to a guarantee by a U.S. person, and other (non-guaranteed) transactions by such non-U.S. persons. As a result, we have assumed that all foreign subsidiaries of U.S. persons rely on guarantees for all transactions, which potentially overestimates the level of transaction activity that would count toward *de minimis* thresholds for U.S. persons with foreign subsidiaries.

Separately, the programmatic costs and benefits associated with the implementation of these rules cannot be quantified with any degree of precision because the full range of the *de minimis* exception's effects on the programmatic costs and benefits also will reflect final rules—which have yet to be finalized—implementing the Title VII entity-level and transaction-level requirements applicable to security-based swap dealers.

In addition, the programmatic benefits and costs associated with the cross-border application of the *de minimis* exception may change as market participants modify their business structure or practices in response to these rules. To avoid the prospect of being regulated as a security-based swap dealer, some market participants may restructure their businesses or take other steps (such as avoiding engaging in security-based swap activities involving U.S. persons) to avoid having their dealing transactions counted against the *de minimis* thresholds. Other market participants may take similar steps in response to counterparty demands. We understand that some market participants already have taken these types of steps to restructure their derivatives operations in response to the implementation of Title VII requirements related to swaps. More fundamentally, there are inherent challenges associated with attempting to quantify the risk-mitigation and other benefits of financial regulation.[448] The programmatic impact of these rules may further reflect the fact that certain entities that are deemed to be security-based swap dealers, and hence are subject to the applicable Title VII dealer requirements, separately may be subject to other regulatory requirements that are analogous to the security-based swap dealer requirements. For example, we recognize that certain entities that are deemed to be security-based swap dealers pursuant to these rules also may be registered as swap dealers with the CFTC, pursuant to the CEA. Those entities' compliance with CFTC requirements applicable to swap dealers potentially may mitigate the programmatic effect of these rules—in terms of both costs and benefits—to the extent that those CFTC requirements are comparable with the SEC's yet-to-be-finalized substantive rules applicable to security-based swap dealers. The potential availability of substituted compliance, whereby a market participant may comply with a Title VII security-based swap dealer requirement by complying with a comparable requirement of a foreign financial regulator, also may affect the final programmatic impact of these rules.

In general, however, and consistent with our territorial approach, we believe that these rules are targeted appropriately, and do not apply dealer regulation to those entities that have a more limited involvement in the U.S. financial system and hence whose regulation as a security-based swap dealer under Title VII would be less linked to programmatic benefits (*i.e.,* non-U.S. persons that engage in security-based swap dealing activity entirely, or almost entirely, outside the United States with non-U.S. persons or with certain foreign branches), while applying dealer regulation to those entities whose dealing activity would be more likely to produce programmatic benefits under Title VII. The nexus between specific aspects of these requirements and the programmatic costs and benefits also is addressed below in connection with our consideration of various alternatives to the approach taken in the final rules.

Finally, we recognize that the U.S. market participants and transactions regulated under Title VII are a subset of the overall global security-based swap market and that shocks to risk or liquidity arising from a foreign entity's dealing activity outside the United States may spill into the United States. Such spillover risks associated with dealing activity that falls outside the scope of Title VII have the potential to affect U.S. persons and the U.S. financial system either through a foreign entity's transactions with foreign entities, which, in turn, transact with U.S. persons (and may, as a result, be registered security-based swap dealers or major security-based swap participants), or through membership in a clearing agency that may provide CCP services in the United States or have a U.S. person as a clearing member. We also have considered these spillovers in connection with our analysis of the effects of these final cross-border rules on efficiency, competition and capital formation.[449]

2. Assessment Costs

The analysis of how these cross-border rules will affect the assessment costs associated with the ''security-based swap dealer'' definition and its *de minimis* exception is related to the assessment cost analysis described in the Intermediary Definitions Adopting Release,[450] but must also account for certain issues specific to these cross-border rules. While in certain regards those assessment costs can more readily be estimated than the programmatic effects discussed above, the assessment costs associated with the cross-border application of the Title VII dealer requirements will be considerably smaller in significance than those programmatic effects.

The Intermediary Definitions Adopting Release addressed how certain market participants whose security-based swap activities exceed or are not materially below the *de minimis* threshold may be expected to incur assessment costs in connection with the dealer analysis.[451] In that release we

[447] The Commission has more complete access to data regarding transactions involving single-name CDS on U.S. reference entities.

[448] In the Intermediary Definitions Adopting Release, we and the CFTC noted that we are ''not of the general view that the costs of extending regulation to any particular entity must be outweighed by the quantifiable or other benefits to be achieved with respect to that particular entity.'' *See* Intermediary Definitions Adopting Release, 77 FR 30630. We also noted that ''it does not appear possible to demonstrate empirically—let alone quantify—the increase or decrease in the possibility that a financial crisis would occur at a particular future time and with a particular intensity in the absence of financial regulation or as a result of varying levels or types of financial regulation.'' *See id.* at 30630 n.421 (also noting the difficulty of demonstrating empirically ''that the customer protections associated with dealer regulation would increase or decrease the likelihood that any particular market participant would suffer injury (or the degree to which the participant would suffer injury) associated with entering into an inappropriate swap or security-based swap'').

[449] *See* section VIII, *supra.*

[450] *See* Intermediary Definitions Adopting Release, 77 FR 30731–32.

[451] *See id.* at 30731. These assessment costs include costs associated with analyzing a person's security-based swap activities to determine whether those activities constitute dealing activity and the

estimated that 166 entities—out of over one thousand U.S. and non-U.S. entities that engaged in single-name CDS transactions in 2011—had more than $2 billion in single-name CDS transactions over the previous 12 months, and as a result would engage in the dealer analysis.[452] Based on those numbers, and assuming that that all of those entities retain outside counsel to analyze their status under the security-based swap dealer definition, including the *de minimis* exception, we estimated that the legal costs associated with assessing market participants' *potential* status as security-based swap dealers may approach $4.2 million.[453]

Application of these cross-border rules to the *de minimis* exception can be expected to affect the assessment costs that market participants will incur. In part, certain non-U.S. persons may be expected to incur personnel costs and legal costs—beyond the legal costs addressed as part of the Intermediary Definitions Adopting Release—associated with analyzing these cross-border rules and developing systems and procedures to assess which transactions would have to be counted against the *de minimis* thresholds (or with the purpose of avoiding activities within the United States that would be sufficient to meet the applicable thresholds). On the other hand, while certain market participants also would incur additional legal costs associated with the dealer determination (*i.e.,* the assessment of whether particular activities constitute dealing activity for purposes of the analysis) addressed in the Intermediary Definitions Adopting Release, the application of the cross-border rules may reduce the number of entities that incur such legal costs.

In adopting these rules we estimate the assessment costs that market participants may incur as a result. As discussed below, however, these costs in practice may be mitigated in large part by steps that market participants already have taken in response to other regulatory initiatives, including the CFTC Cross-Border Guidance.

(a) Legal Costs

The implementation of these cross-border rules in some circumstances has the potential to change the legal costs identified in the Intermediary Definitions Adopting Release, including by adding new categories of legal costs that non-U.S. persons may incur in connection with applying the *de minimis* exception in the cross-border context.

Legal costs related to application of the dealer-trader distinction—As discussed in the Intermediary Definitions Adopting Release, certain market participants will incur assessment costs relating to performing the analysis as to whether their security-based swap activities constitute dealing. For purposes of that release we assumed that only entities with more than $2 billion in security-based swap transactions over the previous 12 months would be likely to engage in the full dealer analysis, and, based on analysis of single-name CDS data, we concluded that there were 166 market participants that would meet those criteria.[454]

In the cross-border context, we believe that some non-U.S. persons that have more than $2 billion in total security-based swap transactions over the previous 12 months nonetheless may be expected to forgo the costs of performing the dealing activity analysis, if only a comparatively low volume of their security-based swap activity involves U.S. counterparties or otherwise potentially needs to be counted against the *de minimis* thresholds. In particular, we believe that it is unlikely that non-U.S. persons would engage in the dealer analysis (and hence would not be likely to incur such legal costs described in the Intermediary Definitions Adopting Release) if over the previous 12 months they have less than $2 billion in security-based swap transactions that potentially would have to be counted against the thresholds.[455]

Available data from 2012 indicates that 218 entities worldwide (147 of which are domiciled in the United States and 71 domiciled elsewhere) had security-based swap activity, with all counterparties, of $2 billion or more. Of those 218 entities 202 had total activity of $2 billion or more that—to the extent it constituted dealing activity—would appear to have to be counted against the *de minimis* thresholds. Those 202 entities consisted of 147 entities domiciled in the United States (which would have to count all of their dealing transactions), and 55 entities domiciled elsewhere that have $2 billion in transactions with U.S. counterparties or that otherwise may have to be counted for purposes of the *de minimis* analysis.[456] To the extent that all 202 of those entities engage in the legal analysis related to which of their security-based swap activities constitutes dealing under the dealer-trader distinction (while recognizing that some such entities may conclude that, based on the nature of their business, they engage in dealing activities and that no such additional analysis is necessary), and assuming that such analyses amount to $30,000 per entity,[457] those 202 entities would incur a total of approximately $6.1 million in such legal costs.[458]

Legal costs related to systems and analysis—As noted above, out of the 218 entities that had total security-based swap activity of $2 billion or more in 2012, 71 are domiciled outside of the United States. Upon further consideration (and in addition to the estimates in the Cross-Border Proposing Release), we also believe that it is

costs of monitoring the volume of dealing activity against the *de minimis* threshold.

[452] *Id.* at 30731–32. As discussed below, a comparable assessment using 2012 data indicates that there were approximately 210 entities in the single-name CDS market with more than $2 billion in transactions over 12 months. That analysis accounts for the aggregation of affiliate activity for purposes of the *de minimis* analysis, by first counting individual accounts with more than $2 billion in activity, and then aggregating any remaining accounts to the level of the ultimate parent and counting those also.

[453] *See id.* We estimated that the per-entity cost of the dealer analysis would be approximately $25,000. Our estimate of aggregate industry-wide costs of $4.2 million reflected the costs that may be incurred by all 166 entities. *See id.*

[454] *See id.* at 30731–32. Using an estimate of $25,000 in legal costs per firm, this led to a total estimate of $4.2 million. *See id.* at 30732.

[455] *See* Cross-Border Proposing Release, 78 FR 31141.

[456] A total of 16 of those 71 entities that are not domiciled in the United States appear to have less than $2 billion in activity that involve U.S. counterparties or that otherwise would appear to potentially have to be counted against the *de minimis* thresholds.

[457] In the Intermediary Definitions Adopting Release, we estimated that such costs may range from $20,000 to $30,000. *See* Intermediary Definitions Adopting Release, 77 FR 30732. For purposes of this analysis, we conservatively are using the upper end of that range.

[458] This analysis of data related to potential assessment costs reflects both the activities of individual DTCC–TIW accounts as well as the activities of transacting agents. The analysis in particular first considers the number of accounts that have $2 billion or more in annual security-based swap activity, and then, after removing those particular accounts, considers activity aggregated at the level of individual transacting agents. This analysis is comparable to the analysis we use to estimate the potential number of dealers under the final rules. *See* note 444, *supra.* This analysis is distinct from the analogous analysis we used in the Intermediary Definitions Adopting Release to estimate the number of entities that may be expected to perform the dealer-trader analysis (*see* notes 149 through 151 and accompanying text, *supra*), which focuses on activity at the transacting agent level, because further experience with the associated data permits us to conduct a more granular analysis of that data. *See generally* Cross-Border Proposing Release, 78 FR 31137 n.1407.

These estimates do not reflect a new category of costs arising from the cross-border rules. They instead are a revision of a category of previously identified costs that market participants may incur in engaging in the dealer-trader analysis, using newer data and reflecting only trades that are counted under the final cross-border rules.

reasonable to conclude that those 71 entities may have to incur one-time legal expenses related to the development of systems and analysis expenses—discussed below—to identify which of their total security-based swap transactions potentially must be counted for purposes of the *de minimis* analysis consistent with these cross-border rules. This additional cost estimate reflects the fact that the development of such systems and procedures must address cross-border rules that require accounting for factors such as whether an entity's security-based swaps are subject to guarantees from affiliated U.S. persons, and whether its counterparties are U.S. persons.[459] We estimate that such legal costs would amount to approximately $30,400 per entity, and that those 60 entities would incur total costs of approximately $2.2 million.[460]

(b) Costs Related to Systems, Analysis, and Representations

Transaction-monitoring systems—The elements introduced by the final cross-border rules may cause certain non-U.S. persons to implement systems to identify whether their dealing transactions exceed the *de minimis* thresholds.[461] Such systems may reflect the need for non-U.S. persons to: (i) identify whether their dealing counterparties are ''U.S. persons''; (ii) determine whether their dealing transactions with a U.S. person constitutes ''transactions conducted through a foreign branch'' (which itself requires consideration of whether their counterparty is a ''foreign branch'') and—of those—determine which transactions involve a foreign branch of a U.S. bank that itself is registered as a security-based swap dealer; (iii) determine whether particular transactions are subject to a recourse guarantee against a U.S. affiliate; (iv) evaluate the applicability of the aggregation principles; and (v) evaluate the availability of the exception for cleared anonymous transactions.[462]

In general, we believe that the costs of such systems should be similar to the costs estimated in the Intermediary Definitions Adopting Release for a system to monitor positions for purposes of the major security-based swap participant thresholds. In both cases –the assessment of dealer status in the cross-border context and the assessment of major participant status—such systems would have to flag a person's security-based swaps against the specific criteria embedded in the final rules, and then compare the cumulative amount of security-based swaps that meet those criteria against regulatory thresholds.[463] Based on the methodology set forth in the Intermediary Definitions Adopting Release related to systems associated with the major participant analysis, we estimate that such systems would be associated with one-time programming costs of $14,904 and ongoing annual systems costs of $16,612 per entity.[464]

Analysis of counterparty status, including representations—Non-U.S. market participants also would be likely to incur costs arising from the need to assess the potential U.S.-person status of their counterparties, and in some cases to obtain and maintain records related to representations regarding their counterparties' U.S.-person status.[465] We anticipate that non-U.S. persons are likely to review existing information (*e.g.,* information already available in connection with account opening

[459] We would not expect U.S. persons with more than $2 billion in activities to incur such costs, given that U.S. persons would need to count all of their dealing activities against the *de minimis* thresholds.

[460] This estimate of $30,400 reflects an assumption that such efforts would require 80 hours of in-house legal or compliance staff's time. Based upon data from SIFMA's Management & Professional Earnings in the Securities Industry 2012 (modified by the Commission staff to account for an 1800-hour-work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead), the staff estimates that the average national hourly rate for an in-house attorney is $380.

[461] It is possible that a subset of non-U.S. dealers may reasonably conclude they are above the *de minimis* thresholds and should register with the Commission as security-based swap dealers, without establishing systems to analyze their status under the exception, in light of the nature of their operations and their activity within the United States.

Moreover, in considering the assessment costs associated with the final rules, we continue to hold the expectation, noted in the Intermediary Definitions Adopting Release, that market participants generally would be aware of the notional amount of their activity involving security-based swaps as a matter of good business practice. *See* Intermediary Definitions Adopting Release, 77 FR 30732. These systems cost estimates for non-U.S. persons are provided in recognition of the fact that non-U.S. persons will likely need to distinguish those transactions that must be counted against their *de minimis* thresholds and those that do not need to be included.

[462] In considering the assessment costs associated with the final rules, we believe that a potential dealer assessment of whether it is a ''conduit affiliate'' would not require the use of any systems. A conduit affiliate must count all of its dealing transactions, making transaction-specific tracking unnecessary. Moreover, the question of whether a person acts as a conduit affiliate would turn upon whether it engages in certain security-based transactions on behalf of a U.S. affiliate, accompanied by back-to-back transactions with that affiliate. That analysis fundamentally is different from the transaction-specific assessments that are more likely to require the development of new systems for monitoring the attributes of particular transactions.

[463] As discussed in the Cross-Border Proposing Release, we would expect that market participants would be aware of the notional amount of their security-based swap activity as a matter of good business practice. *See* Cross-Border Proposing Release, 78 FR 31140.

[464] In the Intermediary Definitions Adopting Release, we estimated that the one-time programming costs of $13,692 per entity and annual ongoing assessment costs of $15,268. *See* Intermediary Definitions Adopting Release, 77 FR 30734–35 and accompanying text (providing an explanation of the methodology used to estimate these costs). The hourly cost figures in the Intermediary Definitions Adopting Release for the positions of Compliance Attorney, Compliance Manager, Programmer Analyst, and Senior Internal Auditor were based on data from SIFMA's Management & Professional Earnings in the Securities Industry 2010.

For purposes of the cost estimates in this release, we have updated these figures with more recent data as follows: the figure for a Compliance Attorney is $334/hour, the figure for a Compliance Manager is $283/hour, the figure for a Programmer Analyst is $220/hour, and the figure for a Senior Internal Auditor is $209/hour, each from SIFMA's Management & Professional Earnings in the Securities Industry 2013, modified by SEC staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead. We also have updated the Intermediary Definitions Adopting Release's $464/hour figure for a Chief Financial Officer, which was based on 2011 data, with a revised figure of $500/hour, for a Chief Financial Officer with five years of experience in New York, that is from *http://www.payscale.com,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead. *See http://www.payscale.com* (last visited Apr. 16, 2014). Incorporating these new cost figures, the updated one-time programming costs based upon our assumptions regarding the number of hours required in the Intermediary Definitions Adopting Release would be $15,287 per entity, *i.e.,* (Compliance Attorney at $334 per hour for 2 hours) + (Compliance Manager at $283 per hour for 8 hours) + (Programmer Analyst at $220 per hour for 40 hours) + (Senior Internal Auditor at $209 per hour for 8 hours) + (Chief Financial Officer at $500 per hour for 3 hours) = $14,904, and the annual ongoing costs would be $16,612 per entity, *i.e.,* ((Senior Internal Auditor at $209 per hour for 16 hours) + Compliance Attorney at $334 per hour for 4 hours) + (Compliance Manager at $283 per hour for 4 hours) + (Chief Financial Officer at $500 per hour for 4 hours) + (Programmer Analyst at $220 per hour for 40 hours) = $16,612).

[465] Non-U.S. market participants potentially may also assess and seek representations related to whether their security-based swap activity with a particular counterparty constitutes transactions conducted through a foreign branch of a U.S. bank (including representations regarding the non-involvement of U.S. personnel) that is registered as a security-based swap dealer. Based on our understanding of changes in the way major U.S. dealers engage with non-U.S. counterparties in the single-name CDS market following the issuance of the CFTC Cross-Border Guidance, we believe that few, if any, U.S. persons currently may participate in this market through their foreign branches. Also, as noted above, other regulatory provisions may limit the ability of U.S. banks to conduct security-based swap activity. *See* note 366, *supra.* Accordingly, we do not believe that it is likely that non-U.S. market participants will independently assess, and seek representations related to, the foreign branch status of their counterparties. Instead, we believe that it is likely that such non-U.S. persons will focus on assessing the U.S.-person status of the bank for which the foreign branch is a part.

materials and ''know your customer'' practices) to assess whether their counterparties are U.S. persons. Non-U.S. persons at times may also request and maintain representations from their counterparties to help determine or confirm their counterparties' status. Accordingly, in our view, such assessment costs primarily would encompass one-time costs to review and assess existing information regarding counterparty domicile, principal place of business, and other factors relevant to potential U.S.-person status, as well as one-time costs associated with requesting and collecting representations from counterparties.[466] The Commission believes that such one-time costs would be approximately $732 thousand per firm.[467]

Monitoring of counterparty status—In addition, market participants may be expected to adapt the systems described above to monitor the status of their counterparties for purposes of their future security-based swap activities. Such refinements would permit these systems to maintain records of counterparty status for purposes of conducting the *de minimis* assessments (*e.g.,* representations regarding a counterparty's U.S.-person status, or whether a counterparty's transaction through a foreign branch involve U.S. personnel), such as by monitoring for the presence of existing representations, to obviate the need to request representations on a transaction-by-transaction basis.[468] Market participants also may need to monitor for the presence of information that may indicate that the representation they have received are outdated or otherwise are not valid.[469] We estimate that this would require one-time costs of approximately $12,436 per firm.[470]

Summary of system, analysis and representation costs—In sum, we estimate that the costs that certain non-U.S. market participants would incur in connection with systems, analysis of counterparty status and representations in connection with these cross-border rules would be approximately $759 thousand in one-time costs,[471] and their estimated annual ongoing costs would be $16,612. The available data provided by the DTCC–TIW, subject to the limitations associated with the use of data analysis discussed above, suggests that such costs may be incurred by 71 non-U.S. domiciled entities with total annual activity of at least $2 billion. Assuming that each of these 71 entities concludes it has a need to monitor the above categories of information in connection with its security-based swap activities, we estimate that the total one-time industry-wide costs associated with establishing such systems would amount to approximately $54 million, and total annual ongoing costs would amount to approximately $1.2 million.

(c) Overall Considerations Related to Assessment Costs

In sum, we believe that the effect of these final cross-border rules would be an increase over the amounts that otherwise would be incurred by certain non-U.S. market participants, both in terms of additional categories of legal costs and in terms of the need to develop certain systems and procedures.

Requiring certain non-U.S. persons to incur such assessment costs is an unavoidable adjunct to the implementation of a set of rules that are appropriately tailored to apply the ''security-based swap dealer'' definition under Title VII to a global security-based swap market in a way that yields the important transparency, accountability, and counterparty protection benefits associated with dealer regulation under Title VII. The alternative—avoiding application of the

[466] We expect that an assessment of whether a particular counterparty is a U.S. person—once properly made—generally will not vary over time, given that the components of the ''U.S. person'' definition generally would not be expected to vary for a particular counterparty absent changes such as a corporate reorganization, restructuring or merger. With that said, we believe market participants will likely monitor for the presence of information that may indicate that the representations they have received in connection with a person's U.S.-person status are outdated or otherwise are no longer accurate (*e.g.,* information regarding a counterparty's reorganization, restructuring, or merger).

We also believe that such non-U.S. persons will likely obtain the relevant information regarding the U.S.-person status of their new accounts as part of the account opening process, as a result of these and other regulatory requirements.

[467] In part, this estimate is based on each firm incurring an estimated one-half hour compliance staff time and one-half hour of legal staff time—per counterparty of the firm—to review and assess information regarding the counterparty, and potentially to request and obtain representations regarding the U.S.-person status of their counterparties. These are in addition to the assessment cost estimates we made in the Cross-Border Proposing Release, and reflect further consideration of the issue in light of industry experience in connection with the CFTC Cross-Border Guidance. For these purposes, we conservatively assume that each of those non U.S. firms will have 2400 single-name CDS counterparties (based on data indicating that the 60 non-U.S. persons with total single-name CDS transactions in 2012 of $2 billion or less all had fewer than 2400 counterparties in connection with single-name CDS), which produces an estimate of 1200 hours of compliance staff time and 1200 hours of legal staff time per firm. Based upon data from SIFMA's Management & Professional Earnings in the Securities Industry 2013 (modified by the Commission staff to account for an 1800-hour-work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead), the staff estimates that the average national hourly rate for a senior compliance examiner is $217 and that the average national hourly rate for an in-house attorney is $380; this leads to a cumulative estimate of approximately $716 thousand per firm for such costs.

Consistent with the Cross-Border Proposing Release, moreover, this estimate is further based on estimated 40 hours of in-house legal or compliance staff's time (based on the above rate of $380 per hour for an in-house attorney) to establish a procedure of requesting and collecting representations from trading counterparties, taking into account that such representation may be incorporated into standardized trading documentation used by market participants. This leads to an estimate of $15,200 per firm for such costs.

[468] The exclusion for a non-U.S. person's dealing transactions conducted through the foreign branch of a counterparty that is a registered security-based swap dealer is predicated on U.S.-based personnel of the counterparty not being involved in arranging, negotiating or executing the transaction at issue. Notwithstanding the potentially transaction-specific nature of that assessment, we believe that parties may structure their relationships in such a way that the non-U.S. person may rely on general representations by its counterparty, without the need for a separate representation in conjunction with each individual transaction.

[469] It is possible that the need to monitor for information inconsistent with existing representations would be more significant in the context of representations regarding whether a transaction has been conducted through a foreign branch of a U.S. bank, than they would be in the context of representations regarding the U.S.-person status of a counterparty. This is because a counterparty's potential status as a U.S. person would not be expected to vary on a transaction-by-transaction basis. At the same time, we believe that few, if any, U.S. persons currently may participate in this market through their foreign branches. *See* note 465, *supra.*

[470] In part, this is based on an estimate of the time required for a programmer analyst to modify the software to track whether the counterparty is a U.S. person (including whether it is a foreign branch of a U.S. bank that is not registered as a security-based swap dealer), and to record and classify whether a transaction constitutes dealing activity conducted through a foreign branch of a registered dealer This includes time associated with consultation with internal personnel, and an estimate of the time such personnel would require to ensure that these modifications conformed to those aspects of the final rule. Using the estimated hourly costs described above, we estimate the costs as follows: (Compliance Attorney at $334 per hour for 2 hours) + (Compliance Manager at $283 per hour for 4 hours) + (Programmer Analyst at $220 per hour for 40 hours) + (Senior Internal Auditor at $209 per hour for 4 hours) + (Chief Financial Officer at $500 per hour for 2 hours) = $12,436. *See* note 464, *supra* (for source of the estimated per-hour costs).

As noted above, we generally would not expect a counterparty's U.S.-person status to vary over time absent changes such as reorganization, restructuring or merger. *See* note 466, *supra.*

[471] Consistent with the above discussion, the estimated one-time costs of $759 thousand represent: the costs to establish a system to assess the status of their dealing activities under the definitions and other provisions specific to these cross-border rules ($14,904); the costs related to the assessment of counterparty status, including costs of assessing existing information and of requesting and obtaining representations, as well as costs of related procedures ($732 thousand), and the costs for monitoring the status of their counterparties for purposes of their future security-based swap activities ($12,436).

Title VII dealer requirements to non-U.S. persons—would be inappropriate because, in our view, the dealing activity of non-U.S. persons required to count their dealing activity under these final rules constitutes part of the U.S. financial system. The benefits that arise from Title VII regulatory requirements, including risk management and transparency benefits associated with dealer regulation accordingly could be undermined if a significant portion of U.S. dealing activity by non-U.S. persons were excluded from the Title VII framework. In certain respects, however, decisions embedded in these final rules are designed to avoid imposing assessment costs upon market participants.[472]

It is important to recognize that our estimates of the assessment costs associated with these rules in practice may tend to overestimate that costs that market participants actually will incur as a result of these rules. This is because in practice, the assessment costs associated with the cross-border scope of the dealer definition (like the potential programmatic effects of that cross-border scope) may be tempered to the extent that the assessments that market participants conduct in connection with their security-based swap activities correspond to the assessments they otherwise would follow due to other regulatory requirements or business practices. Significantly, we understand that a substantial number of market participants already have engaged in assessment activities—including activities to determine whether their counterparties are U.S. persons—conforming to the requirements applicable to swaps. Given our expectation that persons that are not ''U.S. persons'' under the CFTC's policy (as set forth in its cross-border guidance) generally also would not be ''U.S. persons'' under our rules, certain market participants may reasonably determine that as part of the implementation of the rules we are adopting today they need not duplicate work already done in connection with implementing the CFTC's swaps regulations. In this regard we recognize the significance of commenter views emphasizing the importance of harmonization with the CFTC to control the costs associated with assessments under Title VII.[473] We acknowledge that, to the extent our final rules differ from the CFTC's approach—especially if they were to require counting of transactions that would not be captured by the requirements applicable to swaps in the cross-border context, or were to require the collection and/or consideration of information that is materially different from that collected under the CFTC's approach—market participants may face higher costs than if regulations were identical.[474] As discussed in connection with the specific aspects of these rules, however, we believe that such differences are justified, as are any associated assessment (or programmatic) costs.

Finally, we also anticipate that certain market participants that wish to limit the possibility of being regulated as a dealer under Title VII, including the programmatic and assessment costs associated with the dealer definition, may choose to structure their business to avoid engaging in dealing transactions with U.S. persons (other than foreign branches of banks registered with the Commission as dealers).

3. Alternative Approaches

As discussed above, the final rules incorporate a number of provisions designed to focus Title VII dealer regulation upon those persons that engage in the performance of security-based swap dealing activity within the United States in excess of the *de minimis* thresholds, taking into account the mitigation of risks to U.S. persons and potentially to the U.S. financial markets, as well as other purposes of Title VII.

In adopting these final rules we have considered alternative approaches suggested by commenters, including the economic effects of following such alternative approaches. In considering the economic impact of potential alternatives, we have sought to isolate the individual alternatives to the extent practicable, while recognizing that many of those alternatives are not mutually exclusive.

We further have considered such potential alternatives in light of the methodologies discussed above, by assessing the extent to which following particular alternatives would be expected to increase or decrease the number of entities that ultimately would be expected to be regulated as dealers under the final rules, as well as the corresponding economic impact. As discussed below, however, analysis of the available data standing alone would tend to suggest that various alternative approaches suggested by commenters would not produce large changes in the numbers of market participants that may have to be regulated as security-based swap dealers. These results are subject to the above limitations, however, including limitations regarding the ability to quantitatively assess how market participants may adjust their future activities in response to the rules we adopt or for independent reasons. Accordingly, while such analyses provide some context regarding alternatives, their use as tools for illustrating the economic effects of such alternatives is limited.

(a) Dealing Activity by Foreign Branches of U.S. Banks

The final rules require U.S. banks to count all dealing transactions of their foreign branches against the *de minimis* thresholds, even when the counterparty is a non-U.S. person or another foreign branch of a U.S. person. Certain commenters to the rules addressed in the Intermediary Definitions Adopting Release had expressed the view that such transactions by foreign branches should not have to count their dealing transactions involving non-U.S. persons.[475] For the reasons discussed above, we believe that it is appropriate for the analysis to include dealing transactions conducted through foreign branches to the same extent as other dealing transactions by U.S. persons.[476]

Adopting such an alternative approach potentially could provide market participants that are U.S. persons with incentives to execute higher volumes through their foreign branches. Such an outcome may be expected in part to reduce the programmatic and assessment costs associated with dealer regulation under Title VII. Such an outcome also would be expected to reduce the programmatic benefits associated with dealer regulation, given that those U.S. banks (and potentially the U.S. financial

[472] For example, the final rules incorporate an express representation provision in the ''U.S. person'' definition, to help the parties best positioned to make the U.S.-person determination and convey the results of that analysis to its counterparty. *See* section IV.C.4, *supra.*

[473] For example, one commenter urged the Commission to exempt from the definition of U.S. person collective investment vehicles that are publicly offered only to non-U.S. persons, consistent with the CFTC's interpretation, on account of the costs that would be required for collective investment vehicles that transact in both swaps and security-based swaps to develop separate compliance systems and operations for swaps and security-based swaps.

[474] In this regard we also note that in certain areas the Commission has taken an approach that is narrower than the CFTC analogue.

[475] *See* note 181, *supra,* and accompanying text. This issue—regarding whether a foreign branch of a U.S. bank should count all of its dealing activity against the *de minimis* thresholds—is distinct from the issue regarding the extent to which a non-U.S. person should count its dealing activity involving a foreign branch of a U.S. bank as a counterparty. That latter issue is addressed below. *See* section IV.I.3(d), *supra.*

[476] *See* section IV.B, *supra.*

system) would incur risks via their foreign branches equivalent to the risk that might arise from transactions of U.S. banks that are not conducted through foreign branches, but without the additional oversight (including risk mitigation requirements such as capital and margin requirements) that comes from regulation as a dealer.

Using the 2012 data to assess the impact associated with this alternative does not indicate a change to our conservative estimate that up to 50 entities potentially would register as security-based swap dealers.[477] This assessment, as well as the other assessments of alternatives discussed below, is subject to the limitations discussed above, including limitations regarding the ability to assess how market participants would change their activities in response to the final rules.

(b) Dealing Activity by Guaranteed Affiliates of U.S. Persons

The final rules require a non-U.S. person to count, against the *de minimis* thresholds, dealing transactions for which the non-U.S. person's performance in connection with the transaction is subject to a recourse guarantee against a U.S. affiliate of the non-U.S. person. Although the proposal instead would have treated such guaranteed affiliates like any other non-U.S. persons, we believe that this provision is appropriate for the reasons discussed above, including that such recourse guarantees pose risks to U.S. persons and potentially to the U.S. financial system via the U.S. guarantor.

This aspect of the final rules reflects a middle ground between commenter views, given that some commenters opposed any consideration of guarantees as part of the dealer analysis, while others expressed the view that all affiliates of a U.S. person should be assumed to be the beneficiary of a *de facto* guarantee from the U.S. person and, absent a showing otherwise, should have to count all of their dealing activity against the thresholds.[478] This diversity of commenter views suggests a range of potential alternatives to the final rules—including one alternative in which the final rules do not address guarantees at all, as well as alternatives in which (based on the concept of a *de facto* guarantee) all affiliates of a U.S. person, or at least all affiliates within a U.S.-based holding company structure, should have to count their dealing activity against the thresholds (with a potential exception if they demonstrate to the market that there will be no guarantee). For the reasons discussed above, we believe that the approach taken by the final rules is appropriate.[479]

Following such alternative approaches could be expected to lead to disparate economic effects depending on which approach is followed. On the one hand, an approach that does not require counting against the thresholds of a non-U.S. person's transactions with non-U.S. counterparties that are guaranteed by their U.S. affiliates would help provide incentives for greater use of guarantees by U.S. persons, with an increase of the associated risk flowing to the United States.[480] On the other hand, an approach that requires the conditional or unconditional counting of transactions by all affiliates of U.S. persons could provide incentives for certain non-U.S. holding companies to limit or eliminate relationships with U.S.-based affiliates, even if these affiliates perform functions unrelated to security-based swap activity. Additionally, a more limited approach that requires counting by non-U.S. subsidiaries of U.S. holding companies could reduce liquidity in the security-based swap market even if such a subsidiary's participation does not depend on the financial position or backing of its parent.

Data assessment of the first alternative does not indicate a change to our estimate that up to 50 entities may be expected to register with the Commission as security-based swap dealers.[481] The available data does not permit us to assess the other approaches, whereby all affiliates within a U.S.-based holding company, or all affiliates of any U.S. person generally, should have to count their dealing activity against the thresholds.[482]

(c) Dealing by Conduit Affiliates

The final rules require that conduit affiliates of U.S. persons count all of their dealing transactions against the *de minimis* thresholds. The available data does not permit us to identify which market participants currently engage in security-based swap dealing activity on behalf of U.S. affiliates, and hence would be deemed to be conduit affiliates. Accordingly, we are limited in our ability to quantify the economic impact of this anti-evasion provision.

The economic effects of not including these provisions—and instead treating conduit affiliates the same as other non-U.S. persons—has the potential to be significant, as it would remove a tool that should help to deter market participants from seeking to evade dealer regulation through arrangements whereby U.S. persons effectively engage in dealing activity with non-U.S. persons via back-to-back transactions involving non-U.S. affiliates.[483] Following that alternative thus may partially impair the effective

[477] The DTCC–TIW data permits us to separately consider dealing activity involving accounts of foreign branches of U.S. banks from other accounts of U.S.-domiciled persons. As a result, it is possible to consider the potential impact of a requirement under which—in contrast to the final rules—dealing activity conducted through a foreign branch only needs to be counted against the thresholds when the counterparty is a U.S.-domiciled person. Under such an alternative approach, the U.S. person would not have to count dealing transactions in which the counterparty is a non-U.S. person or another foreign branch of a U.S. bank.

As discussed above, current data indicates that there are 27 market participants that have three or more counterparties that are not recognized as dealers by ISDA, and that have $3 billion or more in notional single-name CDS transactions over a 12 month period. Screening those entities against a cross-border test that is identical to the one we are adopting, except that it does not count foreign branches of U.S. banks as U.S. persons, leads to an estimate of 25 market entities that have $3 billion or more in activity that must be counted against the thresholds (rather than the 26 estimated in connection with the test we are adopting). That difference does not appear to warrant a change in the conservative estimate that up to 50 entities may register as security-based swap dealers.

[478] *See* note 310, *supra.*

[479] *See* section IV.E.1(b), *supra.*

[480] In the Cross-Border Proposing Release, we expressed the preliminary view that dealer regulation of such persons would not materially increase the programmatic benefits of the dealer registration requirement, and that such an approach would impose programmatic costs without a corresponding increase in programmatic benefits to the U.S. security-based swap market. *See* Cross-Border Proposing Release, 78 FR 31146–47. For the reasons discussed above, we have reached a different conclusion in conjunction with these final rules. *See* section IV.E.1(b), *supra.*

[481] Although the data available to the Commission includes data regarding transactions of non-U.S. persons that are guaranteed by their U.S. affiliates, the data does not allow us to identify which individual transactions of those non-U.S. persons are subject to guarantees by their U.S. affiliates, or to distinguish the guaranteed and non-guaranteed transactions of such non-U.S. persons. As a result, the assessment of the final rule presumed that all transactions of foreign subsidiaries of U.S. persons for which we have data available constitute guaranteed transactions.

Screening the 27 market participants that have three or more counterparties that are not recognized as dealers by ISDA, and that have $3 billion or more in notional single-name CDS transactions over a 12 month period, with a revised *de minimis* test that does not include any transactions with non-U.S. person counterparties entered into by a foreign subsidiary of a U.S. person produces 26 entities that would have more than $3 billion in notional transactions over 12 months counted against the threshold—a number that is identical to the number associated with the test we are adopting.

[482] The available data does not include information about the single-name security-based swap transactions of non-U.S. domiciled persons (including non-U.S. affiliates of U.S.-domiciled persons) for single-name CDS involving a non-U.S. reference entity.

[483] *See* note 314, *supra,* and accompanying text.

functioning of the Title VII dealer requirements, and lead risk and liquidity to concentrate outside of the U.S. market.

Another potential alternative approach to addressing such evasive activity could be to narrow the inter-affiliate exception to having to count dealing transactions against the *de minimis* thresholds, such as by making the exception unavailable when non-U.S. persons transact with their U.S. affiliates. Such an alternative approach may be expected to reduce the ability of corporate groups to use central market-facing entities to facilitate the group's security-based swap activities, and as such may increase the costs faced by such entities (*e.g.,* by requiring additional entities to directly face the market and hence negotiate master agreements with dealers and other counterparties). We believe that the more targeted approach of incorporating the conduit affiliate concept would achieve comparable anti-evasion purposes with less cost and disruption.

(d) Dealing Activity by Non-U.S. Counterparties With Foreign Branches of U.S. Banks and Certain Other Counterparties

The final rules require non-U.S. persons to count, against the thresholds, their dealing transactions involving counterparties that are foreign branches of U.S. banks unless the U.S. bank is registered as a security-based swap dealer and unless no U.S.-based personnel of the counterparty are involved in arranging, negotiating and executing the transaction. This reflects a change from the proposal, which would have excluded all such transactions with a foreign branch regardless of whether the U.S. bank was registered as a dealer. The change appropriately takes into consideration the benefits of having relevant Title VII provisions applicable to dealers apply to the transaction against the liquidity and disparate treatment rationales underlying the exclusion.[484]

This aspect of the final rules reflects a middle ground between commenter views regarding transactions with foreign branches, given that some commenters expressed the view that all transactions with foreign branches should be counted against a non-U.S. person's *de minimis* threshold, while another commenter took the view that no such transaction should be counted.[485] This suggests at least two possible alternatives to the final rule—one in which all transactions with foreign branches are excluded from being counted against the thresholds, and one in which all transactions with foreign branches are counted against the thresholds (just like other transactions with U.S. person counterparties).

The effect of adopting the first alternative—whereby all transactions with foreign branches are excluded from being counted—could provide U.S. market participants that are not registered as dealers with incentives to execute higher volumes of security-based swaps through their foreign branches, resulting in higher amounts of risk being transmitted to the United States without the risk-mitigating attributes of having a registered dealer involved in the transaction.[486] Adopting the second alternative—whereby all of a non-U.S. person's transactions with foreign branches are counted regardless of the registration status of the U.S. counterparty—would raise the potential for disparate impacts upon U.S. persons trading with foreign branches, along with associated concerns about liquidity impacts.

The available data allows for estimates related to both potential alternatives subject to the limitations discussed above, and neither alternative would be expected to indicate a change to our assessment that up to 50 entities may be expected to register with the Commission as security-based swap dealers.[487]

The final rules also incorporate definitions of ''foreign branch'' and ''transaction conducted through a foreign branch'' that potentially could be modified to reflect alternative approaches. While we do not believe that the economic impact of following such alternatives is readily quantifiable given the available data, we generally believe that any such effects would be limited, particularly in light of our understanding that few, if any, U.S. persons currently may participate in the single-name CDS market through their foreign branches.

Separately, the final rules do not require non-U.S. persons to count their dealing transactions with non-U.S. counterparties. Potential alternatives to that approach could be to require non-U.S. persons to count their dealing transactions with counterparties that are guaranteed affiliates of U.S. persons (at least with regard to transactions subject to the guarantees), or their dealing transactions with counterparties that are conduit affiliates.[488] The alternative approach of requiring non-U.S. persons to count dealing transactions with either or both of those types of non-U.S. counterparties potentially would increase the programmatic benefits associated with Title VII dealer regulation, by applying the risk mitigating aspects of dealer regulation (such as capital and margin requirements) to the dealer counterparties of persons whose security-based swap activities directly affect the United States, while recognizing that such risk mitigating benefits would be more attenuated than those that are associated with the final rules' approach of directly counting dealing transactions of such guaranteed and conduit affiliates. On the other hand, requiring non-U.S. persons to count such transactions would be expected to increase assessment costs by requiring such persons to evaluate and track whether their non-U.S. counterparties are guaranteed or conduit affiliates. Also, to the extent such an alternative approach causes non-U.S. dealers to avoid entering into transactions with affiliates of U.S. persons to avoid the need to conduct such assessments, the approach could reduce the liquidity available to corporate groups with U.S. affiliates, and further could provide an incentive for such corporate groups to move their security-based swap activity entirely outside the United States (which could impair the transparency goals of Title VII).

As we discussed in the Cross-Border Proposing Release, another potential approach related to the treatment of non-U.S. persons' dealing activities would be to not require the registration of non-U.S. persons that engage in

[484] *See* note 370, *supra,* and accompanying text.

[485] *See* notes 359 through 361, *supra,* and accompanying text.

[486] In practice, based on our understanding of changes in the way major U.S. dealers engage with non-U.S. counterparties in the single-name CDS market following the issuance of the CFTC Cross-Border Guidance, we believe that few, if any, U.S. persons currently may participate in the single-name CDS market through their foreign branches. Also, as noted above, we recognize that other regulatory provisions may limit the ability of U.S. banks to conduct security-based swap activities. *See* note 366, *supra.*

[487] Screening the 27 market participants that have three or more counterparties that are not recognized as dealers by ISDA, and that have $3 billion or more in notional single-name CDS transactions over a 12 month period, with the two revised *de minimis* tests addressed above produces 26 entities that would have more than $3 billion in notional transactions over 12 months counted against the threshold—a number identical to the number associated with the test we are adopting.

[488] For the reasons discussed above, we do not believe that it is necessary to require non-U.S. persons to count their dealing transactions with such non-U.S. counterparties. *See* section IV.E.2, *supra.*

Also, as discussed above, we anticipate soliciting additional public comment regarding counting of dealing transactions between two non-U.S. persons towards the *de minimis* exception when activities related to the transaction occur in the United States. *See* section I.A, *supra.*

dealing activity with U.S. person counterparties through an affiliated U.S. person intermediary.[489] In our view, such an approach would reduce the programmatic benefits associated with dealer regulation under Title VII, and would raise particular concerns related to financial responsibility and counterparty risk, as well as create risk to U.S. persons and potentially to the U.S. financial system.

(e) ''U.S. Person'' Definition

The ''U.S. person'' definition used by the final rules seeks to identify those persons for whom it is reasonable to infer that a significant portion of their financial and legal relationships are likely to exist within the United States and for whom it is therefore reasonable to conclude that risks arising from their security-based swap activities could manifest themselves within the United States, regardless of location of their counterparties. Because the definition incorporates decisions regarding a range of issues, the definition potentially is associated with a number of alternative approaches that could influence the final rules' economic impact.[490]

A particularly significant element of this definition addresses the treatment of investment vehicles. Under the final rule, a fund is a ''U.S. person'' if the vehicle is organized, incorporated or established within the United States, or if its principal place of business is in the United States, which we are interpreting to mean that the primary locus of the investment vehicle's day-to-day operations is within the United States. One potential alternative approach to this element would be to make use of a narrower definition that does not use a principal place of business test for investment vehicles, and hence does not encompass vehicles that are not established, incorporated, or organized within the United States, even if the primary locus of their day-to-day operations is located here. Another potential approach would be to focus the meaning of ''principal place of business'' on the location where the operational management activities of the fund are carried out, without regard to the location of the fund's managers.

Similarly, another potential alternative approach to the ''U.S. person'' definition would be for the definition not to incorporate a principal place of business test for operating companies. Under such an alternative approach, an operating company would not fall within the ''U.S. person'' definition if it is not organized, incorporated or established within the United States, even if the officers or directors who direct, control and coordinate the operating company's overall business activities are located in the United States.

Following an alternative approach whereby the ''U.S. person'' definition did not encompass a ''principal place of business'' test, or whereby the definition followed a narrower such test with regard to particular types of market participants, may be expected to reduce the programmatic costs and benefits associated with dealer regulation, in that it may lead certain non-U.S. persons not to have to register as dealers notwithstanding dealing activities with such counterparties above the *de minimis* thresholds. Such an alternative approach also may promote market participants' use of such counterparties that are closely linked to the United States but that are not organized, incorporated or established within the United States, or that do not have operational management activities within the United States, in lieu of entering into security-based swaps with U.S. persons. While such an approach may be expected to reduce programmatic costs, it also would reduce the programmatic risk mitigation and other benefits of dealer regulation under Title VII given that the ''principal place of business'' test helps to identify persons for which the risks associated with their security-based swap activities can manifest themselves within the United States.[491] Such an alternative approach may also be expected to reduce assessment costs incurred by non-U.S. persons, although such assessment costs in any event would be reduced by the ability of non-U.S. persons to rely on a counterparty's representation that the counterparty is not a U.S. person.

Aside from those issues related to the use of a ''principal place of business'' test, other aspects of the ''U.S. person'' definition also may affect the programmatic costs and benefits and assessment costs associated with dealer regulation. For example, the final rules do not encompass funds that are majority-owned by U.S. persons, although two commenters supported such an approach.[492] Also, the final ''U.S. person'' definition does not exclude investment vehicles that are offered publicly only to non-U.S. persons and are not offered to U.S. persons, although some commenters also supported this type of exclusion.[493]

For the reasons detailed above, we believe that including majority-owned funds within the definition of ''U.S. person'' would be likely to increase programmatic costs (by causing more investment funds to be subject to Title VII requirements) as well as assessment costs, while not significantly increasing programmatic benefits given our view that the composition of a fund's beneficial owners is not likely to have significant bearing on the degree of risk that the fund's security-based swap activity poses to the U.S. financial system. Moreover, for the reasons discussed above, we also believe that an exclusion for publicly offered funds that are offered only to non-U.S. persons and not offered to U.S. persons, while likely to reduce programmatic costs, would also reduce programmatic benefits, by excluding certain funds from the definition of U.S. person based on factors that we do not believe are directly relevant to the degree of risk a fund's security-based swap activities are likely to pose to U.S. persons and potentially to the U.S. financial system.

Apart from those potential alternatives regarding the treatment of majority-owned funds and of investment vehicles offered only to non-U.S. persons, an additional alternative approach would be for the Commission simply to adopt the CFTC's interpretation of ''U.S. person.'' We do not believe that following that alternative approach would be expected to have a significant effect on programmatic costs and benefits, given the substantive similarities between the CFTC's interpretation and our final rule. Adopting such an alternative approach, however, could have an impact on assessment costs. We particularly are mindful that some commenters requested that we adopt a consistent definition notwithstanding their views regarding specific features of the definition, in part because they believed that differences between our definition of ''U.S. person'' and the CFTC's interpretation of that term would significantly increase costs associated with determining whether they or their counterparties are U.S. persons for purposes of Title VII. We recognize that differences between the two definitions could lead certain market participants to incur additional costs that they would

[489] *See* Cross-Border Proposing Release, 78 FR 31146.

[490] The issues regarding the treatment of foreign branches of U.S. banks—as potential dealers or as counterparties to non-U.S. persons that engage in dealing activity—that are addressed above also implicate the status of those foreign branches as ''U.S. persons.''

[491] *See* section IV.C.3(b)(ii), *supra.*

[492] *See* section IV.C.3(b)(iii), *supra.* The CFTC Cross-Border Guidance follows such an approach.

[493] *See* note 285 through 287, *supra,* and accompanying text. Here too, the CFTC Cross-Border Guidance follows such an approach.

not incur in the presence of identical definitions. At the same time, we are adopting definitions of ''U.S. person'' and ''principal place of business'' that should be relatively simple and straightforward to implement, which should mitigate commenters' concerns about the costs associated with different approaches to these terms. More generally, for the reasons discussed above we believe that the definitions we are adopting are the appropriate definitions for the cross-border implementation of Title VII in the security-based swap context.[494]

In addition, as discussed above, the final ''U.S. person'' definition does not follow an approach similar to the one used in Regulation S.[495] Because such an alternative approach would treat certain foreign branches of U.S. persons as non-U.S. persons, notwithstanding the entity-wide nature of the associated risks, following such an approach would be expected to reduce programmatic benefits by causing Title VII dealer regulation not to apply to certain dealing activities that occur in the United States and pose direct risks to U.S. persons. Although such an alternative approach potentially could impact assessment costs, given that certain market participants may already be familiar with the parameters of such a Regulation S approach, in our view the ''U.S. person'' definition we are adopting is more appropriate and simpler than an approach based on Regulation S.

Another potential alternative approach for addressing the ''U.S. person'' definition would be for the definition not to include the exclusion we are adopting with regard to specified international organizations. The alternative approach of not explicitly excluding such organizations from the definition could be expected to increase assessment costs—as counterparties to such organizations would have to consider those organizations' potential status as U.S. persons, which would implicate analysis of the privileges and immunities granted such persons under U.S. law—without likely countervailing programmatic benefits.[496]

The available data suggests that an alternative in which offshore funds managed by U.S. persons are excluded from *de minimis* calculations by non-U.S. persons would not be expected to indicate a change to our assessment that up to 50 entities may be expected to register with the Commission as security-based swap dealers.[497] We do not believe that other alternative approaches to the ''U.S. person'' definition are readily susceptible to quantitative analysis that would illustrate their potential programmatic and assessment effects.[498]

(f) Aggregation Requirement

The final rules apply the *de minimis* exception's aggregation requirement to cross-border activities in a way that reflects the same principles that govern when non-U.S. persons must directly count their dealing activity against the thresholds. The final rules thus have been revised from the proposal to incorporate other aspects of the way that the final rules require counting of particular transactions against the thresholds. The final rules further have been modified from the proposal to remove the proposed ''operational independence'' condition to the exclusion that permits a person not to count transactions of its affiliates that are registered as security-based swap dealers.[499] These rules—like the incorporation of the aggregation requirement as part of the Intermediary Definitions Adopting Release—are intended to avoid evasion of the Title VII dealer requirements.

The final rules regarding the aggregation provision represent a middle ground between commenter views. One commenter specifically supported the proposal's ''operational independence'' condition that would limit when a person could exclude the dealing transactions of affiliates that are registered as dealers.[500] On the other hand, other commenters opposed any application of the aggregation provisions in the cross-border context (as well as more generally).[501] This suggests at least two alternatives—one in which the ''operational independence'' condition is retained, and one in which the aggregation requirement is further limited to only require U.S. persons to count dealing activities of affiliated U.S. persons.

The economic impact of retaining the proposed operational independence condition potentially would reduce efficiencies and deter beneficial group-wide risk management practices. Conversely, the impact of the alternative approach of further limiting the aggregation requirement, such that it addresses only affiliated U.S. persons, would facilitate market participants' evasion of the dealer regulation requirement by dividing their dealing activity among multiple non-U.S. entities.

The economic impact of the alternative approach of retaining the ''operational independence'' condition is not readily susceptible to quantification, given the lack of data regarding the extent to which affiliates that engage in security-based swap activities jointly make use of back office, risk management, sales or trades, or other functions. Analysis of data related to the alternate approach under which the requirement would be further limited to aggregating transactions of affiliated U.S. persons would not be expected to indicate a change to our assessment that up to 50 entities may be expected to register with the Commission as security-based swap dealers, subject to the limitations discussed above.[502]

[494] *See* section IV.C, *supra.*

[495] *See* section IV.C.3, *supra.*

[496] Separately, as discussed above, we do not concur with the view of some commenters that a person's dealing activities involving such international organizations as counterparty should be excluded from having to be counted under the final rules. *See* section IV.3(e), *supra.* An alternative approach that followed those views would reduce the programmatic benefits of dealer regulation under Title VII, such as by permitting dealers that are U.S. persons to escape dealer regulation, notwithstanding the risk such U.S. dealers pose to the U.S. market, simply by focusing their dealing activities toward transactions with such international organizations.

[497] Screening the 27 market participants that have three or more counterparties that are not recognized as dealers by ISDA, and that have $3 billion or more in notional single-name CDS transactions over a 12 month period, with a revised *de minimis* test that does not count non-U.S. persons' dealing transactions involving offshore funds managed by U.S. persons produces 26 entities that would have more than $3 billion in notional transactions over 12 months counted against the threshold—a number identical to the number associated with the test we are adopting.

[498] We note generally, however, that similarities between the definition of ''U.S. person'' in the final rules and the CFTC's interpretation of that term would help mitigate the assessment costs associated with the ''U.S. person'' determination. We do not believe that there are any significant differences, whereby a person that is a ''U.S. person'' for purposes of our final rules would generally not be a ''U.S. person'' for purposes of the CFTC Cross-Border Guidance, that may tend to increase assessment costs.

[499] By removing the proposed ''operational independence'' condition, the final rule provides that a person need not count the transactions of its registered dealer affiliate regardless of whether the person and the registered dealer affiliate are operationally independent.

The final rule also has been revised from the proposal to make the exclusion for registered dealer affiliates also available when an affiliate is in the process of registering as a dealer.

[500] *See* note 396, *supra.*

[501] *See* note 391 through 395, *supra.*

[502] Screening the 27 market participants that have three or more counterparties that are not recognized as dealers by ISDA, and that have $3 billion or more in notional single-name CDS transactions over a 12-month period, with a revised *de minimis* test that limits aggregation to U.S. affiliates within a corporate group produces 26 entities that would have more than $3 billion in notional transactions over 12 months counted against the threshold—a number identical to the number associated with the test we are adopting.

(g) Exception for Cleared Anonymous Transactions

The final rules include an exception whereby non-U.S. persons need not count, against the thresholds, transactions that are entered into anonymously and are cleared. This exception reflects limits on the potential availability of relevant information to non-U.S. persons, as well as potential impacts on liquidity that may result absent such an exception.

The likely impact of the alternative approach of not including such an exception could be to deter the development of anonymous trading platforms, or to reduce U.S. persons' ability to participate in such platforms. In this regard the alternative can be expected to help reduce the programmatic benefits of Title VII. The impact of the alternative approach of not including this type of exception is not readily susceptible to quantification.[503]

V. Cross-Border Application of Major Security-Based Swap Participant Thresholds

A. Overview

The statutory definition of ''major security-based swap participant'' encompasses persons that are not dealers but that nonetheless could pose a high degree of risk to the U.S. financial system.[504] The statutory focus of the ''major security-based swap participant'' definition differs from that of the ''security-based swap dealer'' definition, in that the latter focuses on *activity* that may raise the concerns that dealer regulation is intended to address, while the former focuses on *positions* that may raise systemic risk concerns within the United States.[505] The definition focuses on systemic risk issues by targeting persons that maintain ''substantial positions'' that are ''systemically important,'' or whose positions create ''substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets.'' [506] The statute further directed us to define the term ''substantial position'' at the ''threshold that the Commission determines to be prudent for the effective monitoring, management, and oversight of entities that are systemically important or can significantly impact the financial system of the United States.'' [507]

In the Intermediary Definitions Adopting Release, we, together with the CFTC, adopted rules defining what constitutes a ''substantial position'' and ''substantial counterparty exposure.'' [508] In doing so, we concentrated on identifying persons whose large security-based swap positions pose market risks that are significant enough that it is prudent to regulate and monitor those persons.[509] The definition incorporates a current exposure test and a potential future exposure test designed to identify such persons.[510]

We addressed the application of the major participant definition to cross-border security-based swaps in the Cross-Border Proposing Release, proposing that a U.S. person consider all security-based swap positions entered into by it, and also proposing that a non-U.S. person consider only its positions with U.S. persons but not its positions with other non-U.S. counterparties, even if the positions are entered into within the United States or the non-U.S. counterparties are guaranteed by a U.S. person.[511]

In the proposal, we also explained our preliminary view on the application in the cross-border context of the general principles regarding attribution, which were set forth in guidance in the Intermediary Definitions Adopting Release. Specifically, we stated that a person's security-based swap positions must be attributed to a parent, affiliate, or guarantor for purposes of the major security-based swap participant analysis to the extent that the counterparties to those positions have recourse to that parent, affiliate, or guarantor in connection with the position.[512] This treatment was intended to reflect the risk focus of the major security-based swap participant definition by providing that entities will be regulated as major security-based swap participants when the guarantees they provide pose a sufficiently high level of risk to the U.S. financial system.[513]

Commenters raised several issues related to the proposed approach for applying the major security-based swap participant definition to cross-border security-based swaps. As discussed below, these include issues regarding: the treatment of a non-U.S. person's positions with foreign branches of U.S. banks, the treatment of guarantees, and the treatment of entities with legacy positions. Commenters also requested that the Commission generally harmonize its rules and guidance with the CFTC's Cross-Border Guidance.

After considering commenters' views, we are adopting final rules that have been modified from the proposal in certain important respects. As addressed in further detail below, key changes to the proposal include:

- A requirement that a conduit affiliate, as defined above, must include in its major security-based swap

[503] Based on our understanding of the market, transactions in security-based swaps in general currently would not be eligible for the exception because transactions currently are not anonymous.

[504] As discussed in the Intermediary Definitions Adopting Release, the major security-based swap participant definition employs tests incorporating terms—particularly ''systemically important,'' ''significantly impact the financial system'' or ''create substantial counterparty exposure''—that denote a focus on entities that pose a high degree of risk through their security-based swap activities. *See* Intermediary Definitions Adopting Release, 77 FR 30661 n.761. That discussion also noted that the link between the major participant definitions and risk was highlighted during the congressional debate on the statute. *See id.* (citing 156 Cong. Rec. S5907 (daily ed. July 15, 2010) (citing colloquy between Senators Hagen and Lincoln, discussing how the goal of the major participant definitions was to ''focus on risk factors that contributed to the recent financial crisis, such as excessive leverage, under-collateralization of swap positions, and a lack of information about the aggregate size of positions.'')).

[505] *See* section II.B.2(c), *supra.*

[506] *See* section 3(a)(67) of the Exchange Act. The statute defines a ''major security-based swap participant'' as a person that satisfies any one of three alternative statutory tests: a person that maintains a ''substantial position'' in swaps or security-based swaps for any of the major swap categories as determined by the Commission; a person whose outstanding security-based swaps create substantial counterparty exposure that could have serious adverse effects on the financial stability of the U.S. banking system or financial markets; or a person that is a ''financial entity'' that is ''highly leveraged'' relative to the amount of capital it holds (and that is not subject to capital requirements established by an appropriate Federal banking agency) and maintains a ''substantial position'' in outstanding security-based swaps in any major category as determined by the Commission.

[507] *See* Exchange Act section 3(a)(67)(B).

[508] *See* Intermediary Definitions Adopting Release, 77 FR 30663–84.

[509] *See id.* at 30661, 30666.

[510] *See id.* at 30666 (noting the use of such tests in context of ''substantial position'' definition); *id.* at 30682 (noting use of such tests in context of ''substantial counterparty exposure'' definition). We also noted that our definition of ''substantial position'' was intended to address default-related credit risks, the risk that would be posed by the default of multiple entities close in time, and the aggregate risks presented by a person's security-based swap activity, as these considerations reflect the market risk concerns expressly identified in the statute. We interpreted ''substantial counterparty exposure'' in a similar manner, noting the focus of the statutory test on ''serious adverse effects on financial stability or financial markets.'' Id. at 30683. *Cf.* section 3(a)(67)(A)(ii)(II) of the Exchange Act (encompassing as major security-based swap participants persons ''whose outstanding security-based swaps create substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets'').

[511] *See* proposed Exchange Act rule 3a67–10(c); Cross-Border Proposing Release, 78 FR 31030.

[512] *See* Cross-Border Proposing Release, 78 FR 31031 and n.625. *Cf.* Intermediary Definitions Adopting Release, 77 FR 30689 (describing same attribution treatment in context of domestic security-based swap activities).

[513] *See* Cross-Border Proposing Release, 78 FR 31032.

participant threshold calculations all of its security-based swap positions;

- A requirement that a non-U.S. person other than a conduit affiliate must include in its major security-based swap participant threshold calculations all of its security-based swap positions for which its counterparty has rights of recourse against a U.S. person; and
- A modification to the proposed requirement that a non-U.S. person must include in its major security-based swap participant threshold calculations security-based swap positions with foreign branches of U.S. banks.[514]

Our approach to the application of the major security-based swap participant definition in the cross-border context incorporates certain principles that also apply in the context of the dealer definition and that are set forth in the Intermediary Definitions Adopting Release.[515] First, as in the Intermediary Definitions Adopting Release, we interpret the term ''person'' to refer to a particular legal person, meaning that we view a trading desk, department, office, branch, or other discrete business unit that is not a separately organized legal person as a part of the legal person that enters into security-based swap positions.[516] Thus, a legal person with a branch, agency, or office that exceeds the major security-based swap participant thresholds is required to register as a major security-based swap participant as a legal person, even if the legal person's positions are limited to such branch, agency, or office.[517] In addition, consistent with rules adopted in the Intermediary Definitions Adopting Release, cross-border security-based swap positions between majority-owned affiliates will not be considered for purposes of determining whether the person as a whole is a major security-based swap participant.[518]

B. Application of the Major Security-Based Swap Participant Definition to U.S. Persons

1. Proposed Approach and Commenters' Views

Under the proposal, a U.S. person would have considered all of its security-based swap positions for purposes of the major participant analysis.[519] Commenters did not comment on this aspect of the proposed approach, although, as discussed above, several commenters addressed the proposed scope of the ''U.S. person'' definition.[520]

2. Final Rule

Consistent with the proposal, the final rules require a U.S. person to consider all of its security-based swap positions in its major security-based swap participant threshold calculations.[521] The final rule incorporates the definition of ''U.S. person'' used in the context of a security-based swap dealer's *de minimis* calculation.[522]

As discussed above, in our view, the security-based swap positions of a U.S. person exist in the United States and raise, at the thresholds set forth in our further definition of major security-based swap participant, risks to the stability of the U.S. financial system or of U.S. entities, including those that may be systemically important.[523] As noted above, it is the U.S. person as a whole and not merely a foreign branch or office that bears the risk of the security-based swap. Accordingly, it is consistent with our territorial approach to require a U.S. person to include all of its security-based swap positions in its major security-based swap participant threshold calculations.

C. Application of the Major Security-Based Swap Participant Definition to Conduit Affiliates

1. Proposed Approach and Commenters' Views

The proposal would have treated non-U.S. persons acting as ''conduits'' for their U.S. affiliates the same as any other non-U.S. person for purposes of the major participant analysis, and, as such would have required those persons to include in their major participant threshold calculations only positions with U.S. persons.[524]

The proposal solicited comment regarding whether a non-U.S. person's major participant analysis should incorporate security-based swaps other than those entered into with U.S. persons.[525] Also, as discussed above, the proposal requested comment on the use of the conduit affiliate concept and the treatment of entities that operate a ''central booking system''.[526]

As discussed above, two commenters opposed applying the ''conduit affiliate'' definition to entities that serve as ''central booking systems'' for a corporate group, noting that the ''central booking systems'' are used to manage internal risk.[527] The commenters argued that applying the conduit affiliate definition in this manner would tie regulatory requirements to firms' internal risk management practices, and would hamper the firms' ability to manage risk across a multinational enterprise.[528] Another commenter suggested that conduit affiliates are the recipients of a *de facto* guarantee from their U.S. affiliates and thus should be treated as U.S. persons.[529]

2. Final Rule

The final rule modifies the proposal to require conduit affiliates to include all of their security-based swap positions in their major participant threshold calculations.[530] Consistent with the dealer *de minimis* rules, a ''conduit affiliate'' is a non-U.S. affiliate of a U.S. person that enters into security-based swaps with non-U.S. persons, or with foreign branches of U.S. banks that are registered security-based swap dealers, on behalf of one or more of its U.S. affiliates (other than

[514] In addition to the changes listed above, the final rules do not include certain provisions that were included in proposed Exchange Act rule 3a67–10 because those provisions, which defined ''foreign major security-based swap participant,'' and addressed the application of business conduct requirements to registered foreign major security-based swap participants, were relevant to proposed rules regarding substantive requirements that were included in the Cross-Border Proposing Release. As this release only addresses various definitional rules and not those substantive requirements that were proposed, those provisions are not relevant to this release and are not addressed. Those provisions may, however, be relevant to matters addressed in subsequent rulemakings.

The final rules applying the major security-based swap participant definition also incorporate a conforming change by referring to such person's ''positions'' rather than ''transactions.'' This is consistent with the use of the term ''positions'' in the statutory definition of major security-based swap participant and the rules further defining that term.

[515] *See* Intermediary Definitions Adopting Release, 77 FR 30624 (discussing our guidance regarding the meaning of the term ''person'' as used in security-based swap dealer definition). *Cf.* section IV.A, *supra.*

[516] *See* section IV.A. *Cf.* Intermediary Definitions Adopting Release, 77 FR 30624.

[517] *Cf.* Intermediary Definitions Adopting Release, 77 FR 30624; *see also* Cross-Border Proposing Release, 78 FR 30993.

[518] *See* Exchange Act rule 3a67–3(e); Intermediary Definitions Adopting Release, 77 FR 30687.

[519] *See* proposed Exchange Act rule 3a–67–10(c)(1).

[520] *See* section IV.C.2(a) and notes 192–194 (citing comment letters regarding ''U.S. person'' definition generally), *supra.*

[521] *See* Exchange Act rule 3a67–10(b)(1).

[522] *See* Exchange Act rule 3a67–10(a)(4) (defining ''U.S. person'' by referring to rule 3a71–3(a)(4)).

[523] *See* section II.B.2(c); *Cf.* Exchange Act section 3(a)(67)(B).

[524] Cross-Border Proposing Release, 78 FR 31006. *See id.* at 31006 n.356 (acknowledging that such treatment differed from the CFTC's proposal and citing CFTC's proposed cross-border guidance).

[525] *Id.* at 31036.

[526] *See* section IV.D.1, *supra.*

[527] *See id.*

[528] *See* section IV.D.1, *supra,* notes 309 and 311 (citing SIFMA/FIA/FSR Letter and CDEU Letter).

[529] *See* section IV.D.1, note 310, *supra* (citing BM Letter).

[530] Exchange Act rule 3a67–10(b)(2).

U.S. affiliates that are registered as security-based swap dealers or major security-based swap participants [531]), and enters into offsetting transactions with its U.S. affiliates to transfer risks and benefits of those security-based swaps.[532]

After careful consideration and as discussed in the context of the dealer *de minimis* exception, we believe that requiring such conduit affiliates to include their positions in their major participant threshold calculations is consistent with our statutory anti-evasion authority and necessary or appropriate to help ensure that non-U.S. persons do not facilitate the evasion of major participant regulation under the Dodd-Frank Act. Absent a requirement that conduit affiliates include their positions in the threshold calculations, a U.S. person may be able to evade registration requirements under the Dodd-Frank Act by participating in arrangements whereby a non-U.S. person engages in security-based swap activity outside the United States on behalf of a U.S. affiliate that is not a registered security-based swap dealer or major security-based swap participant. The U.S. person could enter into offsetting transactions with the non-U.S. affiliate, thereby assuming the risks and benefits of those positions.[533] Requiring conduit affiliates to include their positions in their major participant threshold calculations will help guard against evasion of major participant regulation and the risk that such entities could pose to the U.S. financial system.[534]

In this context, as in the dealer context, we recognize the significance of commenters' concerns that the ''conduit affiliate'' concept may impede efficient risk management procedures, such as the use of central booking entities.[535] As in the context of the *de minimis* exception to the dealer analysis, the ''conduit affiliate'' definition serves as a prophylactic anti-evasion measure, and we do not believe that any entities currently act as conduit affiliates in the security-based swap market, particularly given that a framework for the comprehensive regulation of security-based swaps did not exist prior to the enactment of Title VII, suggesting that market participants would have had no incentives to use such arrangements for evasive purposes.

Moreover, we believe that commenter concerns may be mitigated by certain features of the major participant analysis and that, to the extent risk mitigation procedures such as ''central booking systems'' are impacted by the final rules on conduit affiliates, such anticipated impact is appropriate given the purpose of the major participant definition to identify entities that may pose significant risk to the market. As discussed in the Intermediary Definitions Adopting Release, we believe the major participant thresholds are high enough that they will not affect entities, including centralized hedging facilities, of any but the largest security-based swap users.[536] We would not expect that centralized hedging facilities would generally hold positions at the level of the major participant thresholds.[537] Further, the first test in the major security-based swap participant definition, which calculates whether a person maintains a ''substantial position,'' excludes positions held for hedging or mitigating commercial risk.[538] In the Intermediary Definitions Adopting Release, we explained that the exclusion includes hedging on behalf of a majority-owned affiliate, such as a centralized hedging facility.[539] We believe this exclusion in the first test of the major participant definition is likely to lessen the impact that the conduit affiliate rules will have on centralized hedging facilities.[540]

In addition to these features of the major security-based swap participant definition that we anticipate will mitigate the impact of the conduit affiliate rules on risk mitigation practices, we believe the focus of the major participant definition on the degree of risk to the U.S. financial system justifies regulation of certain entities that perform this function if they maintain positions at a level that may pose sufficient risk to trigger the major participant definition, regardless of the nature of their security-based swap activity.

For the foregoing reasons, we believe that the final rules regarding conduit affiliates are necessary or appropriate to prevent the evasion of any provision of the amendments made to the Exchange Act by Title VII and appropriately target potentially evasive scenarios that present the level of risk that the major security-based swap participant definition is intended to address.[541]

D. Application to Other Non-U.S. Persons

The proposed rules would have required a non-U.S. person to include in its major security-based swap participant analysis all positions with U.S. persons, including foreign branches of U.S. banks.[542] A non-U.S. person

[531] As noted in the discussion of conduit affiliate in the context of the application of dealer *de minimis* exception, the ''conduit affiliate'' definition does not encompass persons that engage in such offsetting transactions solely with U.S. persons that are registered with the Commission as security-based swap dealers or major security-based swap participants because we believe the registered status of the U.S. person mitigates evasion concerns. *See* note 313, *supra.*

[532] *See* section IV.D.2, *supra;* Exchange Act section 3a67–10(a)(1) (incorporating the ''conduit affiliate'' definition used in the dealer *de minimis* rule).

[533] *See* Exchange Act section 30(c); section II.B.2(d), *supra.* In noting that this requirement is consistent with our anti-evasion authority under section 30(c), we are not taking a position as to whether such activity by a conduit affiliate otherwise constitutes a ''business in security-based swaps without the jurisdiction of the United States.'' *See* note 315, *supra.*

We recognize that not all structures involving conduit affiliates may be evasive in purpose. We believe, however, that the anti-evasion authority of Exchange Act section 30(c) permits us to prescribe prophylactic rules to conduct without the jurisdiction of the United States, even if those rules would also apply to a market participant that has been transacting business through a pre-existing market structure established for valid business purposes, so long as the rule is designed to prevent possible evasive conduct. *See* Cross-Border Proposing Release, 78 FR 30987; *see also* section II.B.2(d) and note 316, *supra* (discussion of anti-evasion authority).

[534] Consistent with the approach we are taking in the dealer context, the rule under the major participant analysis requires a conduit affiliate to count all of its positions. *See* section IV.D.2 and note 312, *supra.* It is not limited to the conduit affiliate's positions that are specifically linked to offsetting positions with its U.S. affiliate because the correspondence between positions and their offsets may not be one-to-one, such as due to netting.

[535] *See* note 311, *supra* (citing SIFMA/FIA/FSR Letter and CDEU Letter).

[536] *See* Intermediary Definitions Adopting Release, 77 FR 30671–72 and n.914 (explaining that, for cleared security-based CDS, a person would have to write $200 billion notional of CDS protection to meet the relevant $2 billion threshold for potential future exposure).

[537] We note that of the five non-U.S. domiciled entities that we expect to perceive the need to engage in the major security-based swap participant calculation threshold analysis (*see* section V.H.2(a), *infra*), none appear to have any U.S.-based affiliates.

[538] *See* Exchange Act rule 3a67–1(a)(2)(i).

[539] *See* Intermediary Definitions Adopting Release, 77 FR 30675–76.

[540] We also note that the third test of the major participant definition, rule 3a67–1(a)(2)(iii), which only applies to ''highly leveraged financial entities,'' excludes centralized hedging facilities acting on behalf of a non-financial entity from the definition of financial entity. To the extent commenters expressed concern that the conduit affiliate rules would affect financial entities and their risk mitigation procedures, this exclusion for centralized hedging facilities is designed to limit that impact. However, to the extent that an entity is not able to use the exclusion and falls within the definition of a highly leveraged financial entity, we believe that requiring such positions to be included is consistent with the focus of the major participant definition. *Cf.* CDEU Letter at 1 (stating that financial and non-financial end-users should be subject to the same cross-border requirements); IIB Letter at 22 (noting that many financial institutions that do not enter into CDS for dealing purposes still enter into them for hedging purposes).

[541] *See* section IV.D.2, *supra.*

[542] *See* Cross-Border Proposing Release, 78 FR 31031 (explaining that the ''U.S. person'' definition

Continued

would not have had to include its security-based swap positions with non-U.S. person counterparties, even if such positions were guaranteed by another person.[543] A few commenters criticized the proposed requirement that a non-U.S. person include its positions with foreign branches of U.S. banks in its calculation thresholds.[544] Regarding the treatment of a non-U.S. person whose positions with non-U.S. persons are guaranteed by a U.S. person, one commenter supported our proposed approach not to require the person whose position is guaranteed to include such guaranteed positions in its calculation,[545] while other commenters requested that such entities be treated as U.S. persons.[546] The final rules applying the major participant definition to non-U.S. persons are tailored to address the market impact and risk that we believe a person's security-based swap positions would pose to the U.S. financial system.

1. Positions With U.S. Persons Other Than Foreign Branches of U.S. Banks

(a) Proposed Approach and Commenters' Views

As noted above, the proposed rules would have required a non-U.S. person to include in its major security-based swap participant threshold calculations all positions with U.S. persons, including foreign branches of U.S. banks.[547] The proposal stated that requiring non-U.S. persons to include their positions with U.S. persons, as defined in the proposal, would ''provide an appropriate indication of the degree of default risk proposed by such non-U.S. person's security-based swap positions to the U.S. financial system,'' by accounting for such non-U.S. person's outward exposures to U.S. persons.[548] One commenter objected to the proposal's approach to look to the U.S.-person status of a clearing agency when a non-U.S. person enters into a security-based swap that is cleared and novated through a clearing agency.[549] In the proposal, we explained that we would consider the clearing agency as the non-U.S. person's counterparty and because the clearing agency is a U.S. person we would require such novated security-based swap to be included in the non-U.S. person's major security-based swap participant calculation threshold calculations.[550] The commenter objected, arguing that the location of clearing should be irrelevant for purposes of determining major security-based swap participant status.[551] Although some commenters took issue with the scope of the ''U.S. person'' definition, as described above, commenters did not otherwise address this specific requirement within the application of the major security-based swap participant definition.

(b) Final Rule

The final rule, like the proposal, generally requires that non-U.S. persons (apart from the conduit affiliates, which are addressed above) [552] include in their major security-based swap participant threshold calculations their positions with U.S. persons.[553]

Generally requiring non-U.S. persons to consider their security-based swap positions with U.S. persons (except for positions with foreign branches of registered security-based swap dealers, as discussed below) will help ensure that persons whose positions are likely to pose a risk to the U.S. financial system at the relevant thresholds are subject to regulation as a major security-based swap participant.[554] Security-based swap positions involving a U.S.-person counterparty exist within the United States by virtue of being undertaken with a counterparty that is a U.S. person. For these reasons, positions entered into with U.S. persons are likely to raise, at the thresholds set forth in our further definition of major security-based swap participant, risks to the stability of the U.S. financial system or of U.S. entities, including those that may be systemically important.[555]

While we considered one commenter's concern that the location of clearing should not be relevant for purposes of determining a non-U.S. person's major security-based swap participant status,[556] we continue to believe that, as such positions are cleared through a U.S.-person clearing agency, they exist within the United States and create risk in the United States of the type the major security-based swap participant definition is intended to address.[557] We note, in response to commenters' opinions about the risk-mitigating effects of central clearing, and the additional level of rigor that clearing agencies may have with regards to the process and procedures for collecting daily margin, that the final rules further defining ''substantial position'' provide that the potential future exposure associated with positions that are subject to central clearing by a registered or exempt clearing agency is equal to 0.1 times the potential future exposure that would otherwise be calculated.[558] This treatment reflects our view that clearing the security-based swap substantially mitigates the risk of such positions but cannot eliminate such risk.[559] We believe that this previously adopted provision may provide additional incentives for market participants to clear their positions through registered or exempt clearing agencies, and that the requirement to include such positions in the major security-based swap participant threshold calculations should not discourage market participants from clearing positions through U.S.-based clearing agencies.

2. Positions With Foreign Branches of U.S. Banks

(a) Proposed Approach and Commenters' Views

As noted above, the proposal would have required non-U.S. persons to include their positions with U.S.

applies to the entire person, including its branches and offices that may be located in a foreign jurisdiction and, as such, the potential impact in the United States due to a non-U.S. counterparty's default would not differ depending on whether the non-U.S. counterparty entered into the security-based swap transaction with the home office of a U.S. bank or with a foreign branch of a U.S. bank).

[543] *See* proposed Exchange Act rule 3a67–10(c)(2).

[544] *See* SIFMA/FIA/FSR Letter at A–19 to A–20 (noting that the requirement may provide an incentive for non-U.S. persons to limit trading with foreign branches of U.S. persons and differs from the CFTC guidance); IIB Letter at 12 (noting that the requirement that non-U.S. person include its positions with foreign branches of U.S. persons in its major participant calculation is inconsistent with the proposed requirement in the *de minimis* context and the CFTC guidance).

[545] *See* SIFMA/FIA/FSR Letter at A–10 to A–11 (stating that a guaranteed non-U.S. person does not have the necessary ''requisite jurisdictional nexus'' to be classified as a U.S. person, and thereby supporting the Commission's proposal to address the risk of such guarantees through the attribution process in the major security-based swap participant requirements); note 209, *supra.*

[546] *See* note 207 (citing AFR Letter I and BM Letter).

[547] *See* Cross-Border Proposing Release, 78 FR 31031.

[548] *See id.* at 31030 n.612.

[549] *See* CME Letter at 2–3.

[550] *See* Cross-Border Proposing Release, FR 78 31030 n.612.

[551] CME Letter at 3 (explaining that the requirement will discourage market participants from clearing through a clearing agency in the United States).

[552] *See* section V.C, *supra.*

[553] *See* Exchange Act rule 3a67–10(b)(3)(i).

[554] *See* Cross-Border Proposing Release, 78 FR 31030 (explaining that the risk to the U.S. financial system would be measured by calculating a non-U.S. person's aggregated outward exposures to U.S. persons, meaning what such non-U.S. person owes, or potentially could owe, on its security-based swaps with U.S. persons).

[555] *Cf.* section 3(a)(67)(B) of the Exchange Act.

[556] *See* CME Letter, *supra,* note 549.

[557] *See* section II.B.2(c), *supra.*

[558] This results in a 90 percent discount on the notional exposure under the security-based swap. *See* Exchange Act rule 3a67–3(c)(3)(i)(A); Intermediary Definitions Adopting Release, 77 FR 30670.

[559] *See* Intermediary Definitions Adopting Release, 77 FR 30670.

persons in their threshold calculations. This requirement would have extended to positions with foreign branches of U.S. banks.[560] Two commenters criticized the proposal's requirement that a non-U.S. person would need to include positions with foreign branches of U.S. banks.[561] One of these commenters suggested that the Commission adopt the CFTC policy, which set forth an exception generally permitting a non-U.S. person that is a non-financial entity to exclude from its calculation positions with foreign branches of U.S. banks that are registered swap dealers.[562] One of the commenters suggested that if the Commission did not allow all non-U.S. persons to exclude transactions with foreign branches of U.S. banks from their calculation, the Commission should at least adopt the approach taken by the CFTC in its cross-border guidance of allowing a non-U.S. person that is a financial entity to exclude transactions, subject to certain additional conditions, with foreign branches of U.S. banks that are registered security-based swap dealers.[563]

(b) Final Rule

The final rule has been modified from the proposal to require non-U.S. persons (other than conduit affiliates, as discussed above) to count, against their major security-based swap participant threshold calculations, their positions with U.S. persons other than positions with foreign branches of registered security-based swap dealers.[564] The proposal would have required non-U.S. persons to all include their positions with U.S. persons in their threshold calculations, including any positions with foreign branches of U.S. banks.[565]

The final rule permits non-U.S. persons not to count certain positions that arise from transactions conducted through a foreign branch of a counterparty that is a U.S. bank.[566] For this exclusion to be effective, persons located within the United States cannot be involved in arranging, negotiating, or executing the transaction.[567] Moreover, the counterparty bank must be registered as a security-based swap dealer,[568] unless the transaction occurs prior to 60 days following the effective date of final rules providing for the registration of security-based swap dealers.[569] Registration of the counterparty U.S. bank would not be required for the exclusion to be effective before then, given that the non-U.S. person would not be able to know with certainty whether the U.S. bank in the future would register with the Commission as a security-based swap dealer.[570]

We believe that the revision to the proposal allowing for an exclusion from counting positions that arise from transactions conducted through foreign branches of registered security-based swap dealers appropriately accounts for the risk in the U.S. financial system created by such positions. In our view, the risk of such positions is lessened when the U.S. bank itself is registered with the Commission as a security-based swap dealer because the U.S. bank, and its transactions, will be subject to the relevant Title VII provisions applicable to security-based swap dealers (for example, margin and reporting requirements).[571] The exception is also consistent with our application of the dealer *de minimis* exception in our final rule, which requires non-U.S. persons, other than conduit affiliates, to include in their *de minimis* threshold calculations dealing transactions with U.S. persons other than the foreign branch of a registered security-based swap dealer (or for a temporary period of time prior to 60 days prior to the effectiveness of the dealer registration rules).[572]

The final rule should help mitigate concerns that non-U.S. persons will limit or stop trading with foreign branches of U.S. banks for fear of too easily triggering major security-based swap participant registration requirements under Title VII. Moreover, the inclusion of this exception in our final rule addresses comments expressing concern that non-U.S. persons would have to include positions with foreign branches of U.S. banks in their major security-based swap participant threshold calculations.[573] We also note that the exception reduces divergence between our major participant threshold calculation and that outlined in the CFTC's guidance, as requested by commenters.[574]

[560] *See* proposed rule 3a67–10(c)(2).

[561] *See* SIFMA/FIA/FSR Letter at A–19 to A–20 (stating that the proposal would result in disparate treatment of foreign branches of U.S. banks because non-U.S. persons could exclude such transactions from their dealer *de minimis* threshold calculations but not from their major security-based swap participant threshold calculations, and noting that the proposal differs from the CFTC Cross-Border Guidance, which takes the approach that non-U.S. person financial entities generally should exclude swaps with foreign branches of U.S. swap dealers, subject to certain conditions); IIB Letter at 12 (stating that the same rationale that applies to excluding transactions with foreign branches of U.S. banks in the dealer context should apply in the major security-based swap participant context and that the proposed approach is inconsistent with the CFTC Cross-Border Guidance).

[562] *See* IIB Letter at 12–13 (suggesting that the CFTC's general policy of not counting non-financial entities' swaps with guaranteed affiliates that are swap dealers or foreign branches that are swap dealers reflects an understanding that non-financial entities present less risk than financial entities). *Cf.* CFTC Cross-Border Guidance at 45324–25.

[563] *See* SIFMA/FIA/FSR Letter at A–20 (stating that the proposal to include transactions with foreign branches in a non-U.S. person's major security-based swap participant threshold calculations may cause non-U.S. persons that would otherwise be considered major security-based swap participants to limit or stop trading with foreign branches of U.S. banks); *id.* at A–20 to A–21 (noting that the approach differs from the CFTC Cross-Border Guidance with respect to counting such transactions towards the major swap participant threshold); *see also* IIB Letter at 12–13 (stating that the proposal is inconsistent with the CFTC Cross-Border Guidance, whose exceptions demonstrate an understanding that the risk to the U.S. financial system can be addressed through different means and noting that the proposal may cause non-U.S. counterparties to stop transacting with foreign branches of U.S. banks).

[564] *See* Exchange Act rule 3a67–10(b)(3)(i). Exchange Act rule 3a67–10(a)(2) defines ''foreign branch'' by referring to Exchange Act rule 3a71–3(a)(2). We note for clarification that the rule described here uses the defined term ''transactions conducted through a foreign branch'' (as defined in Exchange Act rule 3a71–3(a)(3)) to describe the manner in which the U.S.-person must enter into the position in order for the non-U.S. person counterparty to avail itself of this exception. The non-U.S. person counterparty that is calculating its major security-based swap participant calculation thresholds is entering into the position with the foreign branch of the U.S. person.

[565] Proposed Exchange Act rule 3a67–10(c)(2).

[566] *See* Exchange Act rule 3a67–10(b)(3)(i). *See also* IV.E.2(b) (discussing similar exception in the context of the *de minimis* analysis).

[567] *See* Exchange Act rule 3a67–10(b)(3)(i) (using the term ''transaction conducted through a foreign branch,'' which requires that ''the security-based swap transaction is arranged, negotiated, and executed on behalf of the foreign branch solely by persons located outside the United States,'' as defined in Exchange Act rule 3a71–3(a)(3)(i)(B)).

[568] *See* Exchange Act rule 3a67–10(b)(3)(i)(A).

A non-U.S. person would still have to count such positions for purposes of calculating its major security-based swap participant calculation thresholds if the non-U.S. person's counterparty (*i.e.,* the U.S. bank) has rights of recourse against a U.S. person in the position with the non-U.S. person. *See* Exchange Act rule 3a67–10(b)(3)(ii).

[569] *See* Exchange Act rule 3a67–10(b)(3)(i)(B).

[570] In other words, this provision will help to avoid requiring non-U.S. persons to speculate whether their counterparties would register, and to face the consequences of their speculation being wrong.

[571] *See* section IV.E.2(b) and note 373 (discussing that the risk of such positions is mitigated in part because the foreign branch of a registered security-based swap dealer will be subject to a number of Title VII regulatory requirements).

[572] *See* Exchange Act rule 3a71–3(b)(1)(iii)(A); section IV.E.2(b), *supra.*

[573] *See* note 561, *supra.*

[574] *See* notes 562 and 563, *supra.* Although our inclusion of this exception brings us closer to the general policy set forth by the CFTC, our approaches are not entirely identical, as the CFTC includes certain additional inputs for non-U.S. persons that are financial entities that we have determined not to incorporate in our final rule. *See* CFTC Cross-Border Guidance, 78 FR 45326–27.

3. Positions of Non-U.S. Persons That Are Subject to Recourse Guarantees by a U.S. Person

(a) Proposed Approach and Commenters' Views

The proposal would have not required a non-U.S. person to count towards its major security-based swap participant calculation thresholds, those positions that it entered into with non-U.S. persons, regardless of whether the counterparty to the position has a right of recourse against a U.S. person under the security-based swap.[575] To address the risk posed by the existence of a recourse guarantee against a U.S. person, the proposal would have required that all security-based swaps entered into by a non-U.S. person and guaranteed by a U.S. person be attributed to such U.S. person guarantor for purposes of determining such U.S. person guarantor's major security-based swap participant status.[576]

As noted above, one commenter supported the Commission's proposed approach not to require a non-U.S. person whose positions with other non-U.S. persons are subject to a recourse guarantee from a U.S. person, to include such guaranteed positions in its own major participant threshold calculations, expressing support for using the major security-based swap participant attribution requirements to address the risk posed to the U.S. markets by such guarantees.[577] Two commenters argued that non-U.S. persons whose positions are guaranteed by U.S. persons should be treated as U.S. persons for purposes of the major participant threshold calculations, which would require them to include all their positions in their major participant threshold calculations.[578] Additionally, although commenters did not refer specifically to the application of the major security-based swap participant definition, some commenters requested that the Commission generally harmonize its approach to cross-border activities with that of the CFTC.[579]

(b) Final Rule

We are adopting a final rule that requires a non-U.S. person to include in its major security-based swap participant threshold calculations those positions for which the non-U.S. person's counterparty has rights of recourse against a U.S. person.[580] We believe that when a U.S. person guarantees a position, the position exists within the United States and poses risk to the U.S. person guarantor,[581] and the non-U.S. person that enters directly into the position should be required to include the position in its major security-based swap participant threshold calculations. The final rule will also help to apply major participant regulation in a consistent manner to differing organizational structures that serve similar economic purposes, and help avoid disparities in applying major participant regulation to differing arrangements that pose similar risks to the United States.

Accordingly, the final rule modifies the proposal by requiring a non-U.S. person to include in its major security-based swap participant threshold calculations security-based swap positions for which a counterparty to the security-based swap has legally enforceable rights of recourse against a U.S. person, even if a non-U.S. person is counterparty to the security-based swap.[582] For these purposes, and as addressed in the context of *de minimis* exception to the ''security-based swap dealer'' definition, the counterparty would be deemed to have a right of recourse against a U.S. person if the counterparty has a conditional or unconditional legally enforceable right, in whole or in part, to receive payments from, or otherwise collect from, a U.S. person in connection with the non-U.S. person's obligations under the security-based swap.

We understand that such rights may arise in a variety of contexts. For example, a counterparty would have such a right of recourse against the U.S. person if the applicable arrangement provides the counterparty the legally enforceable right to demand payment from the U.S. person in connection with the security-based swap, without conditioning that right upon the non-U.S. person's non-performance or requiring that the counterparty first make a demand on the non-U.S. person. A counterparty also would have such a right of recourse if the counterparty itself could exercise legally enforceable rights of collection against the U.S. person in connection with the security-based swap, even when such rights are conditioned upon the non-U.S. person's insolvency or failure to meet its obligations under the security-based swap, and/or are conditioned upon the counterparty first being required to take legal action against the non-U.S. person to enforce its rights of collection.

The terms of the guarantee need not necessarily be included within the security-based swap documentation or even otherwise reduced to writing (so long as legally enforceable rights are created under the laws of the relevant jurisdiction); for instance, such rights of recourse would arise when the counterparty, as a matter of law in the relevant jurisdiction, would have rights to payment and/or collection that may arise in connection with the non-U.S. person's obligations under the security-based swap that are enforceable. We would view the positions of a non-U.S. person as subject to a recourse guarantee if at least one U.S. person (either individually or jointly and severally with others) bears unlimited responsibility for the non-U.S. person's obligations, including the non-U.S. person's obligations to security-based swap counterparties. Such arrangements may include those associated with foreign unlimited companies or unlimited liability companies with at least one U.S.-person member or shareholder, general partnerships with at least one U.S.-person general partner, or entities formed under similar arrangements such that at least one U.S. persons bears unlimited responsibility for the non-U.S. person's liabilities. In our view, the nature of the legal arrangement between the U.S. person and the non-U.S. person—which makes the U.S. person responsible for the obligations of the non-U.S. person—is appropriately characterized as a recourse guarantee, absent countervailing factors. More generally, a recourse guarantee is present if, in connection with the security-based swap, the counterparty itself has a legally enforceable right to payment or collection from the U.S. person, regardless of the form of the

[575] *See* Cross-Border Proposing Release, 78 FR 31031 and n.622; *see also* proposed Exchange Act rule 3a67–10(c)(2). In the proposal, we stated that the non-U.S. person counterparties of a non-U.S. person would bear the risk of loss if that non-U.S. person was unable to pay what it owes, and therefore, that the non-U.S. person need not include in its major participant threshold calculations positions with a non-U.S. counterparty, even if its obligations under the security-based swap are guaranteed by a U.S. person. *See* Cross-Border Proposing Release, 78 FR 31031.

[576] *See id.* at 31032.

[577] *See* note 545, *supra* (citing SIFMA/FIA/FSR Letter).

[578] *See* note 207, *supra* (citing AFR Letter I and BM Letter).

[579] *See* note 25, *supra.*

[580] *See* Exchange Act rule 3a67–10(b)(3)(ii). *Cf.* note 350, *supra* (noting that this final rule encompasses non-U.S. persons who receive a guarantee from an unaffiliated U.S. person, whereas the final rule under the *de minimis* exception only encompasses non-U.S. persons who receive a guarantee from a U.S. affiliate).

We note that we have retained the requirement in the proposal that the U.S. guarantor also attribute to itself, for purposes of its own major security-based swap participant threshold calculations, all security-based swaps entered into by a non-U.S. person that are guaranteed by the U.S. person. *See* Cross-Border Proposing Release, 78 FR 31032; section V.E.1, *infra.*

[581] *See* section II.B.2(c), *supra.*

[582] Exchange Act rule 3a67–10(b)(3)(ii).

arrangement that provides such an enforceable right to payment or collection.[583]

In light of comments received and upon further consideration, we believe that the revised approach addresses, in a targeted manner, the risk to the U.S. financial system posed by entities whose counterparties are able to turn to a U.S. person for performance of the non-U.S. person's obligations under a security-based swap position.[584] We believe our final approach strikes an appropriate balance by directly regulating a non-U.S. person that enters into a position with a counterparty that has a recourse guarantee against a U.S. person, while not treating that non-U.S. person as a U.S. person.[585]

The final rule reflects our conclusion that a non-U.S. person—to the extent it enters into security-based swap positions subject to a recourse guarantee by a U.S. person—enters into security-based swap positions that exist within the United States.[586] The economic reality of such positions is that by virtue of the guarantee the non-U.S. person effectively acts together with a U.S. person to engage in the security-based swap activity that results in the positions, and the non-U.S. person's positions cannot reasonably be isolated from the U.S. person's engagement in providing the guarantee.[587] Both the guarantor and guaranteed entity are involved in the position and may jointly seek to profit by engaging in such security-based swap positions.[588] The final rule echoes our approach, consistent with our approach to regulation of security-based swap dealers that, to the extent that a single non-U.S. person is responsible for positions within the United States (whether by entering into positions with U.S.-person counterparties or for which its non-U.S. person counterparties have recourse against a U.S. person) that rise above the major participant thresholds, the entity that directly enters into such positions should be required to register as a major security-based swap participant and should be subject to direct regulation as a major security-based swap participant.

The final rules regarding positions for which a counterparty to the position has rights of recourse against a U.S. person aim to apply major participant regulation in similar ways to differing organizational structures that serve similar economic purposes, such as positions entered into by a non-U.S. person that are subject to a recourse guarantee by a U.S. person and security-based swap positions carried out through a foreign branch of a U.S. person.[589] These two differing organizational structures serve similar economic purposes and thus should be treated similarly.

As discussed below, we have maintained the proposed approach requiring a U.S. person to attribute to itself any position of a non-U.S. person for which the non-U.S. person's counterparty has rights of recourse against the U.S. person. This attribution requirement further reflects the focus of the major security-based swap participant definition on positions that may raise systemic risk concerns within the United States.[590] Such positions exist within the United States by virtue of the U.S. person's guarantee, which transmits risk to the U.S. financial system to the extent obligations are owed under the security-based swap by the guaranteed non-U.S. person because the non-U.S. person's counterparty may seek recourse from the U.S. person guaranteeing the position.[591] Additionally, the economic reality of this position, even though entered into by a non-U.S. person, is substantially identical, in relevant respects, to a transaction entered into directly by the U.S. guarantor, because a U.S. person is participating directly in the transaction.[592] For these reasons the attribution requirement, which is consistent with our territorial approach and the approach taken in the proposal, reflects the focus of the major security-based swap participant definition.

We note that, consistent with our proposal, we are not requiring non-U.S. persons to include in their major security-based swap participant threshold calculations positions for which they (as opposed to their counterparties) have a guarantee creating a right of recourse against a U.S. person. As we noted in the proposal, non-U.S. persons with a right of recourse against a U.S. person pursuant to a security-based swap do not pose a direct risk to the person providing a guarantee, as that person's failure generally will not trigger any obligations under the guarantee.[593]

E. Attribution

The Cross-Border Proposing Release stated the preliminary view that a person's security-based swap positions in the cross-border context would be attributed to a parent, other affiliate, or guarantor for purposes of the major participant analysis to the extent that the person's counterparties in those positions have recourse to that parent, other affiliate, or guarantor in connection with the position. Positions

[583] Consistent with the rule implementing the dealer de *minimis* exception, this final rule clarifies that for these purposes a counterparty would have rights of recourse against the U.S. person ''if the counterparty has a conditional or unconditional legally enforceable right, in whole or in part, to receive payments from, or otherwise collect from, the U.S. person in connection with the security-based swap.'' *See* Exchange Act rule 3a67–10(b)(3)(ii).

[584] We are not requiring a non-U.S. person whose performance with respect to one or more security-based swap positions is subject to a recourse guarantee to include all of its positions with non-U.S. persons towards its major security-based swap participant threshold calculations. We recognize that the CFTC Cross-Border Guidance uses the term ''guaranteed affiliate'' and states the view that such entities should include all of their swap positions in their major swap participant threshold calculations. *See* CFTC Cross-Border Guidance, 78 FR 45319. We believe that our final rule, which requires a non-U.S. person to include only those positions with non-U.S. persons where the counterparty has rights of recourse to a U.S. person, appropriately in the context of the security-based swap markets reflects the risk that such positions may create within the United States.

[585] *Cf.* notes 577 and 578 (discussing comment letters).

[586] *See* section II.B.2(c), *supra.*

[587] *See* section IV.E.1(b), *supra* (discussing the same point in the context of the application of the *de minimis* exception).

[588] *Cf.* section IV.E.1(b), *supra* (discussing a non-U.S. person's dealing activity that is subject to a recourse guarantee).

[589] *See* section IV.E.1(b) and note 341, *supra.* For the above reasons, we conclude that this final rule is not being applied to persons who are ''transact[ing] a business in security-based swaps without the jurisdiction of the United States,'' within the meaning of section 30(c). *See* section II.B.2(a), *supra.* We also believe, moreover, that this final rule is necessary or appropriate as a prophylactic measure to help prevent the evasion of the provisions of the Exchange Act that were added by the Dodd-Frank Act, and thus help ensure that the relevant purposes of the Dodd-Frank Act are not undermined. Without this rule, U.S. persons would be able to evade major participant regulation under Title VII simply by conducting their security-based swap positions via a guaranteed non-U.S. person, while still being subject to risks associated with those positions.

[590] *See* section II.B.2(c), *supra.*

[591] *See* section V.E.1(b), *infra.*

[592] *See* section V.E, *infra.*

[593] *See* Cross-Border Proposing Release, 78 FR 31031 and n.622. We recognize that the CFTC Cross-Border Guidance does set forth the concept that non-U.S. persons should generally include in their major swap participant analysis positions with entities that fall within the CFTC's description of a ''guaranteed affiliate,'' subject to certain exceptions. *See* CFTC Cross-Border Guidance, 78 FR 45326–27. We continue to believe, however, consistent with the proposal, that it is not necessary that such non-U.S. person that has rights of recourse against a U.S. person include that position in its major participant threshold calculations because the inability of that non-U.S. person counterparty to pay what it owes pursuant to a security-based swap will generally not pose risk to the U.S. financial system because it will not trigger the obligation of the U.S. guarantor. *See* Cross-Border Proposing Release, 78 FR 31031.

would not be attributed in the absence of recourse.[594]

The final rules codify the proposed guidance related to attribution of guaranteed positions to provide clarity to market participants. We continue to believe that a U.S. person should attribute to itself any positions of a non-U.S. person for which the non-U.S. person's counterparty has rights of recourse against the U.S. person, as the position exists within the United States by virtue of the U.S. person guarantor's involvement in the position.[595] Similarly, a non-U.S. person should attribute to itself any positions of a U.S. person for which that U.S. person's counterparty has rights of recourse against the non-U.S. person.[596] We also continue to believe that when a non-U.S. person guarantor has extended a recourse guarantee on the obligations of a U.S. person, those positions exist within the United States by virtue of the guaranteed U.S. person's involvement in the positions as a direct counterparty to the transaction and therefore the positions should be attributed to the non-U.S. person guarantor that is participating in that position through providing its guarantee. The final rules requiring attribution also aim to apply major participant regulation in similar ways to differing organizational structures that serve similar economic purposes, thus helping to ensure that the relevant purposes of the Dodd-Frank Act are not undermined.

1. Positions Attributed to U.S. Person Guarantors

(a) Proposed Approach and Commenters' Views

Our preliminary view was that a U.S. person would attribute to itself all security-based swap positions for which it provides a guarantee for performance on the obligations of a non-U.S. person, other than in limited circumstances.[597] We noted that the proposed approach did not alter the guidance regarding attribution that was adopted in the Intermediary Definitions Adopting Release, but proposed an approach in the cross-border context applying the principles set forth in the Intermediary Definitions Adopting Release.[598] This attribution standard was based on our preliminary view that, when a U.S. person acts as a guarantor of a position of a non-U.S. person, the guarantee creates risks within the United States whether the underlying security-based swaps that they guarantee are entered into with U.S. persons or with non-U.S. persons.[599] One commenter argued that attribution is beyond the scope of section 30(c) of the Exchange Act.[600] One commenter argued that our preliminary view regarding attribution for entities guaranteed by U.S. persons would result in ''double-counting'' and that security-based swap positions should only be attributed to a U.S. guarantor where the direct counterparty to the security-based swap is not otherwise required to count those positions toward its own calculation.[601]

(b) Final Rule

We are adopting rules that codify the preliminary views set forth in our proposal: A U.S. person is required to attribute to itself any security-based swap position of a non-U.S. person for which the non-U.S. person's counterparty to the security-based swap has rights of recourse against that U.S. person.[602] Although we considered commenters' objections to our proposed attribution requirement, we continue to believe that this approach is necessary because, as stated in the Intermediary Definitions Adopting Release, attribution is intended to reflect the risk posed to the U.S. financial system when a counterparty to a position has recourse against a U.S. person.[603] The final rule also includes a note to clarify that a U.S. person is still expected to attribute to itself positions of other U.S. persons for which the counterparty to that U.S. person has a recourse guarantee against the U.S.-person guarantor, as explained in interpretation in the Intermediary Definitions Adopting Release.[604]

We believe that attribution of positions to guarantors is consistent with Exchange Act section 30(c), notwithstanding the argument by one commenter that attribution to a guarantor ''extends beyond the intended limits of [s]ection 30(c) of the Exchange Act.''[605] As we discuss in more detail above, the major security-based swap participant definition focuses on positions that may raise systemic risk concerns within the United States.[606] It is our view that a security-based swap position exists within the United States when it is held by or with a U.S. person, or when a counterparty to the security-based swap has recourse against a U.S. person, as the risks associated with such positions are borne within the United States, and given the involvement of U.S. persons may, at the thresholds established for the major security-based swap participant definition, give rise to the types of systemic risk within the United States that major security-based swap participant regulation is intended to address.[607]

As discussed above, the final rules regarding positions for which a counterparty to the position has rights of recourse against a U.S. person aim to apply major participant regulation to in similar ways to differing organizational structures that serve similar economic purposes, including structures such as security-based swap positions entered into by a non-U.S. person that are subject to a recourse guarantee by a U.S. person and security-based swap positions carried out through a foreign branch.[608]

[594] *See id.* 31032 and n.625 (noting that we were not proposing to alter the approach with respect to attribution of guarantees that was adopted by the Commission and the CFTC in the Intermediary Definitions Adopting Release, but rather proposing to apply the same principles in the cross-border context).

[595] As discussed above in section V.D.3(b), the economic reality of this position, even though entered into by a non-U.S. person, is substantially identical, in relevant respects, to a transaction entered into directly by the U.S. guarantor.

[596] The economic reality of the non-U.S. person's position is substantially identical, in relevant respects, to a position entered into directly by the non-U.S. person.

[597] Cross-Border Proposing Release, 78 FR 31032 and n.628. *See also* Cross-Border Proposing Release, 78 FR 31033 and section V.E.3, *infra* (discussing limited circumstances where attribution of guaranteed security-based swap positions do not apply).

[598] *See* Cross-Border Proposing Release, 78 FR 31032 n.624; *see also* Intermediary Definitions Adopting Release, 77 FR 30689 n.1132.

[599] Cross-Border Proposing Release, 78 FR 31032.

[600] SIFMA/FIA/FSR Letter at A–20 to A–21 (asserting that only the guaranteed entity, which is the direct counterparty to the security-based swap transactions, should include the positions and that to require the guarantor to include the positions goes ''beyond the intended limits of Section 30(c) of the Exchange Act'').

[601] *See id.* at A–20 to A–21.

[602] Exchange Act rule 3a67–10(c)(1)(i).

[603] *See* Intermediary Definitions Adopting Release, 77 FR 30689 n.1135 (stating that the type of attribution addressed at that time may also be expected to raise special issues in the context of guarantees involving security-based swap positions of non-U.S. entities). As noted in the Cross-Border Proposing Release, these risk concerns are the same regardless of whether the underlying security-based swap positions of the non-U.S. person that the U.S. person guarantees are entered into with U.S. persons or non-U.S. persons. *See* Cross-Border Proposing Release, 78 FR 31032.

[604] *See* Intermediary Definitions Adopting Release, 77 FR 30689.

[605] *See* SIFMA/FIA/FSR Letter at A–21.

[606] *See* section II.B.2(c), *supra.*

[607] *See id.*

[608] *See* section V.D.3(b), *supra.* For the above reasons, we conclude that this final rule is not being applied to persons who are ''transact[ing] a business in security-based swaps without the jurisdiction of the United States,'' within the meaning of Exchange Act section 30(c). *See* section II.B.2(a), *supra.* We also believe, moreover, that this final rule is necessary or appropriate as a prophylactic measure to help prevent the evasion of the provisions of the Exchange Act that were added by the Dodd-Frank Act, and thus help ensure that the relevant purposes of the Dodd-Frank Act are not undermined. Without this rule, U.S. persons would be able to evade major participant regulation under Title VII simply by conducting their security-based

While we recognize one commenter's concern that attribution would require ''double counting'' certain positions, we do not agree with that commenter's assertion that the final rule constitutes double-counting, given that both entities assume the risk of the position by either entering into it directly or by guaranteeing it. Because both entities are involved in the position that poses risk to the U.S. financial system, both entities are required to include it in their respective major participant threshold calculations, at least until the entity whose position is guaranteed is required to register as a major security-based swap participant.[609]

2. Positions Attributed to Non-U.S. Person Guarantors

(a) Proposed Approach and Commenters' Views

In the proposal, we expressed our preliminary view that a non-U.S. person that provides a recourse guarantee for performance on the obligations of a U.S. person should attribute to itself the security-based swap positions of the U.S. person that are subject to guarantees by the non-U.S. person.[610] However, when a non-U.S. person provides a guarantee to another non-U.S. person, the non-U.S. person providing the guarantee would have been required to attribute to itself only those positions for which a U.S. person counterparty has rights of recourse against the non-U.S. person guarantor under the security-based swap. As noted above, one commenter argued that attribution is beyond the scope of section 30(c) of the Exchange Act.[611]

(b) Final Rule

Consistent with our preliminary view, the final rule requires a non-U.S. person to attribute to itself any security-based swap positions of a U.S. person that are subject to a guarantee by the non-U.S. person.[612] In other words, the non-U.S. person guarantor will attribute to itself all security-based swap positions of the U.S. person for which a counterparty of the U.S. person has rights of recourse against the non-U.S. person guaranteeing the position.[613] The rule reflects our view that the guarantee may enable the U.S. person to enter into significantly more security-based swap positions with both U.S.-person and non-U.S. person counterparties than it would be able to absent the guarantee, increasing the risk that such persons could incur, amplifying the risk of the non-U.S. person's inability to carry out its obligations under the guarantee.[614]

Under the final rule, if a U.S. person in a transaction with a non-U.S. person counterparty has rights of recourse against another non-U.S. person under the security-based swap, the non-U.S. person guaranteeing the transaction must attribute the security-based swap to itself for purposes of its major security-based swap participant threshold calculations.[615] We note that, consistent with the rule requiring non-U.S. persons to count positions entered into with U.S. persons, a non-U.S. person that attributes a position of another non-U.S. person to itself does not need to attribute to itself positions arising from a transaction conducted through a foreign branch of the U.S.-person counterparty when the counterparty is a registered security-based swap dealer or positions arising from a transaction conducted through a foreign branch of a U.S.-person counterparty, when the transaction is entered into prior to 60 days following the earliest date on which registration of security-based swap dealers is first required.[616]

As explained above, we believe that attribution of positions to guarantors is consistent with Exchange Act section 30(c), notwithstanding the argument by one commenter that attribution to a guarantor ''goes beyond the intended limits of section 30(c) of the Exchange Act.'' [617] As we discuss in more detail above, the major security-based swap participant definition focuses on positions that may raise systemic risk concerns within the United States.[618] It is our view that a security-based swap position exists within the United States when it is held by or with a U.S. person, or when it is guaranteed by a U.S. person, as the risks associated with such positions are borne within the United States, and given the involvement of U.S. persons may give rise, at the thresholds established for the major security-based swap participant definition, to the types of systemic risk within the United States that major security-based swap participant regulation is intended to address.[619]

The final rules requiring non-U.S. persons to attribute certain positions to themselves for purposes of calculating their own major security-based swap participant calculation thresholds aims to apply major participant regulation in similar ways to differing organizational structures that serve similar economic purposes. For example, when a U.S. person has rights of recourse against a non-U.S. person, the economic reality of the position is substantially identical, in relevant respects, to a position entered into directly by the non-U.S. person with the U.S. person. The relevant attribution requirements reflect that a non-U.S. person would need to include such positions were it to enter into them directly.[620]

3. Limited Circumstances Where Attribution of Guaranteed Security-Based Swap Positions Does Not Apply

(a) Proposed Approach and Commenters' Views

The proposal stated our preliminary view that a guarantor would not be required to attribute to itself the security-based swap positions it guarantees, and, therefore, may exclude those positions from its threshold calculations, if the person whose positions it guarantees is already subject to capital regulation by the Commission or the CFTC (for example, by virtue of being regulated as a swap dealer, security-based swap dealer, major swap participant, major security-based swap participant, FCMs, brokers, or dealers),

swap positions via a guaranteed non-U.S. person, while still being subject to the risks associated with those positions.

[609] *See* Exchange Act rule 3a67–10(c)(2)(i).

[610] *See* Cross-Border Proposing Release, 78 FR 31032–33.

[611] *See* note 600, *supra.*

[612] Exchange Act rule 3a67–10(c)(1)(ii)(A).

[613] Exchange Act rule 3a67–10(c)(1)(ii)(A) may be broader than the CFTC Cross-Border Guidance in this context because the final rule requires the non-U.S. person to attribute to itself all the positions of the U.S. person that are guaranteed by the non-U.S. person, whereas the CFTC Cross-Border Guidance states that the non-U.S. person would generally not attribute to itself positions of the U.S. person that it guarantees where the counterparty is another non-U.S. person that is not guaranteed by a U.S. person. *See* CFTC Cross-Border Guidance at 45326 (stating that a non-U.S. person would generally consider in its own calculation (*i.e.,* attribute to itself) any swap position (of a U.S. or non-U.S. person) that it guarantees in which the counterparty is a U.S. person or a guaranteed affiliate).

[614] *See* Cross-Border Proposing Release, 78 FR 31032–33.

[615] Exchange Act rule 3a67–10(c)(ii)(B).

[616] *See* section V.D.2 (describing exception for transaction conducted through a foreign branch of a registered security-based swap dealer), *supra;* Exchange Act rule 3a67–10(c)(ii)(B) (incorporating Exchange Act rule 3a67–10(b)(3)(i)(A) and (B)).

[617] *See* SIFMA/FIA/FSR Letter at A–20 to A–21.

[618] *See* section II.B.2(c), *supra.*

[619] *See id.*

[620] *See* section V.D.3(b), *supra.* For the above reasons, we conclude that this final rule is not being applied to persons who are ''transact[ing] a business in security-based swaps without the jurisdiction of the United States,'' within the meaning of section 30(c). *See* section II.B.2(a), *supra.* We also believe, moreover, that this final rule is necessary or appropriate as a prophylactic measure to help prevent the evasion of the provisions of the Exchange Act that were added by the Dodd-Frank Act, and thus help ensure that the relevant purposes of the Dodd-Frank Act are not undermined. Without this rule, non-U.S. persons would be able to evade major participant regulation under Title VII simply by conducting their security-based swap positions by guaranteeing another entity that would then enter into the positions.

is regulated as a bank in the United States, or is subject to capital standards adopted by its home country supervisor that are consistent in all respects with the Capital Accord of the Basel Committee on Banking Supervision (''Basel Accord'').[621] This preliminary view applied both to U.S. persons and non-U.S. persons that are subject to registration and regulation in the enumerated categories.[622] Our preliminary view was that such consistent foreign regulatory capital requirements would adequately address the risks arising from such positions, making it unnecessary to separately address the risks associated with guarantees of those same positions.[623] We noted that this approach was consistent with the capital standards of the prudential regulators with respect to foreign banks that are bank holding companies subject to the Federal Reserve Board of Governors' supervision.[624]

One commenter supported our preliminary view that a non-U.S. person's guaranteed positions would not be attributed to the guarantor if the guaranteed non-U.S. person is subject to capital regulation by the Commission, the CFTC, or capital standards in its home jurisdiction that are consistent with the Basel Accord.[625] Another commenter sought clarification that a U.S. guarantor will not be required to attribute transactions of guaranteed entities while the guaranteed person's registration as a major security-based swap participant is pending.[626]

(b) Final Rules

Although the final rules require, in some circumstances, both the guarantor and the guaranteed person to include guaranteed positions in their respective major security-based swap participant threshold calculations, the final rules do not require a guarantor to attribute guaranteed positions to itself when the guaranteed person is subject to capital regulation by the Commission or the CFTC (including, but not limited to regulation as a swap dealer, major swap participant, security-based swap dealer, major security-based swap participant, futures commission merchant, broker, or dealer).[627] This codifies our preliminary view.[628] The final rule, moreover, does not require a guarantor to attribute to itself positions that it guarantees when the guaranteed person is regulated as a bank in the United States, or is subject to capital standards adopted by its home country supervisor that are consistent in all respects with the Basel Accord.[629] Consistent with our preliminary view, we believe that consistent foreign regulatory capital requirements would adequately address the risks arising from such positions, making it unnecessary to separately address the risks associated with guarantees of those same positions.[630] We continue to view such regulatory treatment as adequate to address the risks that the attribution requirement is intended to address. We also note that this approach is consistent with the capital standards of the prudential regulators with respect to foreign banks that are bank holding companies subject to the Federal Reserve Board of Governors' supervision.

As noted above, one commenter requested that a U.S. guarantor not be required to attribute to itself a person's positions for which it provides a guarantee while that person's registration as a major security-based swap participant is pending.[631] Upon further consideration, we believe that it is appropriate to permit a guarantor not to attribute the positions of such entities to itself. This change will mitigate market disruption that may otherwise result due to the prospect of a person intermittently exceeding the major participant threshold when a person that it guarantees is in the process of registering as a major security-based swap participant. This approach is also consistent with the approach under the application of the *de minimis* exception that allows a person not to count the transactions of its affiliates that are in the process of registering as dealers.[632]

F. Other Issues Related to the Application of the Major Security-Based Swap Participant Definition

1. Threshold for Registration as a Major Security-Based Swap Participant

One commenter commented generally that the threshold for having to register as a major-security-based swap participant is too high.[633] This threshold, however, was adopted in the Intermediary Definitions Adopting Release and is not under consideration in this rulemaking. In addition, the Intermediary Definitions Adopting Release provided that the Commission staff will prepare a report subsequent to the effectiveness of the security-based swap reporting requirements that will examine a number of aspects of our definitional rules and related interpretations, including relevant major security-based swap participant thresholds.[634]

2. Entities That Maintain Legacy Portfolios

The Cross-Border Proposing Release did not address the treatment of legacy portfolios, but we stated in the Intermediary Definitions Adopting Release that ''the fact that these entities no longer engage in new swap or security-based swap transactions does not overcome the fact that entities that are major participants will have portfolios that are quite large and could pose systemic risk to the U.S. financial system.'' [635] Based on this

[621] *See* Cross-Border Proposing Release, 78 FR 31033 (explaining that the non-U.S. person must be subject to capital standards that are consistent with the capital standards such non-U.S. person would have been subject to if it was a bank subject to the prudential regulators' capital regulation, *i.e.,* the Basel Accord); *see also* Intermediary Definitions Adopting Release, 77 FR 30689 (stating that it is not necessary to attribute a person's positions to a parent or other guarantor if the person already is subject to capital regulation by the CFTC or SEC or if the person is a U.S. person regulated as a bank in the United States). Thus, once the person whose position is guaranteed registers as a major security-based swap participant, attribution would no longer be required.

[622] *See* Cross-Border Proposing Release, 78 FR 31033 at n.636.

[623] *See id.* at 31033–34.

[624] *See id.* at 31033 (citing § 225.2(r)(3) of Regulation Y, which states that ''[f]or purposes of determining whether a foreign banking organization qualifies under paragraph (r)(1) of this section: (A) A foreign banking organization whose home country supervisor . . . has adopted capital standards consistent in all respects with the Basel Accord may calculate its capital ratios under the home country standard . . .'').

[625] *See* SIFMA/FIA/FSR Letter at A–21 to A–22; *see also* Cross-Border Proposing Release, 78 FR 31033.

[626] *See* AFGI Letter I at 3 (stating that this clarification would be within the spirit and language of the proposed rules).

[627] *See* Exchange Act rule 3a67–10(c)(2)(i).

[628] *See* Cross-Border Proposing Release, 78 FR 31032–33, notes 629, 632, and 634.

[629] Exchange Act rule § 240.3a67–10(c)(2)(ii) and (iii). *See* Cross-Border Proposing Release, 78 FR 31033 (explaining that the non-U.S. person must be subject to capital standards that are consistent with the capital standards such non-U.S. person would have been subject to if it were a bank subject to the prudential regulators' capital regulation, *i.e.,* the Basel Accord); Intermediary Definitions Adopting Release, 77 FR 30689. This approach generally is consistent with the CFTC Cross-Border Guidance. *See* CFTC Cross-Border Guidance, 78 FR 45326 (stating that ''where a subsidiary is subject to Basel-compliant capital standards and oversight by a G20 prudential supervisor, the subsidiary's positions would generally not be attributed to a parental guarantor in the computation of the parent's outward exposure under the MSP definition'').

[630] *See* Cross-Border Proposing Release, 78 FR 31033–34.

[631] *See* note 626, *supra.*

[632] *See* Exchange Act rule 3a67–10(c)(2)(iv) (referring to rule 3a67–8(a)); *see also* Exchange Act rule 3a71–4 (addressing persons who have exceeded the *de minimis* thresholds but are in the process of registering); section IV.F.2, *supra.*

[633] BM Letter at 15–16 (stating that the excessively high major participant threshold excludes most market participants, thus leaving large, non-U.S. entities that are active in the market subject only to dealer requirements).

[634] *See* Intermediary Definitions Adopting Release, 77 FR 30697–30699.

[635] *Id.* at 30691.

understanding, the Commissions jointly determined that such entities should not be excluded from major participant regulation but explained that the Commissions would pay particular attention to special issues raised by the application of substantive rules to those legacy portfolios.[636]

In the Commission's proposed capital and margin requirements, we proposed exceptions from certain account equity requirements, such as collection of margin, for non-bank security-based swap dealers' and non-bank major security-based swap participants' accounts holding legacy security-based swaps and we requested comment on these proposals.[637] As explained in the Intermediary Definitions Adopting Release, we may entertain requests for relief or guidance on a case-by-case basis.[638] One commenter requested that, at a minimum, the Commission provide flexibility in any requirements that require a person to register as a major security-based swap participant solely due to activity related to its legacy portfolios.[639] With respect to the activities of financial guaranty insurers, one commenter suggested that amendments made to an existing insured security-based swap or entry into a new security-based swap with the same or a substituted counterparty in connection with loss mitigation or risk reduction efforts, should receive the same regulatory treatment given to legacy portfolio security-based swaps because such security-based swaps do not increase notional exposure.[640]

In the context of the cross-border application of the major security-based swap participant definition, we are maintaining our approach to legacy portfolios as described in the Intermediary Definitions Adopting Release and are not excluding entities that maintain legacy portfolios from the major security-based swap participant definition.[641] Given the foregoing, we are not adopting an exclusion from the cross-border application of the major security-based swap participant definition for entities that maintain legacy portfolios.

G. Foreign Public Sector Financial Institutions and Government-Related Entities

In the Cross-Border Proposing Release, we did not propose to specifically address the treatment of entities such as foreign central banks, international financial institutions, multilateral development banks, and sovereign wealth funds in the context of the major security-based swap participant definition and instead sought comment regarding the types, levels, and natures of security-based swap activity that such organizations regularly engage in in order to allow us to better understand the roles of these organizations in the security-based swap markets.[642]

The final rule defining ''U.S. person'' (like the proposed definition of that term) specifically excludes several foreign public sector financial institutions and their agencies and pension plans, and more generally excludes any other similar international organization and its agencies and pension plans.[643] As explained in the context of the *de minimis* exception, certain commenters requested that we take further action to address the application of the dealer definition and its *de minimis* exception to security-based swap activities involving such organizations.[644] Additionally, we noted that two commenters stated that they should not be subject to the possibility of dealer regulation for comity reasons, on the grounds that they were arms of a foreign government.[645] Commenters did not make arguments specific to the application of the major security-based swap participant definition but articulated their arguments in conjunction with their arguments related to the application of the dealer definition. However, one commenter explained that, though it understands that multilateral development banks do not currently engage in security-based swap at the level that would trigger major security-based swap participant registration, even if they did, regulation would violate their privileges and immunities.[646]

As discussed in the context of the *de minimis* exception, it is our view that such issues are outside the scope of this release given that the source of any such privileges and immunities is found outside of the Dodd-Frank Act and the federal securities laws.[647]

Similar to the discussion in the context of the *de minimis* exception, commenters also stated that non-U.S. persons should not have to count their security-based swap positions involving these organizations against their major security-based swap participant threshold calculations on the basis that counting such positions would constitute the impermissible regulation of such organizations.[648] As discussed in the context of the *de minimis* exception, we do not agree with the suggestion that counting a person's positions with such organizations against the major participant calculation thresholds—when otherwise provided for by the rules—involves the regulation of such organizations.[649] Requiring a person to count, against their major participant calculation thresholds, the person's positions involving such an international organization as counterparty simply reflects the application of the federal securities laws to that person and its positions, and does not constitute the regulation of the international organization.[650] A person's security-based swap positions with such an international organization are

[636] *Id.* at 30691 and n.1170.

[637] *See* Exchange Act proposed rules 18a-3(c)(1)(iii)(D) and 18a-3(c)(2)(iii)(C); *see also* Capital and Margin Proposing Release, 77 FR 70214, 70247, 70265, 70269–70, 70271–72 (proposed capital, margin and segregation requirements for security-based swap dealers and major security-based swap participants).

[638] Intermediary Definitions Adopting Release, 77 FR 30691.

[639] AFGI Letter I at 2 (suggesting that the Commission consider providing an exemption from major security-based swap participant registration for entities that will be required to register solely due to their legacy portfolios, if their legacy positions are expected to decline below the major security-based swap participant threshold within 12 to 14 months of the effective date due to projected run-off or terminations); AFGI Letter II at 2–5; AFGI letter, dated February 18, 2011 (''AFGI Letter V'') at 11 (stating that attribution to a financial guaranty insurer is not appropriate when the insurer guarantees a security-based swap obligation of an unaffiliated entity) (incorporated by reference in AFGI Letter I).

[640] AFGI Letter I at 3 (stating that such activities, like activities related to legacy swaps, do not constitute new business and that regulators should implement consistent regulatory treatment in this area to reduce exposure resulting from these legacy transactions); AFGI Letter II at 2–3. *See also* AFGI Letter III at 5 (arguing that an amendment to a legacy account for loss mitigation or credit strengthening without increasing notional exposure should still be considered the legacy account instead of a new security-based swap); AFGI letter, dated July 20, 2011 (''AFGI Letter IV'') at 2–4 (supporting exclusion for state-regulated insurers) (incorporated by reference in AFGI Letter I); AFGI Letter V at 3 (same).

[641] *See* Intermediary Definitions Adopting Release, 77 FR 30691.

[642] *See* Cross-Border Proposing Release, 78 FR 31034–35. *See* section IV.C.2(e) and Exchange Act rule 3a71–3(a)(4)(iii) (listing the international organizations that are excluded from the definition of ''U.S. person'').

[643] *See* section IV.C.2(e), *supra.*

[644] *See, e.g.,* WB/IFC Letter at 2–4, 6–7 (also stating that such organizations should not be required to register as major participants or to clear security-based swaps, and that affiliates of such organizations should be excluded from the ''U.S. person'' definition); SC Letter at 16–24 (contending that the privileged and immunities afforded such organizations would be violated by their direct regulation as dealers or major participants, or by direct regulation equivalents, and that affiliates of such organizations also are immune from regulation); IDB Letter at 5. *See* note 420, *supra.*

[645] *See* note 422, *supra.*

[646] *See* SC Letter at 16.

[647] *See* section IV.H.2, *supra.*

[648] *See* section IV.H.2, *supra;* SC Letter at 18–19; WB/IFC Letter (incorporating SC Letter).

[649] *See* IV.H.2, *supra.*

[650] *See id.*

considered the same, for purposes of applying the major participant calculation thresholds and other Title VII requirements, as a position with some other non-U.S. person counterparty.

H. Economic Analysis of Final Rules Regarding ''Major Security-Based Swap Participants''

These final rules and guidance regarding the cross-border implementation of the application of the definition of major security-based swap participants will affect the costs and benefits of major security-based swap participant regulation by determining which positions will be counted against a market participant's major security-based swap participant calculation thresholds.[651] The cross-border rules have the potential to be important in determining the extent to which the risk mitigation and other benefits of Title VII are achieved, by identifying those market participants with sufficiently large exposures to raise the types of systemic risk concerns that the major security-based swap participant definition was intended to address.[652]

As discussed in the context of the cost-benefit analysis of the application of the *de minimis* exception in the cross-border context, commenters addressed cost-benefit issues from a variety of perspectives, including arguing that cost-benefit principles warranted greater harmonization with the approaches taken by the CFTC or foreign regulators.[653] Commenters, however, did not separately address cost-benefit issues related to the application of the major security-based swap participant definition.

We have taken economic effects into account in adopting these final cross-border rules and providing guidance. Because security-based swap contracts are associated with complex risks and the markets are highly interconnected, we believe that positions that exist within the United States, which are most likely to expose the U.S. financial system to financial risk, should generally be included in the major security-based swap participant threshold calculations. At the same time, we recognize that the cross-border application of Title VII has the potential to reduce liquidity within the U.S. market to the extent it increases the costs of entering into security-based swaps or provides incentives for particular market participants to avoid the U.S. market to operate wholly outside the Title VII framework.[654]

As addressed in the analysis of the costs and benefits of our application of the *de minimis* rule, the application of the major security-based swap participant definition implicates two types of costs and benefits: assessment costs and programmatic costs and benefits.[655] First, certain current and future participants in the security-based swap market will incur assessment costs in connection with determining whether they fall within the ''major security-based swap participant'' definition and thus would have to register with the Commission.

Second, the registration and regulation of some entities as major security-based swap participants will lead to programmatic costs and benefits arising as a consequence of the Title VII requirements that apply to registered major security-based swap participants.[656]

We discuss these costs and benefits associated with the final rules more fully below. We also discuss the economic impact of certain potential alternatives to the approach taken in the final rules.

1. Programmatic Costs and Benefits

(a) Cost-Benefit Considerations of the Final Rules

Exchange Act rule 3a67–10 will permit market participants to exclude certain of their positions from their major security-based swap participant threshold calculations, and thus may cause particular entities that engage in security-based swap transactions not to be regulated as major security-based swap participants. The rules accordingly may be expected to affect the programmatic costs and benefits associated with the regulation of major security-based swap participants under Title VII, given that those costs and benefits are determined in part by which persons will be regulated as major security-based swap participants.[657]

As discussed in the context of the application of the *de minimis* exception, this does not mean that there is a one-to-one relationship between a person not being a ''major security-based swap participant'' as a result of these cross-border rules, and the resulting change to programmatic benefits and costs.[658] In practice, we believe that these rules will focus the regulation of major security-based swap participants on those market participants whose security-based swap positions may expose the U.S. financial system to the levels of risk we identified as warranting regulation as a major security-based swap participant in the Intermediary Definitions Adopting Release, or on the prevention of evasion. To the extent that a person's positions within the United States remain below these thresholds, we believe that regulating it as a major security-based swap participant under Title VII would be less likely to produce the types of programmatic benefits that Title VII was intended to address. In other words, these requirements will direct the application of the major security-based swap participant definition—which itself is the product of cost-benefit considerations—towards those entities whose security-based swap positions are most likely to pose the type and level of risk to the U.S. financial system that Title VII was intended to mitigate.

As such, the rules reflect our assessment and evaluation of programmatic costs and benefits:

- *Positions of U.S. persons*—Requiring U.S. persons, as defined in the final rules (including the foreign branches of such persons), to include all of their positions in their major participant threshold calculations, addresses risks that these positions pose to the U.S. financial system.
- *Positions guaranteed by U.S. persons*—Requiring non-U.S. persons to include in their major security-based swap participant threshold calculations all their positions that are guaranteed by a U.S. person, where their counterparties have recourse to the guarantor, reflects both the economic reality of the position—that the position exists within the United States—and addresses the risks posed to the U.S. financial system by the positions of such persons that are guaranteed by U.S. persons.[659]
- *Positions with U.S.-person counterparties*—Requiring non-U.S. persons to include their positions with counterparties that are U.S. persons, unless the positions are with a foreign branch of a registered security-based swap dealer, addresses risks to the U.S.

[651] *See* section IV.I, *supra; see also* Intermediary Definitions Adopting Release, 77 FR 30666 (explaining that in developing the rules further defining ''substantial position,'' we were mindful of the costs associated with regulating major participants and considered cost and benefit principles as part of that analysis).

[652] *See* section III.A, *supra.*

[653] *See* section IV.I, *supra.*

[654] *See id., supra.*

[655] *See id., supra.*

[656] *See* Cross-Border Proposing Release, 78 FR 31139.

[657] *See* Intermediary Definitions Adopting Release, 77 FR 30727.

[658] *See* section IV.I.1(a) and note 431, *supra* (discussing various fixed and variable costs).

[659] *See* Exchange Act rule 3a67–10(b)(3)(ii); section V.D.3, *supra.*

financial system arising from positions entered into with U.S. persons.[660]

• *Attribution of certain positions to guarantors of performance under a security-based swap*—Requiring guarantors of performance under security-based swaps to attribute to themselves, for purposes of their own major security-based swap participant threshold calculations, positions that they guarantee, addresses risks that guarantees pose to the U.S. financial system. To the extent that the guarantee involves a position within the United States or brings a position within the United States, our final rules would typically require attribution to the guarantor. These requirements are intended to help ensure that positions that pose risks to the U.S. financial system are included in the guarantor's major participant threshold calculations.[661]

• *Positions subject to anti-evasion provisions*—Requiring conduit affiliates to include all of their positions in their major participant threshold calculations addresses, in a targeted manner, the potential for evasion of the major security-based swap participant requirements of Title VII.[662] As noted above we are adopting a definition of ''conduit affiliate'' that excludes affiliates of registered security-based swap dealers and major security-based swap participants to avoid imposing costs on registered persons in situations that would not appear to implicate the types of evasion concerns that the conduit affiliate definition is intended to address.

In short, these final rules apply the major security-based swap participant definition—which itself reflects cost-benefit considerations[663]—to cross-border security-based swap positions in a way that directs the focus of major participant regulation toward those entities whose security-based swap positions may expose the U.S. financial system to the levels of risk we identified as warranting regulation as a major security-based swap participant.

(b) Evaluation of Programmatic Impacts

In defining ''substantial position'' and ''substantial counterparty exposure'' as part of the Intermediary Definitions Adopting Release, we sought to capture persons whose security-based swap positions pose sufficient risk to counterparties and the markets generally that regulation as a market participant was warranted, without imposing costs of Title VII on those entities for which regulation currently may not be justified in light of the purposes of the statute.[664] As discussed above in the context of the dealer analysis, we estimated in the Intermediary Definitions Adopting Release that, under those rules, approximately 12 entities had outstanding positions large enough that they would likely carry out threshold calculations and that fewer than five entities, and potentially zero, would ultimately be required to register as major security-based swap participants.[665] Those estimates provide a baseline against which the Commission can analyze the programmatic costs and benefits and assessment costs of the final rules applying the major security-based swap participant definition to cross-border activities.

We believe the methodology used in the Intermediary Definitions Adopting Release also is appropriate for considering the potential programmatic costs and benefits associated with the final cross-border rules. This methodology particularly can help provide context as to how rules regarding the cross-border application of the definition of major security-based swap participant may change the number of entities that must register as major security-based swap participants, and thus help provide perspective regarding the corresponding impact on the programmatic costs and benefits of Title VII. Applying that methodology to 2012 data regarding the single-name CDS market suggests that under these final rules five or fewer entities may have to register as major security-based swap participants—a number that is consistent with our estimates in the Intermediary Definitions Adopting Release.[666]

The factors that are described in more detail in section IV.I.1(b) regarding the application of the *de minimis* exception are also relevant to and may impact the programmatic benefits and costs associated with the implementation of the cross-border application of the major security-based swap participant definition. Those factors include limitations of the methodology and data used, the impact of the not yet finalized rules implementing Title VII entity-level and transaction-level requirements applicable to major security-based swap participants, market participants' modifications to their business structure or practices in response to the final rules, and the impact on market participants of other regulatory requirements that are analogous to the major security-based swap participant requirements.[667]

In general, however, and consistent with our territorial approach, we believe that these rules are targeted

[660] *See* Exchange Act rule 3a67–10(b)(3)(i); section V.D.1; *see also* note 437, *supra* (discussing rationale for this limitation in context of *de minimis* exception).

[661] *See* Exchange Act rule 3a67–10(c); section V.E, *supra.*

[662] *See* Exchange Act rule 3a67–10(b)(2); section V.C, *supra.*

[663] *See* Intermediary Definitions Adopting Release, 77 FR 30666 (explaining that in developing the rules further defining ''substantial position,'' we were mindful of the costs associated with regulating major participants and considered cost and benefit principles as part of that analysis).

[664] *See id.* at 30724–25.

[665] *See id.* at 30727 and note 1529; section III.A.2.

That methodology determined that an entity that margins its positions would need to have security-based swap positions approaching $100 billion to reach the levels of potential future exposure required to meet the substantial position threshold, even before accounting for the impact of netting, while an entity that clears its security based swaps generally would need to have positions approaching $200 billion. We believed that it was reasonable to assume that most entities that will have security-based swap positions large enough to potentially cause them to be major participants in practice will post variation margin in connection with those positions that they do not clear, making $100 billion the relevant measure. The available data from 2011 showed that only one entity had aggregate gross notional positions (*i.e.,* aggregate buy and sell notional positions) in single-name CDS exceeding $100 billion, and three other entities had aggregate gross notional positions between $50 and $100 billion. We explained, however, that an entity's positions reflecting single-name credit protection sold to its counterparties, as opposed to purchased, may be expected to be a more key determinant of potential future exposure under those rules. The data showed that zero entities had more than $100 billion in positions arising from selling single-name credit protection and that only two entities had between $50 and $100 billion arising from such positions. *See id.* at 30727, 30734 and note 1529.

In the Intermediary Definitions Adopting Release, we noted that to the extent that an entity's security-based swap positions are not cleared or associated with the posting of variation margin, security-based swap positions of $20 billion may lead to sufficient potential future exposure to cause the entity to be a major participant, though we believed that few, if any, entities would have a significant number of such positions. The data indicated that only 32 entities have notional CDS positions in excess of $10 billion. *See id.* at note 1529.

[666] *See* note 444, *supra* (noting that the data on which the methodology is based has been updated).

Consistent with the methodology used in the Intermediary Definitions Adopting Release, the 2012 data indicated that two entities had aggregate gross notional positions (*i.e.,* aggregate buy and sell notional positions) in single-name CDS exceeding $100 billion. Applying the principles reflected in these final rules regarding the counting of positions against the major security-based swap participant thresholds suggests that two entities would have aggregate gross notional positions in single name CDS exceeding $100 billion. No additional entities would be required to register as a result of aggregation. Based on this data, we believe that it is reasonable to conclude that five or fewer entities ultimately may register as major security-based swap participants.

[667] *See* section IV.I.1(b), *supra.*

appropriately and do not apply major security-based swap participant regulation to those entities whose positions have a more limited impact on the U.S. financial system and hence whose regulation as a major security-based swap participant under Title VII would be less linked to programmatic benefits (*i.e.,* non-U.S. persons that engage in security-based swap transactions entirely, or almost entirely, outside the United States with non-U.S. persons or with certain foreign branches), while applying major participant regulation to those entities whose positions would be more likely to produce programmatic benefits under Title VII. The nexus between specific aspects of these requirements and the programmatic costs and benefits also is addressed below in connection with our consideration of various alternatives to the approach taken in the final rules.

Finally, as discussed in the context of the *de minimis* exception, we recognize that the U.S. market participants and positions regulated under Title VII are a subset of the overall global security-based swap market and that shocks to risk or liquidity arising from a foreign entity's positions outside the United States may spill into the United States.[668] We also have considered these spillovers in connection with our analysis of the effects of these final cross-border rules on efficiency, competition, and capital formation.[669]

2. Assessment Costs

The analysis of how these cross-border rules will affect the assessment costs associated with the ''major security-based swap participant'' definition is related to the assessment cost analysis described in the Intermediary Definitions Adopting Release,[670] but must also account for certain issues specific to these cross-border rules. While in certain regards those assessment costs can more readily be estimated than the programmatic effects discussed above, the assessment costs associated with the cross-border application of the Title VII major participant requirements will be considerably less significant than those programmatic effects.

The Intermediary Definitions Adopting Release addressed how certain market participants could be expected to incur costs in connection with their determination of whether they have a ''substantial position'' in security-based swaps or pose ''substantial counterparty exposure'' created by their security-based swaps, which is necessary for determining whether they are major security-based swap participants.[671] In that release we estimated that as many as 12 entities would likely perceive the need to perform these calculations, given the size of their security-based swap positions.[672] We preliminarily believed that entities that perceive the need to perform the threshold calculations as a result of the proposed rules and guidance set forth in the Cross-Border Proposing Release would incur only relatively minor incremental costs to those described in the Intermediary Definitions Adopting Release.[673] Based on the estimate that no more than 12 entities would perceive the need to engage in the analysis of whether they are a major security-based swap participant, we estimated that the total legal costs associated with evaluating the various elements of the definition may approach $360,000.[674]

As discussed in the context of the *de minimis* exception, application of these cross-border rules can be expected to affect the assessment costs that market participants will incur. In part, certain non-U.S. persons may be expected to incur personnel costs and legal costs—beyond the legal costs addressed as part of the Intermediary Definitions Adopting Release—associated with analyzing these cross-border rules and developing systems and procedures to assess which transactions would have to be counted against the major security-based swap participant calculation thresholds (or with the purpose of avoiding positions that pose risk to the United States financial system that would be sufficient to meet the applicable thresholds). On the other hand, while certain market participants also would incur additional legal costs associated with the major security-based swap participant determination (*i.e.,* the assessment of whether particular positions should be included in the major participant threshold calculations) addressed in the Intermediary Definitions Adopting Release, the application of the cross-border rules may reduce the number of entities that incur such legal costs.[675]

In adopting these rules we estimate the assessment costs that market participants may incur as a result. As discussed below, however, these costs in practice may be mitigated in large part by steps that market participants already have taken in response to other regulatory initiatives, including compliance actions taken in connection with the requirements applicable to swaps.

(a) Legal Costs

The implementation of these cross-border rules in some circumstances has the potential to change the legal costs identified in the Intermediary Definitions Adopting Release, including by adding new categories of legal costs that non-U.S. persons may incur in connection with applying the major security-based swap participant definition in the cross-border context.

Legal costs related to the cross-border application of major security-based swap participant definition—As discussed in the Intermediary Definitions Adopting Release, certain market participants will incur assessment costs related to the analysis of whether their positions rise to the levels set by the major security-based swap participant definition. For purposes of that release, we assumed that entities with aggregate gross notional single-name CDS positions exceeding $25 billion may identify a need to perform the major participant analysis.[676] Based on that figure, we estimated that 12 entities would perceive the need to perform the major participant analysis.[677]

Under the final rules described above, available data from 2012 indicates that approximately nine persons will have relevant positions exceeding $25 billion, and we continue to believe that firms whose positions exceed this amount will be likely to perform the major participant threshold analysis.[678] Of those nine, five entities are not

[668] *See* section IV.I.1(b), *supra* (describing spillover risks).

[669] *See* section VIII.B, *infra.*

[670] *See* Intermediary Definitions Adopting Release, 77 FR 30733–36.

[671] *See id.* at 30734–36.

[672] *See id.* at 30734.

[673] *See* Cross-Border Proposing Release, 77 FR 31141.

[674] *See* Intermediary Definitions Adopting Release, 77 FR 30736. We also noted in that release that if 32 entities were to perform the analysis, the market wide legal costs would total $960,000. *See id.* at 30736 n. 1539; *see also* note 665, *supra* (noting that if an entity did not clear or post variation margin, $20 billion in notional CDS positions may be sufficient exposure to cause the entity to be a major participant and that 32 entities have notional CDS positions exceeding $10 billion).

[675] *See* section IV.I.2, *supra.*

[676] *See* Intermediary Definitions Adopting Release, 77 FR note 1529.

[677] Based on data as of December 2011, in that release we found that 1 entity had aggregate gross notional positions from bought and sold credit protection exceeding $100 billion, 4 entities had aggregate gross notional single-name CDS positions exceeding $50 million, and 12 entities had aggregate gross notional CDS positions exceeding $25 billion. *See id.* at 30734 n. 1529.

[678] *See* section III.A.1, *supra.* The difference between this and our previous estimate of 12 entities reflects changes in security-based swap activity since the Intermediary Definitions Adopting Release and the final rules' treatment of positions between non-U.S. persons in the absence of guarantees from U.S. persons.

domiciled in the United States. Consistent with our view in the proposing release, we expect that non-U.S. firms in this set will incur additional costs beyond those described in the Intermediary Definitions Adopting Release. These additional costs would arise due to information that non-U.S. market participants would have to collect and maintain in order to calculate the size of positions that count towards the major participant thresholds. Consistent with our analysis in the Intermediary Definitions Adopting Release, we believe that it is reasonable to conclude that at least some entities with security-based swap positions approaching the major participant thresholds are likely to seek legal counsel for interpretation of various aspects of the rules pertaining to the major participant definition.[679] Though the costs associated with obtaining such legal services would vary depending on the facts and circumstances regarding an entity's positions, we believe that $40,000 is a reasonable estimate of the upper end of the range of the costs of obtaining the services of outside counsel in undertaking the legal analysis of the entity's status as a major security-based swap participant.[680]

Legal costs related to systems analysis—As noted in the assessment cost analysis related to the *de minimis* exception (and in addition to the estimates in the Cross-Border Proposing Release), we believe that it is reasonable to conclude that those five entities not domiciled in the United States may have to incur one-time legal expenses related to the development of systems and analysis expenses—discussed below—to identify which of their security-based swap positions potentially must be counted for purposes of the major security-based swap participant analysis, consistent with these cross-border rules. As in the dealer context, this additional cost estimate reflects the fact that the development of such systems and procedures must address cross-border rules that require accounting for factors such as whether an entity's security-based swaps are subject to guarantees from U.S. persons, whether its counterparties are U.S. persons, and, specific to the major security-based swap participant analysis, whether the entity must attribute the position to itself pursuant to the attribution rules. As in the analysis of assessment costs related to the dealer definition, we estimate that such legal costs would amount to approximately $30,400 per entity, and that those five entities would incur total costs of approximately $152,000.[681]

(b) Costs Related to New Systems, Analysis, and Representations

Transaction-monitoring systems—The elements introduced by the final cross-border rules may cause certain non-U.S. persons to implement systems to identify whether their positions exceed the major security-based swap participant calculation thresholds. Such systems may reflect the need for non-U.S. persons to: (i) identify whether their counterparties are ''U.S. persons''; (ii) determine whether their positions with U.S. persons arise from transactions conducted through a foreign branch (which itself requires consideration of whether their counterparty is a ''foreign branch'') and—of those—determine which positions involve a foreign branch of a U.S. bank that itself is a registered security-based swap dealer; (iii) determine whether particular positions are subject to a recourse guarantee against a U.S. person; and (iv) evaluate the applicability of the attribution rules.[682] Our estimates for the required systems are the same in the major participant analysis as they are in the dealer analysis: one-time programming costs of $14,904 and ongoing annual systems costs of $16,612 per entity.[683]

Analysis of counterparty status, including representations—As discussed in the context of the *de minimis* exception, non-U.S. market participants would be likely to incur costs arising from the need to assess the potential U.S.-person status of their counterparties, which we would typically expect to be dealers, and in some cases to obtain and maintain records related to representations regarding their counterparty's U.S.-person status.[684] We anticipate that non-U.S. persons are likely to review existing information about their counterparties to assess whether those counterparties are U.S. persons.[685] Non-U.S. persons at times may also request and maintain representations from their dealer and non-dealer counterparties to help determine or confirm their counterparties' status.[686] Accordingly, as in the discussion of dealer assessment costs, in our view, such assessment costs primarily would encompass one-time costs to review and assess existing information regarding counterparty domicile, principal place of business, and other factors relevant to potential U.S.-person status, as well as one-time costs associated with requesting and collecting representations from counterparties.[687] The costs associated with representations in the context of the major participant analysis would be one-time costs of approximately $24,200 per firm.[688]

[679] *See* Intermediary Definitions Adopting Release, 77 FR 30735.

[680] The average cost incurred by such entities in connection with outside counsel is based on staff experience in undertaking legal analysis of status under federal securities laws. The staff believes that costs associated with obtaining outside legal counsel relating to such determinations range from $20,000 to $40,000 depending on the complexity of the entity. *See id.* at 30735–36 n. 1537 (estimating the upper bound of such costs at $30,000). We note that the additional $10,000 added to the estimate in the Intermediary Definitions Adopting Release is intended to account for the additional complexity that non-U.S. persons may face in performing the analysis.

These estimates do not reflect a new category of costs arising from the cross-border rules. They instead are a revision of a category of previously identified costs that market participants may incur in obtaining legal services to assist in performing the major participant analysis, using newer data and reflecting only positions that are counted under the final cross-border rules.

[681] *See* section IV.I.2(a) and note 460 (addressing calculations of costs), *supra.*

[682] We do not believe that a potential major security-based swap participant will need to use any systems to determine if it is a ''conduit affiliate.'' *See* note 462, *supra.*

[683] *See* section IV.I.2(b) and note 464, *supra.*

[684] *See* Exchange Act rule 3a67–10(a)(4) and (3) (incorporating the definitions of ''U.S. person'' ''transaction conducted through a foreign branch,'' including provisions permitting reliance on representations); *see also* section IV.I.2(b) and note 465, *supra* (noting that non-U.S. market participants may seek representations as to whether positions arise from transactions conducted through a foreign branch of a U.S. bank that is registered as a security-based swap dealer and also noting our understanding that few, if any, U.S. persons may participant in the single-name CDS market through their foreign branches).

[685] *See* section IV.I.2(b), *supra.*

[686] *See id.*

[687] *See* section IV.I.2(b) and note 466, *supra* (explaining that determination of U.S.-person status generally will not vary over time absent changes involving corporate reorganizations).

[688] *See* section IV.I.2(b), *supra.* The cumulative estimate is based on the same methodology and SIFMA Management & Professional Earnings in the Securities Industry 2013 data that we used to estimate these one-time costs for dealers. *See* note 467, *supra.* With respect to major security-based swap participants, we conservatively assume that each of the non-U.S. firms will have 30 single-name CDS counterparties (based on data indicating that the five non-U.S. firms persons with total single-name CDS positions in 2012 exceeding $25 billion all had fewer than 45 counterparties in connection with single-name CDS, which produces an estimate of 15 hours of compliance staff time and 15 hours of legal staff time per firm. Based upon data from SIFMA's Management & Professional Earnings in the Securities Industry 2013 (modified by the Commission staff to account for an 1800-hour-work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead), the staff estimates that the average national hourly rate for a senior compliance examiner is $217 and that the average national hourly rate for an in-house attorney is $380; this leads to a cumulative estimate of $9,000 per firm for such costs.

Continued

Monitoring of counterparty status—Also as addressed in the context of the *de minimis* exception, market participants may be expected to adapt their systems to monitor the status of their counterparties for purposes of future security-based swap activities, which would allow market participants to maintain records of counterparty status for purposes of conducting the major participant assessment.[689] Market participants also may need to monitor for the presence of information that may indicate that the representations they have received are outdated or otherwise are not valid.[690] The costs associated with adapting the systems described above to monitor the status of their counterparties for purposes of their future security-based swaps would be the same as the costs in the dealer analysis: one-time costs of approximately $12,436.[691]

Summary of systems, analysis, and representation costs—The summary of costs that certain non-U.S. market participants would incur in connection with systems, analysis of counterparty status and representations in connection with these cross-border rules would be approximately $51,500 in one-time costs[692] and $16,612 in estimated annual ongoing costs.[693] Based on our estimate, subject to the limitations associated with the use of data analysis discussed above, that five non-U.S. domiciled entities will incur these assessment costs, we estimate that the total one-time industry-wide costs associated with establishing such systems would amount to approximately $257,500 and total ongoing costs would amount to approximately $83,100.

(c) Overall Considerations Related to Assessment Costs

In sum, we believe that the effect of these final cross-border rules would be an increase over the amounts that otherwise would be incurred by certain non-U.S. market participants, both in terms of additional categories of legal costs and in terms of the need to develop certain systems and procedures. As discussed in the context of the assessment costs applicable to the dealer analysis, we believe that requiring certain non-U.S. persons to incur such assessment costs is an unavoidable adjunct to the implementation of a set of rules that are appropriately tailored to apply the ''major security-based swap participant'' definition under Title VII to a global security-based swap market in a way that yields the relevant benefits associated with the regulation of major participants and achieves the benefits of Title VII.[694] The benefits of Title VII's regulatory requirements applicable to major security-based swap participants could be undermined if a significant portion of positions held by non-U.S. persons that impose risk on the U.S. financial system were excluded from the Title VII framework. In certain respects, however, decisions embedded in these final rules are designed to avoid imposing assessment costs upon market participants.[695]

As explained in the context of the analysis for dealers, we recognize that our estimates of assessment costs may result in an overestimation as such costs may be tempered to the extent that market participants' assessments correspond to the assessments they otherwise would follow due to other regulatory requirements or business practices, particularly with respect to assessments they may have made regarding the U.S.-person status of their counterparties.[696]

Also as noted in the dealer discussion, we acknowledge that certain aspects of the final rules may differ from those of the CFTC, which may result in higher costs for market participants, but we believe that such differences are justified and we discuss those differences in the substantive discussions of the specific rules.[697] We also recognize other factors that may impact the assessment costs for potential major security-based swap participants, such as the possibility that certain market participants will choose to restructure their business to avoid major security-based swap participant regulation.[698]

3. Alternative Approaches

As discussed above, the final rules incorporate a number of provisions designed to focus Title VII major security-based swap participant regulation upon those persons whose security-based swap positions may raise the risks within the United States that the major participant definition was intended to address.[699]

In adopting these final rules we have considered alternative approaches suggested by commenters, including the economic effects of following such alternative approaches. In considering the economic impact of potential alternatives, we have sought to isolate the individual alternatives to the extent practicable, while recognizing that many of those alternatives are not mutually exclusive.[700]

We further have considered such potential alternatives in light of the methodologies discussed above, by assessing the extent to which following particular alternatives would be expected to increase or decrease the number of entities that ultimately would be expected to be regulated as major security-based swap participants under the final rules, as well as the corresponding economic impact. Analysis of the available data would tend to suggest that various alternative approaches suggested by commenters would not produce any changes in the numbers of market participants that may have to be regulated as major security-based swap participants. These results are subject to the above limitations, however, including limitations regarding the ability to quantitatively assess how market participants may adjust their future activities in response to the rules we adopt or for independent reasons. Accordingly, while such analyses provide some context regarding alternatives, their use as tools for

Consistent with the Cross-Border Proposing Release, moreover, this estimate is further based on estimated 40 hours of in-house legal or compliance staff's time (based on the above rate of $380 per hour for an in-house attorney) to establish a procedure of requesting and collecting representations from trading counterparties, taking into account that such representation may be incorporated into standardized trading documentation used by market participants. This leads to an estimate of $15,200 per firm for such costs. *See* section IV.I.2(b) and note 467, *supra.*

[689] We also recognize that the final rules requiring attribution may impose certain additional monitoring costs on market participants whose position in a security-based swap is guaranteed by another entity and on the entities that provide the guarantee. We anticipate that the guarantors may receive reports from the market participants whose position is guaranteed in order to allow the guarantors to monitor the amount of such positions for purposes of determining whether the positions attributed to the guarantor rise to the level that would require them to register as a major security-based swap participant.

[690] *See* section IV.I.2(b) and note 469, *supra.*

[691] *See* section IV.I.2(b) and note 468 (noting that parties may structure their relationships in a way that will not require a separate representation in conjunction with each individual position) and 470, *supra* (describing calculations for this estimate).

[692] Consistent with the above discussion, the estimated one-time costs of $51,500 represent: the costs to establish a system to assess the status of their positions under the definitions and other provisions specific to these cross-border rules ($14,904); the costs related to the assessment of counterparty status, including costs of assessing existing information and of requesting and obtaining representations, as well as costs of related procedures ($24,200); and the costs for monitoring the status of their counterparties for purposes of their future security-based swap activities ($12,436). *See* section IV.I.2(b) and note 471, *supra.*

[693] *See* section IV.I.2(b), *supra.*

[694] *See* section IV.I.2(c), *supra.*

[695] *See id.*

[696] *See id.*

[697] *See id.*

[698] *See id.*

[699] *See* section V.A, *supra.*

[700] *Cf.* section IV.I.3, *supra.*

illustrating the economic effects of such alternatives is limited.

(a) Security-Based Swap Positions Held by Foreign Branches of U.S. Banks

As with the final rules in the context of the *de minimis* exception, the final rules applying the major security-based swap participant definition require U.S. banks to count all positions of their foreign branches against the major participant calculation thresholds, even when the counterparty is a non-U.S. person or another foreign branch of a U.S. person. The proposed definition of ''U.S. person'' plays a central role in the application of Title VII in the cross-border context, directly affecting which positions a person must include in its major security-based swap participant threshold calculations and ultimately, the number of entities that will register as major security-based swap participants. An alternative approach would permit U.S. persons not to include the positions of their foreign branches in their major security based swap participant calculation thresholds. As discussed above, we believe our approach to U.S. persons as described above, is consistent with our overall territorial approach to the application of Title VII requirements to the cross-border security-based swap market, because it requires that major security-based swap participant calculation thresholds include the positions of such persons that are most likely to cause risk to the U.S. financial system at the threshold levels set in the major security-based swap participant definition.[701] For the reasons discussed above, we believe that it is appropriate for a U.S. person to include in its calculation thresholds positions conducted through foreign branches to the same extent as other positions held by U.S. persons.[702]

As in the dealer analysis, using the 2012 data to assess the impact associated with this alternative does not indicate a change to our estimate that up to five entities potentially would register as major security-based swap participants, and the analysis is subject to the limitations discussed in the context of the dealer analysis.[703] Adopting an alternative approach that does not require foreign branches to count their positions with non-U.S. persons could incentivize U.S. persons to execute higher volumes through their branches.[704]

(b) Positions of Non-U.S. Persons for Which the Counterparty Has Rights of Recourse Against a U.S. Person

The final rules require a non-U.S. person to count, against its major security-based swap participant calculation thresholds, positions for which the non-U.S. person's performance in connection with the transaction is subject to a recourse guarantee against a U.S. person. Although the proposal instead would have treated such guaranteed affiliates like any other non-U.S. persons, we believe that this provision is appropriate for the reasons discussed above, including the fact that such recourse guarantees pose risks to the U.S. financial system via the guarantor.[705]

This aspect of the final rules reflects a middle ground between commenter views, as is discussed above regarding the approach taken in the dealer analysis.[706] The same two alternatives that are presented in the analysis of alternatives to the approach to the dealer final rules are relevant to the discussion of the application of the major security-based swap participant definition—one alternative in which the final rules do not address guarantees at all, and one in which (based on the concept of a *de facto* guarantee) all affiliates of a U.S. person should have to count their security-based swap positions against the calculation thresholds, with a potential exception if they demonstrate to the market that there will be no guarantee.[707] A third alternative and the approach taken in the proposal would require the non-U.S. person to include in its threshold calculations only those positions with U.S. persons that are not guaranteed but would require those positions that are guaranteed to be attributed to the U.S. person guarantor for purposes of its own threshold calculations.

The analysis of the first two alternatives discussed in the context of the application of the dealer requirements above also applies in the context of applying the major security-based swap participant definition.[708] The third alternative, which is the approach taken in the proposal, may have reduced programmatic benefits by increasing the likelihood that, even when a person exceeds the thresholds by virtue of its own positions, which exist within the United States by virtue of the U.S. person guarantor, it will not be subject to direct regulation as a major participant.[709] Under the proposed approach, only the U.S. person guarantor would have counted the positions for which the non-U.S. person's counterparty had rights of recourse against the U.S. person, meaning that such positions would not be accounted for in the major participant threshold calculations of the entity that directly enters into the positions. The economic reality of such positions is that by virtue of the guarantee the non-U.S. person effectively acts together with a U.S. person to engage in the security-based swap activity that results in the positions, and the non-U.S. person's positions cannot reasonably be isolated from the U.S. person's engagement in providing the guarantee.[710] The final rule reflects this economic reality by requiring the non-U.S. person whose position is guaranteed to include such positions in its major security-based swap participant threshold calculations.[711]

For the foregoing reasons, we believe that the approach taken in the final rules is appropriate. We note that an assessment of the data regarding the first alternative does not indicate a change in the number of entities that may be expected to register as major security-based swap participants.[712] Due to data limitations that prevent us from identifying which individual transactions of non-U.S. persons are subject to guarantees by U.S. persons and data limitations preventing us from obtaining information about the single-name security-based swap transactions of non-U.S. domiciled persons for single-name CDS involving a non-U.S. reference entity, the available data does not enable us to assess the second and third alternatives.[713]

(c) Positions of Conduit Affiliates

The final rules require conduit affiliates to count all of their security-based swap positions in their major security-based swap participant threshold calculations. The available

[701] *See* section II.B.2(c), *supra.*

[702] *See* section V.B.2, *supra.*

[703] *See* section IV.I.3(a) and note 477, *supra.*

[704] *See* section IV.I.3(a), *supra* (discussing the same issue in the dealer context).

[705] *See* section IV.I.3(b), *supra* (addressing similar discussion in the context of the dealer analysis).

[706] *See id., supra.*

[707] *See id.*

[708] *See* section IV.I.3(b), *supra* (explaining that not requiring non-U.S. persons to include positions for which their counterparty has a recourse guarantee against a U.S. person could incentivize U.S. persons to use such guarantees, whereas an approach that requires an affiliate of a non-U.S. person to include all of its positions in its major security-based swap participant calculation thresholds may negatively impact liquidity).

[709] *See* section II.B.2(c), *supra.*

[710] *See* section V.D.3(b), *supra.*

[711] *See id.*

[712] *See* section IV.I.3(b) and note 481 (explaining that the data does not enable us to identify which positions of non-U.S. persons are subject to guarantees by U.S. persons).

[713] *See* section IV.I.3(b) and notes 481 and 482, *supra.*

data does not permit us to identify which market participants would be deemed conduit affiliates.[714] As explained in the corollary discussion in the dealer analysis, we believe the alternative of not requiring such entities to count their positions would remove a tool that should help to deter market participants from seeking to evade regulation.

As addressed in the dealer analysis another alternative to address such evasive activity could be to narrow the inter-affiliate exception, such as by making the exception unavailable when non-U.S. persons enter into positions with their U.S. affiliates.[715] While this alternative may be expected to reduce costs to such entities, we believe the final rules will achieve comparable anti-evasion purposes with less cost and disruption.[716]

(d) Positions of Non-U.S. Persons With Foreign Branches of U.S. Banks and Certain Other Counterparties

The final rules require non-U.S. persons to include their positions arising from transactions conducted through foreign branches of U.S. banks unless the U.S. bank is registered as a security-based swap dealer. This reflects a change from the proposal, which would have required non-U.S. persons to include all positions with foreign branches of U.S. banks without exception. The final approach, as in the context of the dealer analysis, reflects a middle ground between commenter views, which provided two alternatives: that all positions arising from transactions conducted through foreign branches be counted or that no such position be counted against a non-U.S. person's major security-based swap participant calculation thresholds.[717] Adopting the first alternative requiring non-U.S. persons to include all positions with foreign branches would raise the potential for disparate impacts upon U.S. persons with foreign branches, along with associated concerns about liquidity impacts.[718] Adopting the second alternative excluding all such positions from being counted, could incentivize U.S. market participants that are not registered as dealers to execute higher volumes of security-based swaps through their foreign branches, resulting in higher levels of risk being transmitted to the United States without the risk-mitigating attributes of having a registered dealer involved in the position.[719]

The available data related to these alternatives is subject to the limitations discussed above and does not indicate a change to our assessment of the number of entities that may be expected to register as major security-based swap participants.[720]

Another alternative approach would require non-U.S. persons to include in their major security-based swap participant threshold calculations those positions for which they have rights of recourse against a U.S. person or their positions with counterparties that are conduit affiliates.[721] We believe that the positions of such non-U.S. persons do not transmit risk to the United States in the same way as if the potential major security-based swap participant is the entity whose performance is guaranteed by a U.S. person because the default of the non-U.S. person who holds the right of recourse against the U.S. person guarantor will not impact the outward exposure of the U.S. person or the non-U.S. person whose position is guaranteed. While these alternatives may potentially increase programmatic benefits associated with Title VII major participant regulation, they would also likely increase assessment costs by requiring such non-U.S. persons to evaluate and track whether they have a right of recourse against a U.S. person, potentially reducing liquidity available to U.S. corporate groups that provide guarantees to non-U.S. persons.[722] We note that, under the final rules regarding guaranteed positions, the entity involved in the position with the closest connection to the United States, the non-U.S. person whose position is guaranteed, as well as the U.S. guarantor itself, will already be including the position in each of their calculations. Thus we believe such benefits would be more attenuated than those associated with the final rules' approach of directly counting the positions of such guaranteed non-U.S. persons. Accordingly, we do not believe these alternatives would generate significant additional programmatic benefits.

(e) Attribution

i. Attribution to U.S. Persons

Our final attribution approach requires U.S. persons to include, for purposes of their major security-based swap participant calculation thresholds, those positions for which a non-U.S. person's counterparty has rights of recourse against the U.S. person.

An alternative approach would not require a U.S. person to include such positions in its threshold calculations. This alternative potentially reduces the programmatic costs and benefits of major participant regulation because it would reduce the number of positions that U.S. guarantors would include in their calculations. By reducing the costs associated with providing guarantees, such an alternative could reduce the barriers to participation in the security-based swap market faced by participants who might benefit from risk sharing afforded by security-based swap positions but cannot credibly provide sufficient information for their counterparties to assess creditworthiness. We further believe that such an approach would only reduce the assessment costs associated with major participant regulation to the extent that U.S. guarantors do not have private incentives in place to collect information about positions they guarantee.

As noted in section V.D.3, however, we believe it is important to account for the risk to the U.S. financial system transmitted by such guaranteed positions. Ensuring that a U.S. person counts positions of potentially several entities whose counterparties have rights of recourse against it, where each of those entities may be individually below the major participant threshold, will generate the types of benefits that Title VII was intended to produce. The benefits of including these positions are significant because, through the U.S. guarantor, these positions expose the U.S. financial system to the type of risk that the definition of major security-based swap participant is intended to address.

ii. Attribution to Non-U.S. Persons

Under the final rules a non-U.S. person must include security-based swap positions of a U.S. person for which that person's counterparty has rights of recourse against the non-U.S. person, and security-based swap positions of another non-U.S. person that are with a U.S.-person counterparty who has rights of recourse against the non-U.S. person that is the potential major security-based swap participant.

An alternative approach to these requirements would be to not require non-U.S. persons to include such positions, even when those positions are entered into by U.S. persons or when a U.S. person has a right of recourse against them under those positions. Not requiring these positions to be attributed

[714] *See* section IV.I.3(c), *supra.*

[715] *See id.*

[716] *See id.*

[717] *See* section IV.I.3(d), *supra.*

[718] *See id.*

[719] *See id.*

[720] *See id.*

[721] *See* note 576 (describing CFTC approach) and note 189 (describing comments suggesting to treat guaranteed entities as U.S. persons), *supra.*

[722] *See* section IV.I.3(d).

to the non-U.S. person could reduce assessment costs for non-U.S. persons and potentially result in fewer non-U.S. persons ultimately registering as major security-based swap participants. This alternative potentially improves risk sharing by U.S. persons who must rely on guarantees in order to participate in the security-based swap market by reducing the costs incurred by non-U.S. person guarantors. It likely would, however, also reduce programmatic benefits to the extent that non-U.S. persons that guarantee positions within the United States of multiple entities, each of which is below the major participant threshold, are not required to include such positions in their own calculations.

Such non-U.S. persons who provide guarantees ultimately bear the risk of positions they guarantee, and the aggregate risk exposure of the U.S. financial system to a non-U.S. person guarantor varies more directly with the notional amount of positions involving U.S. persons that are guaranteed than with the number of entities to which it provides guarantees. As a result, the Commission believes it is appropriate to apply attribution requirements that treat non-U.S. person guarantors of positions to which U.S. persons are counterparties as if they were direct counterparties. With respect to guarantees provided by non-U.S. persons to U.S. persons, the Commission believes it is appropriate to attribute guaranteed positions because U.S. persons bear the risk that non-U.S. person guarantors will be unable to fulfill obligations under the guarantees they provide.

(f) Positions Cleared Through a Clearing Agency in the United States

The final approach requires non-U.S. persons to include in their major participant threshold calculations those positions that are entered into with U.S. persons, including positions that are cleared through a registered clearing agency in the United States. An alternative raised by a commenter suggested that the location of clearing not be relevant for purposes of determining whether a non-U.S. person is a major security-based swap participant.[723] This alternative would ignore the risk that is posed to the U.S. financial system by positions cleared through a U.S.-person clearing agency, and would be inconsistent with the general approach that all positions with U.S. counterparties should be counted towards the major security-based swap participant threshold calculation. For this reason, we believe the alternative would ignore important programmatic benefits that are incorporated in the final approach.

(g) Foreign Government-Related Entities

Several commenters suggested that foreign government-related entities, such as sovereign wealth funds and MDBs, should be excluded from the U.S. person, security-based swap dealer, and major security-based swap participant definitions.[724] By potentially capturing fewer major security-based swap participants, this alternative approach would correspondingly decrease the programmatic costs and benefits associated with Title VII regulation of major security-based swap participants. We believe that security-based swap transactions entered into by these types of foreign government-related entities with U.S. persons pose the same risks to the U.S. security-based swap markets as transactions entered into by entities that are not foreign-government related. Moreover, as noted above,[725] we understand that foreign government-related entities rarely enter into security-based swap transactions (as opposed to other types of swap transactions) in amounts that would trigger the obligation to register as a major security-based swap participant. To the extent that such entities do enter into security-based swaps with U.S. persons, however, we believe such requiring such entities to include those positions in their major participant threshold calculations will generate programmatic benefits, as such positions introduce risk into the United States of the type title VII intended to address.

VI. Substituted Compliance Procedural Rule

A. Proposed Approach and Commenters' Views

The Cross-Border Proposing Release addressed a range of substantive issues regarding the potential availability of substituted compliance, whereby a market participant could satisfy certain Title VII obligations by complying with comparable foreign requirements. These included issues regarding which requirements might be satisfied via substituted compliance, and regarding the showings necessary to obtain a substituted compliance order from the Commission.

The release also proposed to amend the Commission's Rules of General Application to establish procedures for considering substituted compliance requests, similar to the procedures that the Commission uses to consider exemptive order applications under section 36 of the Exchange Act.[726] Among other aspects, proposed Exchange Act rule 0–13 would require that substituted compliance applications be in writing and include any supporting documentation necessary to make the application complete—''including information regarding applicable requirements established by the foreign financial regulatory authority or authorities, as well as the methods used by the foreign financial regulatory authority or authorities to monitor compliance with such rules''—and that applications cite applicable precedent.[727] The proposed rule also stated that the Commission may choose to publish requests in the **Federal Register**, and stated that requestors may seek confidential treatment.[728] We preliminarily concluded that those proposed procedures would provide sufficient guidance regarding the submission process.[729] We also solicited comment regarding the sufficiency of the guidance provided by the proposed rule,

[723] *See* section V.B.2 and note 549, *supra. See also* section VIII.A, *infra.*

[724] *See* section IV.H.2 and note 420 (addressing comments in *de minimis* context and citing WB/IFC Letter SC Letter and IDB Letter at 5), *supra.*

[725] *See* section V.G, *supra.*

[726] *See generally* Cross-Border Proposing Release, 78 FR 31087–88.

[727] *See* proposed Exchange Act rule 0–13(a), (e). Proposed Exchange Act rule 0–13 further would provide that applications must comply with Commission rule 0–3 (regarding the filing of materials with the Commission). Under the proposal, all applications would be submitted to the Commission's Office of the Secretary electronically or in paper format, and in the English language. If an application is incomplete, the Commission may request that the application be withdrawn unless the applicant can justify why supporting materials have not been submitted and undertakes to submit promptly the omitted materials. The Commission would not consider hypothetical or anonymous requests for a substituted compliance order. The proposed rule further addressed issues regarding contact information, amendments to the application, the review process, and potential hearings regarding the application. *See* proposed Exchange Act rule 0–13; *see also* Cross-Border Proposing Release, 78 FR 31087–88.

[728] *See* proposed Exchange Act rule 0–13(a), (h). The proposal stated that requests for confidential treatment would be permitted to the extent provided under 17 CFR 200.81. *See* proposed Exchange Act rule 0–13(a); Cross-Border Proposing Release, 78 FR 31087–88. Under 17 CFR 200.81, persons submitting exemptions and related relief may also request that it be accorded confidential treatment for a specified period of time not exceeding 120 days. If the Commission staff determines that the request is reasonable and appropriate it will be granted and the letter or other communication will not be made available for public inspection or copying until the expiration of the specified period. If the staff determines that the request for confidential treatment should be denied, the staff shall advise the person making the request and the person may withdraw the letter or other communication within 30 days.

[729] *See* Cross-Border Proposing Release, 78 FR 31088.

and regarding whether foreign regulatory authorities should be able to submit substituted compliance requests.[730]

One commenter raised concerns that the proposed availability of confidential treatment ''would foreclose any public comment, debate or analysis of the applicant's claims about the foreign regulatory regime, leading to an industry-led process.'' That commenter urged us to disallow confidential treatment of applications, and to invite public comment as foreign jurisdictions are considered for comparability.'' [731]

Commenters also asked for greater clarity regarding the information to be provided in connection with substituted compliance requests.[732] Commenters also asked that the Commission coordinate with the CFTC and foreign regulators in making substituted compliance determinations.[733]

Other commenters addressed a related issue regarding whether foreign regulators could submit substituted compliance requests. Proposed Exchange Act rule 3a71–5, regarding substituted compliance for foreign security-based swap dealers, specified that such requests may be filed by a foreign security-based swap dealer or group of dealers. A number of commenters took the contrasting position that foreign regulators should be able to submit substituted compliance requests.[734] Some commenters further stated that such requests solely should be submitted by foreign regulators.[735] Two commenters particularly emphasized the importance of the Commission's substituted compliance assessments taking into account foreign enforcement and supervisory practices.[736]

B. Final Rule

In large part, we expect to address issues regarding the availability of substituted compliance as part of future rulemakings, in conjunction with considering the cross-border application of the relevant substantive rules. As discussed above, we believe that it is appropriate to address issues regarding the cross-border application of the substantive requirements under Title VII in conjunction with considering the final rules to implement those substantive requirements, as substituted compliance potentially will constitute an integral part of the final approach toward cross-border application.

At this time, however, we believe that it is appropriate to adopt a final rule to address the procedures for submitting substituted compliance requests. Using the same general procedural requirements would facilitate the efficient consideration of substituted compliance requests. Proposed Exchange Act rule 0–13, moreover, is sufficiently flexible to accommodate requests related to a range of regulatory requirements, even when the requirements necessitate different approaches toward substituted compliance.

Accordingly, we are adopting Exchange Act rule 0–13 largely as proposed. In response to commenter input, however, the final rule has been modified from the proposal to provide that a request for a substituted compliance order may be submitted either by a party that potentially would comply with requirements under the Exchange Act pursuant to a substituted compliance order, or by a relevant foreign financial regulatory authority or authorities.[737] We are persuaded that allowing foreign regulators to submit such requests would promote the completeness of requests and promote efficiency in the process for considering such requests, in light of foreign regulators' expertise regarding their domestic regulatory system, including the effectiveness of their compliance and enforcement mechanisms, and to allow for a single point of contact to facilitate the consideration of substituted compliance requests associated with the jurisdiction. We are not, however, foreclosing the ability of a market participant itself to submit a request that it be able to comply with Exchange Act requirements pursuant to a substituted compliance order.[738]

The final rule further revises the proposal to provide that applications should include supporting documentation regarding the methods that foreign financial regulatory authorities use to enforce compliance with the applicable rules.[739] This type of information—which we expect would be best provided by the relevant foreign regulator—is consistent with the fact that our substituted compliance assessments will not be limited to a comparison of applicable rules and their underlying goals, but also will take into account the capability of a foreign financial regulatory authority to monitor compliance with its rules and take appropriate enforcement action in response to violations of such rules.[740]

[730] *See id.*

[731] *See* AFR Letter I at 11–12.

[732] *See* FOA Letter at 4 (stating that the proposed requirement that an application include supporting documentation that the applicant believes necessary for the Commission to make the determination ''puts the burden of interpretation wholly on the applicant''; requesting additional guidance regarding the information needed to accompany requests, and greater specificity to ensure ''that the applications it receives address a similar range of compliance issues and contain a similar amount of supporting detail''); SIFMA/FIA/FSR Letter at A–38 (urging the Commission ''to provide a more granular and detailed framework regarding the considerations relevant to evaluating substituted compliance requests'').

[733] *See, e.g.,* FOA Letter at 8 (requesting that the Commission and the CFTC coordinate in making substituted compliance determinations and that the Commissions consider whether to accept joint submissions from foreign regulators or foreign market participants); CEDU Letter at 2 (stating that the Commission should work closely with the CFTC ''when determining whether substituted compliance is applicable with respect to a particular jurisdiction'').

[734] *See, e.g.,* SIFMA/FIA/FSR Letter at A–36 (''Foreign regulators are often best placed to describe their rules and provide information for the purposes of a comparability analysis. Such an approach would also allow for a more efficient use of resources.'').

[735] *See* EC Letter at 3 (suggesting that ''the review of a foreign regime should be conducted in cooperation solely with the relevant foreign regulators or legislators, as opposed to firms'' to avoid duplication or confusion); ESMA Letter at 3.

[736] *See* AFR Letter I at 12 (supporting ability to reject or withdraw substituted compliance determinations based on the failure of a foreign regime to exercise supervisory or enforcement authority); BM Letter at 30–31 (criticizing Cross-Border Proposing Release for including ''only passing reference to foreign supervision and enforcement as discretionary factors the SEC may consider in making a substituted compliance determination,'' and stating that any substituted compliance determinations be predicated on evaluation of ''a host of factors regarding the foreign regulatory system, including staff expertise, agency funding, agency independence, technological capacity, supervision *in fact,* and enforcement *in fact''*).

[737] The decision to permit foreign regulators to submit substituted compliance requests may impact our future consideration of proposed rule 3a71–5(c), which specified that applications for substituted compliance determinations in connection with security-based swap dealer requirements may be made by foreign dealers or by groups of foreign dealers.

[738] To the extent we receive multiple requests in connection with a particular jurisdiction, we may consider such requests together.

[739] *See* Exchange Act rule 0–13(e). The final rule addresses the need for applications to provide information regarding how foreign regulatory authorities ''monitor and enforce'' compliance with the applicable rules. The relevant language of the proposal simply referred to ''monitor.''

In addition, the final rule revises the proposed language regarding the Commission's ability to request applications to be withdrawn, by omitting the proposed reference to the Commission acting ''through its staff.'' *See* Exchange Act rule 0–13(a).

The final rule further revises the proposed language regarding the process for considering applications, by providing that an appropriate response will be issued following ''a vote by'' the Commission. *See* Exchange Act rule 0–13(g).

[740] We note that assessments of analogous factors occur in other contexts. For example, assessments conducted by the Federal Reserve in connection with applications by foreign banks to establish a branch, agency or commercial lending company in the United States consider—and the Federal Reserve requires applications to provide information regarding—the following factors regarding the role played by the foreign bank's

Finally, the final rule revises the proposal by removing a provision that would have stated that requestors may seek confidential treatment of their application to the extent provided by Exchange Act rule 200.81. This change reflects the fact that under the final rules substituted compliance applications may be submitted by foreign financial regulatory authorities, and recognizes the importance of having the assessment consider potentially sensitive information regarding a foreign regime's compliance and enforcement capabilities and practices. Accordingly, requests for confidential treatment may be submitted pursuant to any applicable provisions governing confidentiality under the Exchange Act.[741] We expect confidential treatment requests will seek protection for privileged information obtained from foreign regulators.[742]

Recognizing the significance of commenter concerns regarding the need for public comment, debate and analysis of substituted compliance requests, moreover, rule 0–13 provides that the Commission shall provide public notice of requests and solicit public comment when a complete application has been submitted.[743] We recognize that public comment regarding substituted compliance requests may be helpful to our consideration of particular requests.[744]

In adopting rule 0–13, we recognize that the requirement that an application ''include any supporting documents necessary to make the application complete'' implicates commenter concerns regarding the need for further guidance regarding what information must be submitted as part of substituted compliance requests. We expect to address such issues regarding supporting documentation in the future, as we consider the potential availability of substituted compliance in connection with particular Title VII requirements.

C. Economic Analysis

The availability of substituted compliance has the potential to impact the interplay between programmatic costs and benefits associated with the Title VII regulation of security-based swap dealers and major security-based swap participants, as well as those associated with other Title VII requirements. For example, substituted compliance potentially may permit the risk management and other programmatic benefits of dealer regulation to be achieved while avoiding costs that market participants otherwise may incur. At the same time, the process of making substituted compliance requests may cause certain market participants to incur extra costs, although that possibility may be obviated in part by the provision that permits foreign financial authorities to make such requests.

As discussed throughout this release, the security-based swap market is a global market that is subject to regulatory requirements that may vary by jurisdiction. As a result, market participants that operate globally potentially could be subject to overlapping or conflicting regulations. If Title VII requirements for non-U.S. market participants conflict with regulations in local jurisdictions, Title VII could act as a barrier to entry to the U.S. security-based swap market. In such cases, allowing market participants to comply with Title VII via substituted compliance could act as a mechanism to preserve access for non-U.S. persons to the U.S. security-based swap market, reducing the likelihood that non-U.S. persons exit the U.S. market entirely. Therefore, we expect that substituted compliance—so long as it is conditioned on a foreign regime's comparability to the relevant requirements under the Dodd-Frank Act, and on the foreign regime having adequate compliance and enforcement capabilities—would help preserve access and competition in the U.S. market, and thus benefit non-dealer participants in the security-based swap market.[745]

Although the costs associated with the process of making substituted compliance request may be uncertain at this time, the decision to request substituted compliance is purely voluntary. To the extent such requests are made by market participants, moreover, such participants would request substituted compliance only if, in their own assessment, compliance with applicable requirements under a foreign regulatory system was less costly than compliance with both the foreign regulatory regime and the relevant Title VII requirement. Even after a substituted compliance determination is made, market participants would only choose substituted compliance if the private benefits they expect to receive from participating in the U.S. market exceeds the private costs they expect to bear, including any conditions the Commission may attach to the substituted compliance determination. Where substituted compliance increases the number of dealers or other participants in the U.S. security-based swap market, or prevents existing participants from leaving the U.S. market, this may help mitigate the programmatic costs associated with the applicable Title VII requirements, while

home country supervisor: (a) the scope and frequency of on-site examinations by the home-country supervisor; (b) off-site monitoring by the home-country supervisor; (c) the role of external auditors; (d) regulation and monitoring of affiliate transactions; (e) other applicable prudential requirements (including capital adequacy, asset classification and provisioning, single or aggregate credit and foreign currency exposure limits, and liquidity) and associated supervisor monitoring; (f) remedial authority of the home-country supervisor to enforce compliance with prudential controls and other supervisory or regulatory requirements; and (g) prior approval requirements (related to investments in other companies or the establishment of overseas offices). *See* Federal Reserve Board, ''International Applications and Prior Notifications under Subpart B of Regulation K,'' (*http://www.federalreserve.gov/reportforms/forms/FR_K–220110331_f.pdf*). In noting this analogous requirement, we are not predicting the extent to which such factors may or may not be considered as part of the Commission's substituted compliance assessments.

[741] For example, Exchange Act rule 24b–2 addresses the potential availability of confidential treatment in connection with any registration statement, report, application, correspondence or other document filed pursuant to the Exchange Act. The rule provides that the person filing the information must make written objection to its public disclosure at the time of the filing. *See* 17 CFR 240.24b–2.

Separately, Commission Rule 200.83 is a procedural rule that addresses how persons submitting information to the Commission may request that the information not be disclosed pursuant to a request under the Freedom of Information Act for reasons permitted by Federal law. The rule does not apply when any other statute or Commission rule provides procedures for confidential treatment regarding particular categories of information, or where the Commission has specified that an alternative procedure be utilized in connection with a particular study, report, investigation or other matter. Under this rule, a person submitting information to the Commission must request confidential treatment at the time of the submission. *See* 17 CFR 200.83.

[742] Exchange Act Section 24(d) provides that the Commission generally shall not be compelled to disclose records obtained from a foreign securities authority if: (1) the foreign authority in good faith determines and represents that public disclosure of the records would violate the laws applicable to that foreign securities authority; and (2) the Commission obtains the records pursuant to procedures authorized for use in connection with the administration or enforcement of the securities laws, or a memorandum of understanding.

Exchange Act Section 24(f)(2) further provides that the Commission shall not be compelled to disclose privileged information obtained from any foreign securities authority or law enforcement authority if the foreign authority in good faith has determined and represented that the information is privileged.

[743] The text of the final rule has been revised from the proposal to eliminate a reference to the Commission having ''sole discretion'' to choose to publish a notice, and to provide that publication would occur following submission of a ''complete'' application. *See* Exchange Act rule 0–13(h).

[744] The final rule also makes technical change to the proposal by replacing references to the Commission's Division of Trading and Markets with general references to the ''staff,'' consistent with the broad range of issues that will likely arise in connection with evaluating substituted compliance requests. *See* Exchange Act rule 0–13(a), (g).

[745] *Cf.* Institute of International Finance (''IIF'') Letter (making a similar point).

helping to ensure that the associated programmatic benefits are achieved.

The costs particularly associated with making substituted compliance requests, as well as the general costs and benefits associated with allowing substituted compliance, may be expected to vary between the various categories of Title VII requirements. Relevant considerations may include: whether (and to what extent) substituted compliance is permitted in connection with a requirement; the relevant information required to demonstrate consistency between the foreign regulatory requirements and the Commission's analogous dealer requirements; the relevant information required to demonstrate the adequacy of the foreign regime's compliance and enforcement mechanisms; and whether substituted compliance requests are made by market participants or by foreign regulatory authorities. These factors limit our ability to further predict the economic consequences of this procedural rule.

We recognize that commenters have asked that the Commission coordinate with the CFTC and foreign regulators in making substituted compliance determinations. As discussed above, the Commission is subject to obligations to consult and coordinate with the CFTC and foreign regulators in connection with Title VII.[746] Our revision of the final rule to permit foreign regulators to submit substituted compliance requests also helps address goals of increased coordination. Moreover, our substituted compliance assessments regarding particular requirements applicable to security-based swap dealers also as appropriate may take into account the way that other regulators address similar issues, subject to the need for any allowance of substituted compliance to be predicated on the extent to which compliance with another regulatory regime will help achieve the goals of Title VII.

VII. Antifraud Authority

A. Final Rule

The provisions of the rules and guidance, discussed above, do not limit the cross-border reach of the antifraud provisions or other provisions of the federal securities laws that are not specifically addressed by this release.

In section 929P(b) of the Dodd-Frank Act, Congress added provisions to the federal securities laws confirming the Commission's broad cross-border antifraud authority.[747] Congress enacted section 929P(b) in the wake of the Supreme Court's decision in *Morrison* v. *National Australia Bank,*[748] which created uncertainty about the Commission's cross-border enforcement authority under the antifraud provisions of the federal securities laws. Before *Morrison,* the federal courts of appeals for nearly four decades had construed the antifraud provisions to reach cross-border securities frauds when the fraud either involved significant conduct within the United States causing injury to overseas investors, or had substantial foreseeable effects on investors or markets within the United States.[749] With respect to the Commission's enforcement authority, section 929P(b) codified the courts of appeals' prior interpretation of the scope of the antifraud provisions' cross-border reach. Section 929P(b) also made clear that the scope of subject-matter jurisdiction was coextensive with the cross-border reach of the antifraud provisions.[750]

Specifically, the Commission's antifraud enforcement authority under section 17(a) of the Securities Act and the antifraud provisions of the Exchange Act—including sections 9(j) and 10(b)—extends to ''(1) conduct within the United States that constitutes significant steps in furtherance of [the antifraud violation], even if the securities transaction occurs outside the United States and involves only foreign investors,'' and ''(2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.'' [751] Similarly, the Commission's enforcement authority under section 206 of the Investment Advisers Act applies broadly to reach ''(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the violation is committed by a foreign adviser and involves only foreign investors,'' and ''(2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.'' [752]

Although no commenters challenged the Commission's interpretation of its cross-border antifraud authority, we are aware that a federal district court recently expressed the view that the statutory language may be unclear.[753] We therefore have determined to adopt a rule that clearly sets forth our interpretation of the Commission's cross-border antifraud authority.[754] We believe that our interpretation is not only the better reading of the antifraud authorities and the statutory text added by section 929P(b), but that our reading is consistent with section 929P(b)'s legislative history and purpose.[755]

[746] *See* section II.B, *supra.*

[747] The antifraud provisions of the securities laws include section 17(a) of the Securities Act, 15 U.S.C. 77q(a); sections 9, 10(b), 14(e), and 15(c)(1)–(2) & (7) of the Exchange Act, 15 U.S.C. 78i, 78j, 78n, 78o(c)(1)–(2); section 206 of the Investment Advisers Act of 1940, 15 U.S.C. 80b-6; and any rule or regulation of the Commission promulgated under these statutory authorities.

[748] *See* 130 S. Ct. 2869, 2888 (2010) (holding in a section 10(b) class action that ''it is . . . only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies'').

[749] *See, e.g., Schoenbaum* v. *Firstbrook,* 405 F.2d 200, 206 (2d Cir. 1968), *modified on other grounds,* 405 F.2d 215 (1968) (*en banc*).

[750] *See* 156 Cong. Rec. H5237 (daily ed. June 30, 2010) (statement of Rep. Kanjorski, author of section 929P(b)) (''In the case of *Morrison* v. *National Australia Bank,* the Supreme Court last week held that section 10(b) of the Exchange Act applies only to transactions in securities listed on United States exchanges and transactions in other securities that occur in the United States. In this case, the Court also said that it was applying a presumption against extraterritoriality. This bill's provisions concerning extraterritoriality, however, are intended to rebut that presumption by clearly indicating that Congress intends extraterritorial application in cases brought by the SEC or the Justice Department. Thus, the purpose of the language of section 929P(b) of the bill is to make clear that in actions and proceedings brought by the SEC or the Justice Department, the specified provisions of the Securities Act, the Exchange Act and the Investment Advisers Act may have extraterritorial application, and that extraterritorial application is appropriate, irrespective of whether the securities are traded on a domestic exchange or the transactions occur in the United States, when the conduct within the United States is significant or when conduct outside the United States has a foreseeable substantial effect within the United States.''). *See also* 156 Cong. Rec. S5915–16 (daily ed. July 15, 2010) (statement of Senator Reed).

[751] Section 22 of the Securities Act, 15 U.S.C. 77v(a); section 27 of the Exchange Act, 15 U.S.C. 78aa.

[752] Section 214 of the Investment Advisers Act, 15 U.S.C. 80b–14.

[753] *See SEC* v. *A Chicago Convention Center, LLC,* 961 F. Supp. 2d 905 (N.D. Ill. 2013); *see also* Richard W. Painter *et al.,* ''When Courts and Congress Don't Say What They Mean: Initial Reactions to *Morrison* v. *National Australia Bank* and to the Extraterritorial Jurisdiction Provisions of the Dodd-Frank Act,'' 20 Minn. J. of Inter. L. 1 (Winter 2011). *But see Liu* v. *Siemens A.G.,* 2013 WL 5692504, *3 (S.D.N.Y. Oct. 21, 2013) (''Section 929P(b) permits the SEC to bring enforcement actions for certain conduct or transactions outside the United States.''); *SEC* v. *Tourre,* 2013 WL 2407172, *1 n.4 (S.D.N.Y. June 4, 2013) (929P(b) ''effectively reversed *Morrison* in the context of SEC enforcement actions''); *In re Optimal U.S. Litig.,* 865 F. Supp. 2d 451, 456 n.28 (S.D.N.Y. 2012) (''Congress has . . . restor[ed] the conducts and effects test for SEC enforcement actions.''); *SEC* v. *Gruss,* 2012 WL 3306166, *3 (S.D.N.Y. Aug. 13, 2012) (''Section 929P(b) . . . allows the SEC to commence civil actions extraterritorially in certain cases.''); *SEC* v. *Compania Internacional Financiera S.A.,* 2011 WL 3251813, *6 n.2 (S.D.N.Y. July 29, 2011) (''It may be that [929P(b)] was specifically designed to reinstate the Second Circuit's 'conduct and effects' test.''); *Cornwell* v. *Credit Suisse Grp.,* 729 F. Supp. 2d 620, 627 n.3 (S.D.N.Y. 2010) (''[I]n legislation recently enacted, Congress explicitly granted federal courts extraterritorial jurisdiction under the conduct or effect test for proceedings brought by the SEC.'').

[754] *See* rule 250.1.

[755] The *Morrison* decision does not preclude the Commission's interpretation. When the Supreme Court construed section 10(b) in *Morrison* to

Further, we believe that our interpretation of the cross-border antifraud enforcement authority best advances the strong interest of the United States in applying the antifraud provisions to cross-border frauds that implicate U.S. territory, U.S. markets, U.S. investors, other U.S. market participants, or other U.S. interests.[756] We believe that our interpretation of the cross-border antifraud authority is necessary to ensure honest securities markets and high ethical standards in the U.S. securities industry, and thereby to promote confidence in our securities markets among both domestic and foreign investors. Our interpretation of the cross-border antifraud authority will also allow us to better protect U.S. investors from securities frauds executed outside of the United States where those frauds may involve non-domestic securities transactions but nonetheless threaten to produce, foreseeably do produce, or were otherwise intended to produce effects upon U.S. markets, U.S. investors, other U.S. market participants, or other U.S. interests.

B. Economic Analysis

This rule is designed to ensure the antifraud provisions of the securities laws are provided broad cross-border reach. Effective cross-border enforcement of the antifraud provisions should help detect and deter or stop transnational securities frauds the final rule may mitigate inefficiencies in allocation of capital. For example, by directly diverting financial resources from more productive projects to less productive projects, serious transnational securities frauds can generate welfare losses.

Further, in the absence of the cross-border application of the antifraud provisions, the perceived risk of fraud may indirectly result in less efficient capital allocation if it reduces investors' trust in the securities market.[757] Additionally, given the global nature of the securities market, ensuring that antifraud provisions of the securities laws have cross-border reach will reduce the likelihood of a fragmented market. As a result of reduced ambiguity over the degree to which they are protected from fraud, U.S. market participants will have fewer incentives to avoid cross-border activity because, as explained above, they will have increased confidence in the integrity of the market. Through this channel, the final rules support a market that provides greater opportunities for U.S. market participants to share risks with market participants in other jurisdictions.

VIII. Impacts on Efficiency, Competition, and Capital Formation

In developing our approach to the cross-border application of the Title VII security-based swap dealer and major participant definitions, we have focused on meeting the goals of Title VII, including the promotion of the financial stability of the United States, by the improvement of accountability and transparency in the U.S. financial system and the protection of counterparties to security-based swaps. We also have considered the effects of our policy choices on competition, efficiency, and capital formation as mandated under section 3(f) of the Exchange Act. That section requires us, whenever we engage in rulemaking pursuant to the Exchange Act and are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.[758] In addition, section 23(a)(2) of the Exchange Act requires us, when making rules under the Exchange Act, to consider the impact such rules would have on competition. Section 23(a)(2) also prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[759]

In this section, we focus particularly on these effects. In adopting these final rules, we recognize that the most significant impact of the cross-border implementation of the dealer and major participant definitions will derive from the role of the definitions in determining which market entities are subject to security-based swap dealer and major security-based swap participant regulation under Title VII and which entities are not. That is, the scope of the final definitions will affect the ultimate regulatory costs and benefits that will accompany the full implementation of Title VII rules aimed at increasing transparency, accountability, and financial stability. Furthermore, the final cross-border rules may create incentives for market participants, including dealers as well as non-dealers and other non-registered entities who transact with dealers, to structure their businesses to operate wholly outside of the Title VII framework. This incentive may be particularly strong for entities at the boundaries of the definitions—for example, entities with relatively limited contact with U.S. persons—for whom the benefits of operating outside of Title VII may exceed the costs of restructuring or forgoing trading opportunities with U.S. counterparties.

A. Competition

As noted above, a key goal of Title VII of the Dodd-Frank Act is to promote the financial stability of the United States by improving accountability and transparency in the financial system. To that end, Title VII imposes new regulatory requirements on market participants who register as security-based swap dealers or major participants. The final cross-border implementation of the dealer and major participant definitions discussed in this release, including the cross-border implementation of the *de minimis* exception, will likely affect competition in the U.S. security-based swap market and potentially change the set of available counterparties that would compete for business and provide liquidity to U.S. market participants. Though these substantive Title VII requirements have not been finalized, application of Title VII to registered dealers and major participants may directly affect the competitive landscape of the security-based swap market.

As detailed above, the security-based swap market is a global, interconnected market. Within this global market, foreign and domestic dealers compete for business from counterparties, while non-dealers (including major participants) that participate in the

determine its territorial scope, it acknowledged that the language of section 10(b) neither required nor precluded extraterritorial application. *Morrison,* 130 S.Ct. at 2881–82. It was merely silent. The Court also looked to other provisions of the Exchange Act for evidence of extraterritorial intent, but found none. The Court thus applied a default ''presumption'' against extraterritoriality to find that section 10(b) lacked extraterritorial effect, while making clear that this presumption was not ''a limit upon Congress's power to legislate'' and only applied ''unless a contrary intent appears.'' *Id.* at 2877. Section 929P(b) now provides that contrary intent——in the words of *Morrison,* it supplies the ''indication of an extraterritorial application'' that had been missing. Our interpretation is thus, at a minimum, a reasonable reading of the antifraud provisions in light of section 929P(b)'s enactment.

[756] *See generally* Restatement (Third) of Foreign Relations Law of the United States § 402 (1987) (stating that ''the United States has authority to prescribe law with respect to . . . conduct that, wholly or in substantial part, takes place within its territory; the status of persons, or interests in things, present within its territory'' and ''conduct outside its territory that has or is intended to have substantial effect within its territory'').

[757] *See e.g.,* Luigi Guiso, Paola Sapienza, and Luigi Zingales. ''Trusting the stock market,'' 63 J. Fin. Vol. 63, No. 6: 2557 2600 (2008); *see also* David Easley and Maureen O'Hara, Microstructure and Ambiguity, 65 J. Fin. 1817 (2010).

[758] 15 U.S.C. 78c(f).

[759] 15 U.S.C. 78w(a)(2).

market use security-based swaps for purposes that can include speculation and hedging. Because the market for security-based swaps is a global market and some participants may not engage in relevant security-based swap activity within the United States, the rules we adopt pursuant to Title VII will not reach all participants or all transactions in the global market. We are aware that application of rules to a subset of participants in the worldwide security-based swap market would change the costs and benefits of market participation for one group (those that engage in relevant security-based swap activity within the United States) relative to another (those that do not) and therefore create competitive effects.

More specifically, in addition to requiring U.S. dealers to register, our final rules implementing the cross-border approach to the security-based swap dealer definition would generally apply dealer registration and other Title VII requirements to non-U.S. entities that conduct dealing activity (as defined in the Intermediary Definitions Adopting Release) in excess of the *de minimis* threshold, but where calculation of the threshold depends on various features of the person's transactions (*e.g.,* whether the person's counterparty is a U.S. or non-U.S. person, whether the transaction is guaranteed by a U.S. person, whether the counterparty is a registered or non-registered foreign branch of a U.S. person, and whether the person is a conduit affiliate of a U.S. person). Similarly, our final rules implementing cross-border application of the major security-based swap participant definition would apply major participant registration and other Title VII requirements to entities that have exposures to U.S. persons that exceed the major participant thresholds (as defined in the Intermediary Definitions Adopting Release). Given the approach we are adopting with respect to application of the dealer *de minimis* and major participant threshold calculation requirements, U.S. persons should have no incentive to favor a non-U.S. person counterparty over a U.S.-person counterparty.

However, we recognize that the final rule treats U.S. persons and different types of non-U.S. persons differently. Unless their dealing activity is guaranteed by a U.S. person, non-U.S. persons may exclude from their *de minimis* calculations dealing activity with other non-U.S. persons. Similarly, unless their security-based swap activity is guaranteed by a U.S. person, non-U.S. persons may exclude from their major participant threshold calculations their positions with non-U.S. persons. U.S. persons, non-U.S. persons whose security-based swap transactions are guaranteed by a U.S. person, and conduit affiliates cannot exclude such transactions or positions from their own calculations. This differential treatment makes it more likely that non-U.S. persons will not be subject to the regulatory requirements associated with dealer and major participant registration. Furthermore, because transactions with U.S. persons in excess of the *de minimis* and major participant thresholds trigger registration requirements, non-U.S. dealers and other market participants may be reluctant to trade with U.S. counterparties or clear security-based swap transactions through U.S. person clearing agencies because of the potential application of Title VII regulation. For example, our final rules may produce competitive frictions insofar as market participants prefer to clear transactions using non-U.S. person clearing agencies who may have U.S. person members instead of U.S. person clearing agencies, because only positions held against the latter would count against their major participant thresholds.[760] Indeed, some entities may determine that the compliance costs arising from the requirements of Title VII warrant exiting the security-based swap market in the United States entirely. Non-U.S. persons may find this option more attractive than U.S. persons because they may find it easier to structure their foreign business so as to prevent it from falling within the scope of Title VII. However, U.S. entities may also have an incentive to establish separately-capitalized foreign subsidiaries to conduct their security-based swap operations, since such subsidiaries would qualify as non-U.S. persons.[761] In this case, the cross-border application of Title VII rules may affect participants depending on their size, as larger participants could be better-equipped to set up offshore vehicles enabling them to transact as non-U.S. persons.

To the extent that entities engaged in dealing activity exit the U.S. security-based swap market, the end result could be a U.S. market where fewer intermediaries compete less intensively for business. These exits could result in higher spreads and reduced liquidity, and could affect the ability and willingness of non-dealers within the United States to engage in security-based swaps. The concentrated nature of dealing activity suggests that there are high barriers to entry in connection with security-based swap dealing activity, which could preclude the ability of new dealers to enter the security-based swap market and compete away spreads.

Notwithstanding the potential that our final rule may reduce competition, the Commission believes it appropriate to require U.S. persons to count all dealing transactions towards the *de minimis* threshold and all positions toward the major security-based swap participant thresholds, given the potential for these transactions to create risk to U.S. persons and in the U.S. financial system. We also note that it is uncertain that such requirements will reduce competition. In fact, the final rule may enhance competition among dealers, as the Title VII regulatory requirements and the ability to meet the standards set by Title VII may allow registered dealers to credibly signal high quality, better risk management, and better counterparty protection relative to foreign unregistered dealers that compete for the same order flow. In this scenario, non-dealers in the U.S. market may be willing to pay higher prices for higher-quality services in regulated markets, and registration requirements may separate high-quality intermediaries that are willing and able to register from low-quality firms that are not.[762] Furthermore, while dealers and speculative traders may prefer to transact in opaque markets, transparency requirements that apply to

[760] *See* section V.D.1(b).

[761] The rules we are adopting regarding conduit affiliates should mitigate this risk to some degree, as the foreign affiliate's non-U.S. person counterparties would not generally be able to engage in security-based swap dealing activity on behalf of its U.S.-person affiliate without itself being required to include those transactions in its own *de minimis* calculations.

[762] *Cf.* Carl Shapiro, ''Investment, Moral Hazard, and Occupational Licensing,'' The Review of Economic Studies, Vol. 53, No. 5 (1986) (using a theoretical model to show ''that licensing and certification tend to benefit customers who value quality highly at the expense of those who do not''). Oren Fuerst, ''A Theoretical Analysis of the Investor Protection Regulations Argument for Global Listing of Stocks,'' Working Paper (1998) (using a theoretical model of the listing decision to show how managers of high quality firms signal their quality more effectively in a strict regulatory regime). Craig Doidge, G. Andrew Karolyi, and Rene M. Stulz, ''Why are Foreign Firms Listed in the U.S. Worth More?'' Journal of Financial Economics, Vol. 71, Issue 2 (2004) (hypothesizing that firms cross-listed in the United States are better able to take advantage of growth opportunities, and finding that ''expected sales growth is valued more highly for firms listing in the U.S. and that this effect is greater for firms from countries with poorer investor rights''). While economic theory supports the assertion that registration can separate high-quality dealers from low-quality dealers, with corresponding differences in pricing, we received no comments either agreeing or disagreeing with the assertion that some market participants may be willing to pay higher prices to trade with a high-quality intermediary.

U.S. dealers and transactions that occur within the scope of Title VII may be attractive to hedgers and other market participants who do not benefit from opacity. Therefore, Title VII requirements may promote liquidity in the U.S.; liquid markets should attract additional participants, thereby enhancing risk sharing and making markets more competitive. These regulatory benefits could mitigate the competitive burdens imposed by the proposed and anticipated final cross-border rules and substantive Title VII requirements applicable to registered security-based swap dealers by, for example, reducing incentives for firms to exit the market.

Similarly, the cross-border application of the *de minimis* exception could reduce the number of entities likely to exit the U.S. market entirely because it would enable an established foreign entity to transact a *de minimis* amount of security-based swap dealing activity in the U.S. market before it determines whether to expand its U.S. business and become a registered security-based swap dealer.[763] However, since the ability of smaller entities to access the U.S. security-based swap market without registration would be limited to conducting dealing activity below the *de minimis* threshold, these entities would have an incentive to curtail their security-based swap dealing activity with U.S. persons as they approach the *de minimis* threshold to avoid dealer registration requirements.

Finally, incentives to restructure ultimately depend on future regulatory developments, both with respect to final Title VII rules and foreign regulatory frameworks; the differences in regulatory requirements across jurisdictions; and strategic interactions with non-dealer participants. For example, although pre-and post-trade transparency requirements provide a number of benefits both to financial markets and the real economy, dealers benefit from operating in opaque markets. To the extent that foreign jurisdictions require only regulatory reporting, without public dissemination requirements, dealers may wish to operate in jurisdictions where they can continue to benefit from opaque markets.

Other market participants, however, may prefer transparency, and the availability of transparent trading venues that result from Title VII pre- and post-trade transparency requirements could shift market power away from dealers. If non-dealer market participants are able to demand transparent trade execution, the incentives to restructure may be tempered, particularly if transparent venues attract liquidity away from opaque markets. Ultimately, the effects of transparency requirements on dealers' incentives to restructure depend on differences across jurisdictions, as well as whether non-dealer participants prefer transparency. These preferences may, in turn, depend on motives for trading among non-dealers. Hedgers and participants that need liquidity may prefer transparent venues while participants who believe they have private information about asset values may prefer opaque markets that allow them to trade more profitably on their information.

The potential restructurings and exits described above may impact competition in the U.S. market in different ways. On one hand, the ability to restructure one's business rather than exit the U.S. market entirely to avoid application of Title VII to a person's non-U.S. operations may reduce the number of entities that exit the market, thus mitigating the negative effects on competition described above. On the other hand, U.S. non-dealers may find that the only foreign security-based swap dealers that are willing to deal with them are those whose security-based swap business is sufficiently large to afford the costs of restructuring as well as registration and the ensuing compliance costs associated with applicable Title VII requirements. To the extent that smaller dealers continue to have an incentive to exit the market, the overall level of competition in the market may decline.

Moreover, regardless of the response of dealers to our approach, we cannot preclude the possibility that large non-dealer financial entities and other non-dealer market participants in the United States, such as investment funds, who have the resources to restructure their business also may pursue restructuring and move part of their business offshore in order to transact with dealers outside the reach of Title VII, either because liquidity has moved offshore or because these participants want to avoid Title VII requirements (such as transparency requirements) that may reveal information about trading strategies. This may reduce liquidity within the U.S. market and provide additional incentives for U.S. persons and non-U.S. persons to shift a higher proportion of their security-based swap business offshore, further reducing the level of competition within the United States. In this scenario, the competitive frictions caused by the application, in the cross-border context, of a *de minimis* threshold for dealing activity may affect the ability of small market participants of security-based swaps to access the security-based swap market more than large ones, as smaller participants are less likely to have the resources that would enable or justify a restructuring of their business.

In addition to the global nature of the security-based swap market and the implications for the reach of Title VII dealer and major participant registration requirements, we also noted above the current opacity of the over-the-counter derivatives market and the informational advantage that dealers currently have over non-dealers. By having greater private order flow information, dealers are in a position to make more-informed assessments of market values and can use that information to extract rents from less-informed counterparties. While this issue will be the focus of future Commission rulemaking covering pre- and post-trade transparency, we note that the final rule to exclude cleared, anonymous transactions from the *de minimis* threshold for non-U.S. persons has implications for competition in the security-based swap market. Because cleared, anonymous transactions will not trigger registration requirements, the exclusion strengthens incentives for trading in transparent venues, reducing market power and the competitive advantage currently enjoyed by dealers over non-dealer market participants. Furthermore, while Title VII rules governing clearing, trade execution, and trade reporting have not been finalized, providing stronger incentives to trade on transparent venues and through CCPs increases the likelihood that the benefits of Title VII, including increased transparency and reduced potential for risk spillovers, will be realized.[764]

The overall effects of the final approach described in this release on competition among dealing entities in the U.S. security-based swap market will depend on the way market participants ultimately respond to different elements of Title VII. Application of the dealer and major participant registration requirements may create incentives for dealers and market participants to favor non-U.S.

[763] *See* IIF Letter (noting that, ''. . . the rule proposal if adopted would make it much easier for foreign market participants to offer services in the US, providing greater choice and competition, and making it easier for instance for corporates to hedge their risks).''

[764] The exclusion for cleared, anonymous transactions does not require participants to use a registered clearing agency. Therefore, this benefit may be limited if final Title VII rules for registered clearing agencies create incentives for market participants to trade through CCPs that are not registered and regulated under Title VII.

counterparties; incentives to restructure due to inconsistent regulatory requirements may increase concentration among security-based swap dealers providing services to U.S. non-dealers. However, registration and compliance with Title VII may signal high quality and mitigate the incentive to restructure and exit U.S. markets for intermediaries with the ability to meet the standards set by Title VII. Furthermore, if hedgers and other market participants who do not benefit from opacity demand transparency and counterparty protections that come from trading with a registered dealer, dealers may prefer to register if serving this market is profitable. Finally, while fewer dealing entities could lead to decreased competition and wider spreads in the security-based swap market, exclusion of cleared, anonymous trades from the *de minimis* threshold strengthen incentives to trade in transparent venues, reducing the ability of dealing entities to post wider spreads and reducing the competitive advantage over access to information enjoyed by dealers.

B. Efficiency

As noted above, in adopting the rules and guidance discussed in this release, we are required to consider whether these actions would promote efficiency. In significant part, the effect of these rules on efficiency is linked to the effect of these rules on competition. Definitional rules that promote, or do not unduly restrict, competition can be accompanied by regulatory benefits that minimize the risk of liquidity crises, aggregate capital shortfalls, and other manifestations of contagion. Furthermore, by reducing the costs that individual market participants impose on others through their trades—that is, by imposing registration requirements and substantive regulations on dealers and major participants who, by virtue of the volume of their transactions, their number of counterparties, and their aggregate positions and exposures, are most likely to contribute to risk spillovers—the rules promote efficiency within the market. Generally, rules and interpretations that promote competitive capital markets can be expected to promote the efficient allocation of risk, capital, and other resources by facilitating price discovery and reducing costs associated with dislocations in the market for security-based swaps.[765]

As discussed several times throughout this release, the global nature of the security-based swap market suggests that the regulatory framework adopted under Title VII may not reach all participants or all transactions. Additionally, differing regulatory timelines and differences in regulatory scope may moderate the benefits flowing from Title VII. In particular, if other regulatory regimes offer more opacity in transactions, those who are most harmed by transparency (including dealers who currently benefit from privately observing order flow) have incentives to restructure their business to operate abroad or otherwise take advantage of regulatory gaps. Restructuring itself, while potentially optimal for an individual participant, represents a form of inefficiency for the overall market in that firms expend resources simply to circumvent regulation and not for any productive purpose.

More importantly, altering business models to take advantage of looser regulatory regimes undermines other efficiency benefits to Title VII. For example, U.S. dealers may have an incentive to restructure their businesses by setting up separately capitalized entities in non-U.S. jurisdictions, through which they would continue their dealing operations in order to take advantage of the rules applicable to non-U.S. persons. As discussed above, if some market participants choose to operate wholly outside of the Title VII regulatory framework, risk and liquidity may concentrate in less regulated, opaque corners of the market, undermining the benefits of Title VII. Moreover, insofar as the types of restructuring contemplated above purely constitute attempts at arbitraging regulations, including regulations applied to registered dealers, such as capital and reporting regulations, they represent a use of resources that could potentially be put to more productive uses. Ultimately, the incentive to restructure, and the corresponding loss of benefits, depends on the extent to which other jurisdictions implement comprehensive OTC derivatives regulations. If foreign jurisdictions subject security-based swap transactions to regulatory oversight consistent with Title VII, the ability to arbitrage regulations will be limited.[766]

Nevertheless, two features of our rules adopted today may mitigate the incentive for market participants to undermine the benefits of Title VII through inefficient restructuring or evasion. First, the requirement that conduit affiliates count all dealing activity towards the *de minimis* threshold closes one potential path for evasion. We have tailored the application of these requirements in connection with affiliates of registered security-based swap dealers and major security-based swap participants, as we do not believe that transactions involving these types of registered entities and their foreign affiliates raise the types of evasion concerns that the conduit affiliate concept is designed to address.[767] Second, the exclusion of cleared, anonymous transactions from the *de minimis* threshold for non-U.S. persons strengthens incentives for trading in transparent venues, reducing the incentive to trade in opaque corners of the market in order to avoid the reach of Title VII. Strengthening incentives for non-U.S. persons to trade in transparent venues reduces the likelihood that liquidity will fragment to opaque corners of the market and increases the likelihood that risks that non-U.S. persons present to the U.S. financial system will be covered by the Title VII regulatory framework. Furthermore, shifting trades to transparent venues produces benefits associated with pre- and post-trade price transparency, including more efficient valuations of financial assets.[768]

Finally, we received several comments from outside commenters urging us to harmonize our final rules with interpretations set forth in the CFTC's guidance.[769] While our final rules track the CFTC's guidance in many respects—for example, in the treatment of conduit affiliates, the treatment of transactions with foreign branches, and the exclusion for cleared, anonymous transactions from non-U.S. persons' *de minimis* calculations—we are not adopting rules identical to the policies and interpretations in the guidance. For example, our treatment of investment funds with respect to the U.S. person definition differs from the CFTC's, which, in addition to looking to the location of incorporation and principal place of business, considers majority-ownership. While we acknowledge the benefits of harmonization, we believe our rules meet the goals of Title VII while appropriately minimizing the costs to security-based swap market participants. More specifically, our rules are designed to capture transactions and

[765] Definitional rules do not promote efficiency by themselves; rather, the effect is through the number of entities required to register as dealers and major participants, and the corresponding effect on the programmatic costs and benefits associated with registration requirements.

[766] *See* Section III.B, *supra* (discussing global regulatory efforts).

[767] *See* note 320, *supra.*

[768] As discussed above, this benefit may be limited if final Title VII rules for registered clearing agencies create incentives for market participants to trade through CCPs that are not registered and regulated under Title VII.

[769] *See* note 193, *supra.*

entities that pose risk to U.S. persons and potentially to the U.S. financial system, while excluding those transactions and entities that do not warrant regulation under Title VII. In the case of investment funds, we have decided not to look to majority-ownership for determining U.S.-person status, notwithstanding that the CFTC Cross-Border Guidance articulates such an approach. Our belief is that, by adopting an approach that generally focuses on the location of economic decisions made on behalf of a fund, we are more accurately measuring whether a fund poses risks to U.S. persons and to the U.S. financial system of the type that Title VII was intended to address.[770] Nevertheless, we acknowledge that different regulations for swaps and security-based swaps may create inefficiencies for market participants due to conflicting or overlapping requirements, particularly for those participants who deal in both swaps and security-based swaps.

C. Capital Formation

We believe that many aspects of the final cross-border approach to the dealer and major participant definitions are likely to promote capital formation, by focusing dealer and major participant regulation on activity and entities that are most likely to serve as conduits of risk to U.S. persons and potentially to the U.S. financial system. We also believe that applying the full range of Title VII requirements to this group of entities will increase the likelihood that the benefits of Title VII, including increased transparency, accountability, and financial stability, will be realized. To the extent that these requirements reduce asymmetric information about market valuations, we expect that a security-based swap market with enhanced transparency and enhanced regulatory oversight may facilitate entry by a wide range of market participants seeking to engage in a broad range of hedging and trading activities.

Additionally, strengthening incentives for non-U.S. persons to trade in transparent venues encourages market participants to express their true valuations for security-based swaps; information revealed through transparent trades allows market participants to derive more-informed assessments with respect to asset valuations, leading to more efficient capital allocation. This should be true for the underlying assets as well. That is, information learned from security-based swap trading provides signals not only about security-based swap valuation, but also about the value of the reference assets underlying the swap.[771] Similarly, we expect transparency to benefit the real economy as well. Transparent prices provide better signals about the quality of a business investment, promoting capital formation in the real economy by helping managers to make more-informed decisions and making it easier for firms to obtain new financing for new business opportunities.[772]

However, the Commission recognizes that, to the extent that the cross-border implementation of the dealer and major participant definitions encourages inefficient restructuring or results in market fragmentation, the final rules may impair capital formation and result in a redistribution of capital across jurisdictional boundaries. We note that, unlike in the proposed rules, we are requiring non-U.S. persons with U.S. guarantees to include all transactions that benefit from a U.S. guarantee in their *de minimis* calculations. Similarly, we are requiring conduit affiliates to include all transactions in their *de minimis* calculations, whether with a U.S. person or not. Inclusion of these transactions will limit the risk these participants pose to U.S. persons and to the U.S. financial system. More generally, the definition of ''U.S. person'' mitigates the risk of contagion affecting U.S. markets as a result of cross-border swap activity. To the extent that future substantive regulation under Title VII is conditioned on entities' registration status, this definition may also improve transparency and provide increased customer protection for U.S. persons who participate in the security-based swap market. Nevertheless, expanding the scope of transactions that must be included in these calculations may also increase the scope of potential market fragmentation, to the extent that it raises the costs that market participants will incur if they engage in security-based swap activity through guaranteed non-U.S. persons or conduit affiliates.

IX. Paperwork Reduction Act

A. Introduction

The Paperwork Reduction Act of 1995 (''PRA'')[773] imposes certain requirements on Federal agencies in connection with their conducting or sponsoring any ''collection of information.''[774] An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. In addition, 44 U.S.C. 3507(a)(1)(D) provides that before adopting (or revising) a collection of information requirement, an agency must, among other things, publish a notice in the **Federal Register** stating that the agency has submitted the proposed collection of information to the Office of Management and Budget (''OMB'') and setting forth certain required information, including: (1) A title for the collection of information; (2) a summary of the collection of information; (3) a brief description of the need for the information and the proposed use of the information; (4) a description of the likely respondents and proposed frequency of response to the collection of information; (5) an estimate of the paperwork burden that shall result from the collection of information; and (6) notice that comments may be submitted to the agency and director of OMB.[775]

In the Cross-Border Proposing Release, we identified a number of proposed rules that contained ''collection of information requirements'' within the meaning of the PRA.[776] The majority of those proposed rules and forms are outside of the scope of the dealer and major participant definitions at issue in this release.[777] In two areas, however,

[770] For instance, as discussed above, LTCM demonstrated that an investment vehicle could have a negative impact on U.S. financial institutions and on the stability of the U.S. financial system more generally when the vehicle is directed, controlled, or coordinated from within the United States. *See* note 271, *supra.*

[771] *See* Sugato Chakravarty, Huseyin Gulen, and Stewart Mayhew, ''Informed Trading in Stock and Option Markets,'' Journal of Finance, Vol. 59, No. 3 (2004) (estimating that the proportion of information about underlying stocks revealed first in option markets ranges from 10 to 20 percent).

[772] *See* Philip Bond, Alex Edmans, and Itay Goldstein, ''The Real Effects of Financial Markets,'' Annual Review of Financial Markets, Vol. 4 (Oct. 2012) (reviewing the theoretical literature on the feedback between financial market prices and the real economy).

[773] 44 U.S.C. 3501 *et seq.*

[774] 44 U.S.C. 3502(3).

[775] 44 U.S.C. 3507(a)(1)(D) (internal formatting omitted); *see also* 5 CFR 1320.5(a)(1)(iv).

[776] *See* Cross-Border Proposing Release, 77 FR 31103.

[777] In particular, the present release does not address the following proposed rules and forms that implicated collections of information under the Paperwork Reduction Act: proposed Rule 3Ch–2; reproposed Forms SBSE, SBSE–A and SBSE–BD; proposed Rule 18a–4, and reproposed Rules 242.900 through 242.911 of Regulation SBSR. We expect to address those Paperwork Reduction Act issues in connection with our consideration of those proposed rules and forms.

In addition, the representation provision of the proposed definition of ''transaction conducted within the United States'' contained a collection of information. These final rules do not encompass that collection of information requirement, however, because we are not adopting the ''transaction conducted within the United States'' element of the proposed rule in this release. *See* section I.A, *supra.*

Exchange Act rule 3a71–3 which we are adopting today contains collections of information requirements. First, the rule's definition of ''transaction conducted through a foreign branch,'' which we are adopting largely as proposed, contains a representation provision that constitutes a collection of information. Moreover, the rule's final definition of ''U.S. person'' incorporates, as an addition to the proposal, a representation provision that constitutes a collection of information.[778] Commenters did not address Paperwork Reduction Act issues in connection with the proposal.

The Commission previously submitted proposed rule 3a71–3, as well as certain other rules proposed as part of the Cross-Border Proposing Release, to OMB for review in accordance with 44 U.S.C. 3507 and 5 CFR 1320.11. The title of the collection related to proposed rule 3a71–3 is ''Reliance on Counterparty Representations Regarding Activity Within the United States.'' OMB has not yet assigned Control Numbers in connection with rule 3a71–3 or the other rules submitted in connection with the proposal.

B. Reliance on Counterparty Representations Regarding Transactions Conducted Through a Foreign Branch

1. Summary of Collection of Information

When determining whether a security-based swap transaction constitutes a ''transaction conducted through a foreign branch,'' a person may rely on its counterparty's representation that the transaction ''was arranged, negotiated, and executed on behalf of the foreign branch solely by persons located outside the United States, unless such person knows or has reason to know that the representation is not accurate.'' [779]

2. Proposed Use of Information

Under the final rules, a non-U.S. person need not count, against the applicable thresholds of the dealer exception and the major security-based swap participant definition, dealing transactions with foreign branches of U.S. banks that are registered as security-based swap dealers. For these purposes, the foreign branch must be the counterparty to the security-based swap transaction, and the transaction must be arranged, negotiated, and executed on behalf of the foreign branch solely by persons located outside the United States.[780]

As discussed in the Cross-Border Proposing Release, the Commission acknowledges that verifying whether a security-based swap transaction falls within the definition of ''transaction conducted through a foreign branch'' could require significant due diligence. The definition's representation provision would mitigate the operational difficulties and costs that otherwise could arise in connection with investigating the activities of a counterparty to ensure compliance with the corresponding rules.[781]

These representations would be provided voluntarily by the counterparties to certain security-based swap transactions to other counterparties; therefore, the Commission would not typically receive confidential information as a result of this collection of information. However, to the extent that the Commission receives confidential information described in this representation provision through our examination and oversight program, an investigation, or some other means, such information would be kept confidential, subject to the provisions of applicable law.[782]

3. Respondents

Based on our understanding of the OTC derivatives markets, including the size of the market, the number of counterparties that are active in the market, and how market participants currently structure security-based swap transactions, the Commission estimates that up to 15 entities that are registered as security-based swap dealers may include a representation that a security-based swap is a ''transaction conducted through a foreign branch'' in their trading relationship documentation (*e.g.,* the schedule to a master agreement).[783]

4. Total Initial and Annual Reporting and Recordkeeping Burdens

The estimates in this section reflect the Commission's experience with burden estimates for similar requirements and discussions by our staff with market participants. The Commission believes that, in most cases, the representations associated with the definition of ''transaction conducted through a foreign branch'' would be made through amendments to the parties' existing trading documentation (*e.g.,* the schedule to a master agreement).[784] Because these representations relate to new regulatory requirements, the Commission anticipates that counterparties may elect to develop and incorporate these representations in trading documentation soon after the effective date of the Commission's security-based swap regulations, rather than incorporating specific language on a transactional basis. The Commission believes that parties would be able to adopt, where appropriate, standardized

[778] We also note that Exchange Act rule 0–13, which we are adopting today, determines the procedures for market participants and foreign regulatory authorities to submit substituted compliance requests. The rule, however, does not provide any substituted compliance rights, and its applicability will be determined solely by the substituted compliance provisions of the substantive rulemakings. Accordingly, collection of information arising from substituted compliance requests, including associated control numbers, will be addressed in connection with any applicable substantive rulemakings that provide for substituted compliance.

[779] *See* Exchange Act rule 3a71–3(a)(3)(ii).

[780] *See* Exchange Act rule 3a71–3(a)(3)(i).

[781] *See* Cross-Border Proposing Release, 78 FR 31107.

[782] *See, e.g.,* 5 U.S.C. 552 (Exemption 4 of the Freedom of Information Act provides an exemption for ''trade secrets and commercial or financial information obtained from a person and privileged or confidential.'' 5 U.S.C. 552(b)(4). Exemption 8 of the Freedom of Information Act provides an exemption for matters that are ''contained in or related to examination, operating, or condition reports prepare by, or on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.'' 5 U.S.C. 552(b)(8)).

[783] We have estimated that up to 50 entities may register with the Commission as security-based swap dealers, based on an analysis of 2012 data indicating that 27 entities had $3 billion or more in notional transactions that would be counted against the thresholds under the final rules, and further accounting for new entrants into the market. *See* note 444, *supra,* and accompanying text. Because six of those 27 entities are domiciled in the United States, we conservatively estimate that it is possible that new entrants may lead up to 15 registered dealers to be U.S. banks. Although not all U.S. banks engaged in security-based swap dealing activity currently operate foreign branches, we also conservatively estimate that all such dealers that are U.S. banks would do so.

In the Cross-Border Proposing Release, we preliminarily estimated that 50 entities may include a representation that a transaction constitutes a ''transaction conducted through a foreign branch.'' *See* Cross-Border Proposing Release, 78 FR 31108. This revised estimate reflects the fact that under the final rules such a representation would be relevant only if provided by a person that is registered with the Commission as a security-based swap dealer. In practice, however, based on our understanding of changes in the way major U.S. dealers engage with non-U.S. counterparties in the single-name CDS market following the issuance of the CFTC Cross-Border Guidance, we believe that few, if any, U.S. persons currently may participate in the single-name CDS market through their foreign branches. Also, as noted above, moreover, we recognize that other regulatory provisions may limit the ability of U.S. banks to conduct security-based swap activity. *See* note 366, *supra.*

[784] The Commission believes that because trading relationship documentation is established between two counterparties, the question of whether one of those counterparties, that is registered with the Commission as a security-based swap dealer, is able to represent that it is entering into a ''transaction conducted through a foreign branch'' would not change on a transaction-by-transaction basis and, therefore, such representations would generally be made in the schedule to a master agreement, rather than in individual confirmations.

language across all of their security-based swap trading relationships. This language may be developed by individual firms or through a combination of trade associations and industry working groups.

The Commission estimates the maximum total paperwork burden associated with developing new representations would be, for each U.S. bank registered as a security-based swap dealer that may make such representations, no more than five hours, and up to $2,000 for the services of outside professionals, for an estimate of approximately 75 hours and $30,000 across all security-based swap counterparties that may make such representations. This estimate assumes little or no reliance on standardized disclosure language.

The Commission expects that the majority of the burden associated with the new disclosure requirements will be experienced during the first year as language is developed and trading documentation is amended. After the new representations are developed and incorporated into trading documentation, the Commission believes that the annual paperwork burden associated with this requirement would be no more than approximately 10 hours per counterparty for verifying representations with existing counterparties and onboarding new counterparties, for a maximum of approximately 150 hours across all applicable security-based swap counterparties.[785]

C. Reliance on Counterparty Representations Regarding Non-U.S. Person Status

1. Summary of Collection of Information

When determining whether its counterparty is a U.S. person for purposes of the application of the dealer and major participant analyses, a person may rely on its counterparty's representation that the counterparty does not meet the applicable criteria to be a U.S. person, unless the person knows or has reason to know that the representation is not accurate.[786]

2. Proposed Use of Information

Under the final rules, a non-U.S. person's dealer and major participant analysis require it to determine whether its security-based swap counterparties are U.S. persons because certain security-based swaps in which the counterparty is not a U.S. person will not have to be counted against the applicable thresholds.

The Commission recognizes that the ''U.S. person'' definition encompasses a number of distinct components, and that in some circumstances verifying whether a security-based swap counterparty is a ''U.S. person'' could require significant due diligence. As a result, the final rules have added a representation provision to that definition, to help mitigate the operational difficulties and costs that could arise in connection with investigating the status of a counterparty.

As with the representations associated with the ''transaction conducted through a foreign branch'' definition, these representations would be provided voluntarily by the counterparties to certain security-based swap transactions to other counterparties. The Commission would not typically receive confidential information as a result of this collection of information. However, to the extent that the Commission receives confidential information described in this representation provision through our examination and oversight program, an investigation, or some other means, such information would be kept confidential, subject to the provisions of applicable law.[787]

3. Respondents

Based on our understanding of the OTC derivatives markets, including the domiciles of counterparties that are active in the market, the Commission estimates that up to 2400 entities may provide representations that they do not meet the criteria necessary to be U.S. persons.[788]

4. Total Initial and Annual Reporting and Recordkeeping Burdens

The estimates in this section reflect the Commission's experience with burden estimates for similar requirements and discussions by our staff with market participants. Consistent with the discussion above related to the representation provision of the ''transaction conducted through a foreign branch'' definition, the Commission believes that in most cases the representations associated with the ''U.S. person'' definition would be made through amendments to the parties' existing trading documentation (*e.g.,* the schedule to a master agreement).[789] Here too, because these representations relate to new regulatory requirements, the Commission anticipates that counterparties may elect to develop and incorporate these representations in trading documentation soon after the effective date of the Commission's security-based swap regulations, rather than incorporating specific language on a transactional basis. The Commission believes that parties would be able to adopt, where appropriate, standardized language across all of their security-based swap trading relationships. This language may be developed by individual firms or through a combination of trade associations and industry working groups.

As above, the Commission estimates the maximum total paperwork burden associated with developing new representations would be, for each counterparty that may make such representations, no more than five hours and up to $2,000 for the services of outside professionals, for a maximum of approximately 12,000 hours and $4.8 million across all security-based swap counterparties that may make such representations. This estimate assumes little or no reliance on standardized disclosure language.

The Commission expects that the majority of the burden associated with the new disclosure requirements will be experienced during the first year as language is developed and trading documentation is amended. After the new representations are developed and incorporated into trading documentation, the Commission believes that the annual paperwork burden associated with this requirement would be no more than approximately 10 hours per counterparty for verifying representations with existing counterparties and onboarding new counterparties, for a maximum of approximately 24,000 hours across all applicable security-based swap counterparties.[790]

[785] The Commission staff estimates that this burden would consist of 10 hours of in-house counsel time for each security-based swap market participant that may make such representations.

[786] *See* Exchange Act rule 3a71–3(a)(4)(iv).

[787] *See* note 782, *supra.*

[788] Data regarding activity from 2012 indicates that a total of 4452 accounts had positions in single-name CDS, with those activities conducted by a total 1030 transacting agents such as investment advisers. Of those 4452 accounts, 1199 are domiciled outside of the United States. Accounting for potential growth in the number of market participants domiciled outside of the United States—particularly in light of information suggesting there has been some shifting of derivatives activities to non-U.S. entities—leads to our estimate that such representations may be made on behalf of 2400 accounts. To the extent that one transacting agent such as an investment adviser conducts derivatives activities on behalf of multiple accounts, it is possible that a single representation by a transacting agent would address the U.S.-person status of multiple accounts.

[789] *See* section IV.E.2, *supra.*

[790] The Commission staff estimates that this burden would consist of 10 hours of in-house counsel time for each security-based swap market participant that may make such representations.

X. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act (''RFA'') [791] requires Federal agencies, in promulgating rules, to consider the impact of those rules on small entities. Section 603(a) of the Administrative Procedure Act,[792] as amended by the RFA, generally requires the Commission to undertake a regulatory flexibility analysis of all proposed rules, or proposed rule amendments, to determine the impact of such rulemaking on ''small entities.'' [793] Section 605(b) of the RFA [794] provides that this requirement shall not apply to any proposed rule or proposed rule amendment which, if adopted, would not have a significant economic impact on a substantial number of small entities.

For purposes of Commission rulemaking in connection with the RFA, a small entity includes: (1) When used with reference to an ''issuer'' or a ''person,'' other than an investment company, an ''issuer'' or ''person'' that, on the last day of its most recent fiscal year, had total assets of $5 million or less; [795] or (2) a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to Rule 17a–5(d) under the Exchange Act,[796] or, if not required to file such statements, a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the last day of the preceding fiscal year (or in the time that it has been in business, if shorter); and is not affiliated with any person (other than a natural person) that is not a small business or small organization.[797] Under the standards adopted by the Small Business Administration, small entities in the finance and insurance industry include the following: (i) For entities engaged in credit intermediation and related activities, entities with $175 million or less in assets; [798] (ii) for entities engaged in non-depository credit intermediation and certain other activities, entities with $7 million or less in annual receipts; [799] (iii) for entities engaged in financial investments and related activities, entities with $7 million or less in annual receipts; [800] (iv) for insurance carriers and entities engaged in related activities, entities with $7 million or less in annual receipts; [801] and (v) for funds, trusts, and other financial vehicles, entities with $7 million or less in annual receipts.[802]

The Cross-Border Proposal stated that, based on feedback from industry participants and our own information about the security-based swap markets, we preliminarily believed that non-U.S. entities that would be required to register and be regulated as security-based swap dealers and major security-based swap participants exceed the thresholds defining ''small entities'' set out above. Thus, we noted that we preliminarily believed it is unlikely that the proposed rules regarding registration of security-based swap dealers and major security-based swap market participants would have a significant economic impact any small entity. As a result, we certified that the proposed rules would not have a significant economic impact on a substantial number of small entities for purposes of the RFA and requested written comments regarding this certification.[803]

While we received comment letters that addressed cost issues in connection with the proposed rules, we did not receive any comments that specifically addressed whether the rules applying the definitions of ''security-based swap dealer'' or ''major security-based swap participant'' to the cross-border context would have a significant economic impact on small entities.

We continue to believe that the types of entities that would engage in more than a *de minimis* amount of dealing activity involving security-based swaps—which generally would be major banks—would not be ''small entities'' for purposes of the RFA. Similarly, we believe that only the largest financial companies would be likely to develop security-based swap exposures of the size that would be required to cross the major security-based swap participant definition thresholds. Accordingly, the SEC certifies that the final rules applying the definitions of ''security-based swap dealer'' or ''major security-based swap participant'' to the cross-border context will not have a significant economic impact on a substantial number of small entities for purposes of the RFA.

XI. Effective Date and Implementation

These final rules will be effective 60 days following publication in the **Federal Register.**

If any provision of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

Because Exchange Act rules 3a67–10 and 3a71–3 through 3a71–5 address the application of the dealer and major participant definitions to cross-border security-based swap activities, those rules will not immediately impose requirements upon market participants even after the rules become effective. In the Intermediary Definitions Adopting Release, we noted that because the Commission has not yet promulgated final rules implementing the substantive requirements imposed on dealers and major participants by Title VII, persons determined to be dealers or major participants under the regulations adopted in that release need not register as such until the dates provided in the Commission's final rules regarding security-based swap dealer and major security-based swap participant registration requirements, and will not be subject to the requirements applicable to those dealers and major participants until the dates provided in the applicable final rules.[804] Those principles apply here too.

Although Exchange Act rule 0–13—regarding the procedures for the submission of substituted compliance requests—also will become effective at that time, we would not expect to receive any such requests until relevant substantive rulemakings have been completed. Those rulemakings are necessary to determine when substituted compliance may be available, and to promulgate the requirements against which we may assess comparability for purposes of making substituted compliance determinations.

[791] 5 U.S.C. 601 *et seq.*

[792] 5 U.S.C. 603(a).

[793] Although section 601(b) of the RFA defines the term ''small entity,'' the statute permits agencies to formulate their own definitions. The Commission has adopted definitions for the term ''small entity'' for the purposes of Commission rulemaking in accordance with the RFA. Those definitions, as relevant to this proposed rulemaking, are set forth in Rule 0–10 under the Exchange Act, 17 CFR 240.0–10. *See* Exchange Act Release No. 18451 (Jan, 28, 1982), 47 FR 5215 (Feb, 4, 1982) (File No. AS–305).

[794] 5 U.S.C. 605(b).

[795] *See* 17 CFR 240.0–10(a).

[796] 17 CFR 240.17a–5(d).

[797] *See* 17 CFR 240.0–10(c).

[798] *See* 13 CFR 121.201 (Subsector 522).

[799] *See id.* at Subsector 522.

[800] *See id.* at Subsector 523.

[801] *See id.* at Subsector 524.

[802] *See id.* at Subsector 525.

[803] *See* Cross-Border Proposing Release, 78 FR 31205.

[804] *See* Intermediary Definitions Adopting Release, 77 FR 30700. We also noted that an extended compliance period was available with regard to the applicable thresholds used in the *de minimis* exception to the dealer definition. *See id.; see also* section III.A, *supra.*

Statutory Authority and Text of Final Rules

Pursuant to the Exchange Act, 15 U.S.C. 78a *et seq.,* and particularly, sections 3(b), 23(a)(1), and 30(c) thereof, sections 761(b), and 929P(b) of the Dodd-Frank Act, the SEC is adopting rules 0–13, 3a67–10, 3a71–3, 3a71–4, and 3a71–5 under the Exchange Act, and the SEC is adding Part 250 to chapter II of Title 17 of the Code of Federal Regulations.

List of Subjects

17 CFR Part 240

Brokers, Confidential business information, Fraud, Reporting and recordkeeping requirements, Securities.

17 CFR Parts 241 and 250

Securities.

Text of Final Rules

For the reasons stated in the preamble, the SEC is amending Title 17, Chapter II, of the Code of Federal Regulations as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The general authority citation for part 240 continues to read, and a sectional authority is added in numerical order to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78l, 78m, 78n, 78n–1, 78o, 78o–4, 78o–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78ll, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, 7201 et seq., and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

Sections 240.3a67–10, 240.3a71–3, 240.3a71–4, and 240.3a71–5 are also issued under Pub. L. 111–203, section 761(b), 124 Stat. 1754 (2010), and 15 U.S.C. 78dd(c).

* * * * *

■ 2. Add § 240.0–13 to read as follows:

§ 240.0–13 Commission procedures for filing applications to request a substituted compliance order under the Exchange Act.

(a) The application shall be in writing in the form of a letter, must include any supporting documents necessary to make the application complete, and otherwise must comply with § 240.0–3. All applications must be submitted to the Office of the Secretary of the Commission, by a party that potentially would comply with requirements under the Exchange Act pursuant to a substituted compliance order, or by the relevant foreign financial regulatory authority or authorities. If an application is incomplete, the Commission may request that the application be withdrawn unless the applicant can justify, based on all the facts and circumstances, why supporting materials have not been submitted and undertakes to submit the omitted materials promptly.

(b) An applicant may submit a request electronically. The electronic mailbox to use for these applications is described on the Commission's Web site at *www.sec.gov* in the ''Exchange Act Substituted Compliance Applications'' section. In the event electronic mailboxes are revised in the future, applicants can find the appropriate mailbox by accessing the ''Electronic Mailboxes at the Commission'' section.

(c) All filings and submissions filed pursuant to this rule must be in the English language. If a filing or submission filed pursuant to this rule requires the inclusion of a document that is in a foreign language, a party must submit instead a fair and accurate English translation of the entire foreign language document. A party may submit a copy of the unabridged foreign language document when including an English translation of a foreign language document in a filing or submission filed pursuant to this rule. A party must provide a copy of any foreign language document upon the request of Commission staff.

(d) An applicant also may submit a request in paper format. Five copies of every paper application and every amendment to such an application must be submitted to the Office of the Secretary at 100 F Street NE., Washington, DC 20549–1090. Applications must be on white paper no larger than 8½ by 11 inches in size. The left margin of applications must be at least 1½ inches wide, and if the application is bound, it must be bound on the left side. All typewritten or printed material must be set forth in black ink so as to permit photocopying.

(e) Every application (electronic or paper) must contain the name, address, telephone number, and email address of each applicant and the name, address, telephone number, and email address of a person to whom any questions regarding the application should be directed. The Commission will not consider hypothetical or anonymous requests for a substituted compliance order. Each applicant shall provide the Commission with any supporting documentation it believes necessary for the Commission to make such determination, including information regarding applicable requirements established by the foreign financial regulatory authority or authorities, as well as the methods used by the foreign financial regulatory authority or authorities to monitor and enforce compliance with such rules. Applicants should also cite to and discuss applicable precedent.

(f) Amendments to the application should be prepared and submitted as set forth in these procedures and should be marked to show what changes have been made.

(g) After the filing is complete, the staff will review the application. Once all questions and issues have been answered to the satisfaction of the staff, the staff will make an appropriate recommendation to the Commission. After consideration of the recommendation and a vote by the Commission, the Commission's Office of the Secretary will issue an appropriate response and will notify the applicant.

(h) The Commission shall publish in the **Federal Register** a notice that a complete application has been submitted. The notice will provide that any person may, within the period specified therein, submit to the Commission any information that relates to the Commission action requested in the application. The notice also will indicate the earliest date on which the Commission would take final action on the application, but in no event would such action be taken earlier than 25 days following publication of the notice in the **Federal Register.**

(i) The Commission may, in its sole discretion, schedule a hearing on the matter addressed by the application.

■ 3. Add § 240–3a67–10 to read as follows:

§ 240.3a67–10 Foreign major security-based swap participants.

(a) *Definitions.* As used in this section, the following terms shall have the meanings indicated:

(1) *Conduit affiliate* has the meaning set forth in § 240.3a71–3(a)(1).

(2) *Foreign branch* has the meaning set forth in § 240.3a71–3(a)(2).

(3) *Transaction conducted through a foreign branch* has the meaning set forth in § 240.3a71–3(a)(3).

(4) *U.S. person* has the meaning set forth in § 240.3a71–3(a)(4).

(b) *Application of major security-based swap participant tests in the cross-border context.* For purposes of calculating a person's status as a major security-based swap participant as defined in section 3(a)(67) of the Act (15 U.S.C. 78c(a)(67)), and the rules and regulations thereunder, a person shall include the following security-based swap positions:

(1) If such person is a U.S. person, all security-based swap positions that are

entered into by the person, including positions entered into through a foreign branch;

(2) If such person is a conduit affiliate, all security-based swap positions that are entered into by the person; and

(3) If such person is a non-U.S. person other than a conduit affiliate, all of the following types of security-based swap positions that are entered into by the person:

(i) Security-based swap positions that are entered into with a U.S. person; provided, however, that this paragraph (b)(3)(i) shall not apply to:

(A) Positions with a U.S. person counterparty that arise from transactions conducted through a foreign branch of the counterparty, when the counterparty is a registered security-based swap dealer; and

(B) Positions with a U.S. person counterparty that arise from transactions conducted through a foreign branch of the counterparty, when the transaction is entered into prior to 60 days following the earliest date on which the registration of security-based swap dealers is first required pursuant to the applicable final rules and regulations; and

(ii) Security-based swap positions for which the non-U.S. person's counterparty to the security-based swap has rights of recourse against a U.S. person; for these purposes a counterparty has rights of recourse against the U.S. person if the counterparty has a conditional or unconditional legally enforceable right, in whole or in part, to receive payments from, or otherwise collect from, the U.S. person in connection with the security-based swap.

(c) *Attributed positions*—(1) *In general.* For purposes of calculating a person's status as a major security-based swap participant as defined in section 3(a)(67) of the Act (15 U.S.C. 78c(a)(67)), and the rules and regulations thereunder, a person also shall include the following security-based swap positions:

(i) If such person is a U.S. person, any security-based swap position of a non-U.S. person for which the non-U.S. person's counterparty to the security-based swap has rights of recourse against that U.S. person.

Note to paragraph (c)(1)(i). This paragraph describes attribution requirements for a U.S. person solely with respect to the guarantee of the obligations of a non-U.S. person under a security-based swap. The Commission and the Commodity Futures Trading Commission previously provided an interpretation about attribution to a U.S. parent, other affiliate, or guarantor to the extent that the counterparties to those positions have recourse against that parent, other affiliate, or guarantor in connection with the position. *See* Intermediary Definitions Adopting Release, *http://www.gpo.gov/fdsys/pkg/FR–2012–08–13/pdf/2012–18003.pdf.* The Commission explained that it intended to issue separate releases addressing the application of the major participant definition, and Title VII generally, to non-U.S. persons. *See id.* at note 1041.

(ii) If such person is a non-U.S. person:

(A) Any security-based swap position of a U.S. person for which that person's counterparty has rights of recourse against the non-U.S. person; and

(B) Any security-based swap position of another non-U.S. person entered into with a U.S. person counterparty who has rights of recourse against the first non-U.S. person, provided, however, that this paragraph (c)(1)(ii)(B) shall not apply to positions described in § 240.3a67–10(b)(3)(i)(A) and (B).

(2) *Exceptions.* Notwithstanding paragraph (c)(1) of this section, a person shall not include such security-based swap positions if the person whose performance is guaranteed in connection with the security-based swap is:

(i) Subject to capital regulation by the Commission or the Commodity Futures Trading Commission (including, but not limited to regulation as a swap dealer, major swap participant, security-based swap dealer, major security-based swap participant, futures commission merchant, broker, or dealer);

(ii) Regulated as a bank in the United States;

(iii) Subject to capital standards, adopted by the person's home country supervisor, that are consistent in all respects with the Capital Accord of the Basel Committee on Banking Supervision; or

(iv) Deemed not to be a major security-based swap participant pursuant to § 240.3a67–8(a).

■ 4. Add §§ 240.3a71–3, 240.3a71–4, and 240.3a71–5 to read as follows:

* * * * *

Sec.

240.3a71–3 Cross-border security-based swap dealing activity.

240.3a71–4 Exception from aggregation for affiliated groups with registered security-based swap dealers.

240.3a71–5 Substituted compliance for foreign security-based swap dealers.

* * * * *

§ 240.3a71–3 Cross-border security-based swap dealing activity.

(a) *Definitions.* As used in this section, the following terms shall have the meanings indicated:

(1) *Conduit affiliate*—(i) *Definition. Conduit affiliate* means a person, other than a U.S. person, that:

(A) Is directly or indirectly majority-owned by one or more U.S. persons; and

(B) In the regular course of business enters into security-based swaps with one or more other non-U.S. persons, or with foreign branches of U.S. banks that are registered as security-based swap dealers, for the purpose of hedging or mitigating risks faced by, or otherwise taking positions on behalf of, one or more U.S. persons (other than U.S. persons that are registered as security-based swap dealers or major security-based swap participants) who are controlling, controlled by, or under common control with the person, and enters into offsetting security-based swaps or other arrangements with such U.S. persons to transfer risks and benefits of those security-based swaps.

(ii) *Majority-ownership standard.* The majority-ownership standard in paragraph (a)(1)(i)(A) of this section is satisfied if one or more persons described in § 240.3a71–3(a)(4)(i)(B) directly or indirectly own a majority interest in the non-U.S. person, where ''majority interest'' is the right to vote or direct the vote of a majority of a class of voting securities of an entity, the power to sell or direct the sale of a majority of a class of voting securities of an entity, or the right to receive upon dissolution, or the contribution of, a majority of the capital of a partnership.

(2) *Foreign branch* means any branch of a U.S. bank if:

(i) The branch is located outside the United States;

(ii) The branch operates for valid business reasons; and

(iii) The branch is engaged in the business of banking and is subject to substantive banking regulation in the jurisdiction where located.

(3) *Transaction conducted through a foreign branch*—(i) *Definition. Transaction conducted through a foreign branch* means a security-based swap transaction that is arranged, negotiated, and executed by a U.S. person through a foreign branch of such U.S. person if:

(A) The foreign branch is the counterparty to such security-based swap transaction; and

(B) The security-based swap transaction is arranged, negotiated, and executed on behalf of the foreign branch solely by persons located outside the United States.

(ii) *Representations.* A person shall not be required to consider its counterparty's activity in connection with paragraph (a)(3)(i)(B) of this section in determining whether a

security-based swap transaction is a transaction conducted through a foreign branch if such person receives a representation from its counterparty that the security-based swap transaction is arranged, negotiated, and executed on behalf of the foreign branch solely by persons located outside the United States, unless such person knows or has reason to know that the representation is not accurate; for the purposes of this final rule a person would have reason to know the representation is not accurate if a reasonable person should know, under all of the facts of which the person is aware, that it is not accurate.

(4) *U.S. person.* (i) Except as provided in paragraph (a)(4)(iii) of this section, *U.S. person* means any person that is:

(A) A natural person resident in the United States;

(B) A partnership, corporation, trust, investment vehicle, or other legal person organized, incorporated, or established under the laws of the United States or having its principal place of business in the United States;

(C) An account (whether discretionary or non-discretionary) of a U.S. person; or

(D) An estate of a decedent who was a resident of the United States at the time of death.

(ii) For purposes of this section, *principal place of business* means the location from which the officers, partners, or managers of the legal person primarily direct, control, and coordinate the activities of the legal person. With respect to an externally managed investment vehicle, this location is the office from which the manager of the vehicle primarily directs, controls, and coordinates the investment activities of the vehicle.

(iii) The term *U.S. person* does not include the International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies and pension plans, and any other similar international organizations, their agencies and pension plans.

(iv) A person shall not be required to consider its counterparty to a security-based swap to be a U.S. person if such person receives a representation from the counterparty that the counterparty does not satisfy the criteria set forth in paragraph (a)(4)(i) of this section, unless such person knows or has reason to know that the representation is not accurate; for the purposes of this final rule a person would have reason to know the representation is not accurate if a reasonable person should know, under all of the facts of which the person is aware, that it is not accurate.

(5) *United States* means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

(b) *Application of de minimis exception to cross-border dealing activity.* For purposes of calculating the amount of security-based swap positions connected with dealing activity under § 240.3a71–2(a)(1), except as provided in § 240.3a71–5, a person shall include the following security-based swap transactions:

(1)(i) If such person is a U.S. person, all security-based swap transactions connected with the dealing activity in which such person engages, including transactions conducted through a foreign branch;

(ii) If such person is a conduit affiliate, all security-based swap transactions connected with the dealing activity in which such person engages; and

(iii) If such person is a non-U.S. person other than a conduit affiliate, all of the following types of transactions:

(A) Security-based swap transactions connected with the dealing activity in which such person engages that are entered into with a U.S. person; provided, however, that this paragraph (b)(1)(iii)(A) shall not apply to:

(*1*) Transactions with a U.S. person counterparty that constitute transactions conducted through a foreign branch of the counterparty, when the counterparty is a registered security-based swap dealer; and

(*2*) Transactions with a U.S. person counterparty that constitute transactions conducted through a foreign branch of the counterparty, when the transaction is entered into prior to 60 days following the earliest date on which the registration of security-based swap dealers is first required pursuant to the applicable final rules and regulations; and

(B) Security-based swap transactions connected with the dealing activity in which such person engages for which the counterparty to the security-based swap has rights of recourse against a U.S. person that is controlling, controlled by, or under common control with the non-U.S. person; for these purposes a counterparty has rights of recourse against the U.S. person if the counterparty has a conditional or unconditional legally enforceable right, in whole or in part, to receive payments from, or otherwise collect from, the U.S. person in connection with the security-based swap; and

(2) If such person engages in transactions described in paragraph (b)(1) of this section, except as provided in § 240.3a71–4, all of the following types of security-based swap transactions:

(i) Security-based swap transactions connected with the dealing activity in which any U.S. person controlling, controlled by, or under common control with such person engages, including transactions conducted through a foreign branch;

(ii) Security-based swap transactions connected with the dealing activity in which any conduit affiliate controlling, controlled by, or under common control with such person engages; and

(iii) Security-based swap transactions connected with the dealing activity of any non-U.S. person, other than a conduit affiliate, that is controlling, controlled by, or under common control with such person, that are described in paragraph (b)(1)(iii) of this section.

§ 240.3a71–4 Exception from aggregation for affiliated groups with registered security-based swap dealers.

Notwithstanding §§ 240.3a71–2(a)(1) and 240.3a71–3(b)(2), a person shall not include the security-based swap transactions of another person (an ''affiliate'') controlling, controlled by, or under common control with such person where such affiliate either is:

(a) Registered with the Commission as a security-based swap dealer; or

(b) Deemed not to be a security-based swap dealer pursuant to § 240.3a71–2(b).

§ 240.3a71–5 Exception for cleared transactions executed on a swap execution facility.

(a) For purposes of § 240.3a71–3(b)(1), a non-U.S. person, other than a conduit affiliate, shall not include its security-based swap transactions that are entered into anonymously on an execution facility or national securities exchange and are cleared through a clearing agency; and

(b) For purposes of § 240.3a71–3(b)(2), a person shall not include security-based swap transactions of an affiliated non-U.S. person, other than a conduit affiliate, when such transactions are entered into anonymously on an execution facility or national securities exchange and are cleared through a clearing agency.

PART 241—INTERPRETIVE RELEASES RELATING TO THE SECURITIES EXCHANGE ACT OF 1934 AND GENERAL RULES AND REGULATIONS THEREUNDER

■ 5. Part 241 is amended by adding Release No. 34–72472 to the list of interpretive releases as follows:

Subject	Release No.	Date	Fed. Reg. vol. and page
Application of "Security-Based Swap Dealer" and "Major Security-Based Swap Participant" Definitions to Cross-Border Security-Based Swap Activities.	34–72472	June 25, 2014	79 FR [Insert FR Page Number]

■ 6. Part 250, consisting of § 250.1, is added to read as follows:

PART 250—CROSS–BORDER ANTIFRAUD LAW–ENFORCEMENT AUTHORITY

Authority: 15 U.S.C. 77s, 77v(c), 78w, 78aa(b), 80b–11, and 80b–14(b).

§ 250.1 Cross-border antifraud law-enforcement authority.

(a) Notwithstanding any other Commission rule or regulation, the antifraud provisions of the securities laws apply to:

(1) Conduct within the United States that constitutes significant steps in furtherance of the violation; or

(2) Conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

(b) The antifraud provisions of the securities laws apply to conduct described in paragraph (a)(1) of this section even if:

(1) The violation relates to a securities transaction or securities transactions occurring outside the United States that involves only foreign investors; or

(2) The violation is committed by a foreign adviser and involves only foreign investors.

(c) Violations of the antifraud provisions of the securities laws described in this section may be pursued in judicial proceedings brought by the Commission or the United States.

By the Commission.

Date: June 25, 2014.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–15337 Filed 7–3–14; 8:45 am]

Editorial Note: Proposed rule document 2014–15337 was originally published on pages 39067 through 39162 in the issue of Wednesday, July 9, 2014. In that publication the footnotes contained erroneous entries. The corrected document is republished in its entirety.

[FR Doc. R1–2014–15337 Filed 8–11–14; 8:45 am]

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