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WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WHEN: Tuesday, November 9, 2010
9 a.m.–12:30 p.m.

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

RESERVATIONS: (202) 741–6008

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 924

[Doc. No. AMS–FV–10–0054; FV10–924–2 FIR]

Fresh Prunes Grown in Designated Counties in Washington and in Umatilla County, OR; Suspension of Reporting and Assessment Requirements

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Affirmation of interim rule as final rule.

SUMMARY: The Department of Agriculture (USDA) is adopting, as a final rule, without change, an interim rule that suspended the reporting and assessment requirements prescribed under the Washington-Oregon fresh prune marketing order. The marketing order regulates the handling of fresh prunes grown in designated counties in Washington and in Umatilla County, Oregon, and is administered locally by the Washington-Oregon Fresh Prune Marketing Committee (Committee). On June 1, 2010, the Committee unanimously voted to terminate Marketing Order No. 924. Since the only regulatory actions then in effect were the reporting and assessment requirements, the Committee included a recommendation to immediately suspend those activities while USDA processes the termination request. The reporting and assessment requirements will remain suspended until reinstated or permanently terminated.

DATES: Effective October 28, 2010.

FOR FURTHER INFORMATION CONTACT: Robert Curry or Gary Olson, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; *Telephone:* (503) 326–2724, *Fax:* (503) 326–7440, or *E-mail: Robert.Curry@ams.usda.gov* or *GaryD.Olson@ams.usda.gov.*

Small businesses may obtain information on complying with this and other marketing order and agreement regulations by viewing a guide at the following Web site: *http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateN&page=MarketingOrdersSmallBusinessGuide;* or by contacting Antoinette Carter, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; *Telephone:* (202) 720–2491, *Fax:* (202) 720–8938, or *E-mail: Antoinette.Carter@ams.usda.gov.*

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 924 (7 CFR 924), regulating the handling of fresh prunes grown in designated counties in Washington and in Umatilla County, Oregon, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the "Act."

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

Marketing Order No. 924 has been in effect since 1960 and has provided the fresh prune industry in Washington and Oregon with authority for grade, size, quality, maturity, pack, and container regulations, as well as authority for inspection requirements. The order also authorizes production research and marketing research and development projects, as well as the necessary reporting and recordkeeping functions required for operation. Based on the Committee's recommendation, USDA suspended the order's handling regulations in May 2006. These handling regulations required that certain varieties of fresh prunes meet minimum grade standards. The Committee believed that the costs of inspection outweighed the benefits provided from having the regulatory requirements in effect.

Following the regulatory suspension, the Committee continued to levy assessments in order to maintain its functionality. The Committee felt that it should continue to fund its full operational capability in order to gauge the merits of the handling regulation suspension. When it recommended suspension of the handling regulations, the Committee also recommended the establishment of reporting requirements for the purpose of tracking shipments and collecting assessments. Prior to the handling regulation suspension, the Committee relied on the Federal-State Inspection Service to provide it with copies of the certificates that accompany each lot of inspected fresh prunes. The inspection certificates contained information necessary for the Committee to collect assessments from each of the regulated handlers. A new section 924.160 and Committee form "Handler Statement for Washington-Oregon Fresh Prunes" were implemented in the **Federal Register** on May 9, 2006, at 71 FR 26817. The Committee used this form to collect fresh prune shipment information and to monitor market and crop conditions, thus helping it to make a determination regarding the impact of non-regulation on the industry.

Based on its analysis that the regulatory suspension has not negatively impacted the marketing of fresh prunes over the last four years, and the fact that the Washington-Oregon fresh prune industry has been decreasing in size and volume in recent years, the Committee determined that there is no longer a need for the order, and thus recommended termination at the meeting held in Prosser, Washington, on June 1, 2010.

In addition, the Committee determined that there is no need to continue collecting assessments and requiring reports for the sole purpose of maintaining its functionality, thus recommended that the assessment rate and reporting requirements be immediately suspended. This action will relieve the industry of the assessment and reporting burden during the pendency of the termination process.

The Committee recommended a budget of $6,085 for the remainder of the period leading to order termination. The budgeted amount was established on the basis of the amount remaining in the Committee's monetary reserve. The budget in its entirety will provide for such operating expenses as are necessary during the termination

process, including a final financial review and management compensation.

In an interim rule published in the **Federal Register** on July 23, 2010, and effective on July 24, 2010 (75 FR 43040, Doc. No. AMS–FV–10–0054, FV10–924–2 IR), §§ 924.160 and 924.236 were suspended.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are six handlers of Washington-Oregon fresh prunes subject to regulation under the order and approximately 56 fresh prune producers in the regulated area. Small agricultural service firms are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than $7,000,000, and small agricultural producers are defined as those having annual receipts of less than $750,000.

Based on information compiled by both the Committee and the National Agricultural Statistics Service, the average producer price for fresh prunes in 2009 was approximately $385 per ton. With 4,260 tons of fresh prunes shipped from the Washington and Oregon production areas in 2009, this equates to average producer revenue of about $30,000. In addition, AMS Market News Service reported that 2009 f.o.b. prices ranged from $12.00 to $18.00 per 30-pound container, thus the entire Washington-Oregon fresh prune industry handled less than $7,000,000 worth of prunes last season. In view of the foregoing, the majority of Washington-Oregon fresh prune producers and handlers may be classified as small entities.

The Committee made the recommendation to suspend the reporting and assessment requirements as an adjunct to the recommendation to terminate the order. As such, the only other alternative would have been to continue to assess handlers and to require reports, options not seriously considered since additional funds are not required.

This action continues in effect the action that suspended the reporting and assessment obligations imposed on handlers. During any period when effective, assessments are applied uniformly on all handlers and some of the costs may be passed on to producers. This suspension of the reporting and assessment requirements reduces the burden on handlers and should also reduce the burden on producers.

This rule will not impose any additional reporting or recordkeeping requirements on either small or large prune handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. In addition, USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule.

The Committee's meeting was widely publicized throughout the Washington-Oregon fresh prune industry and all interested persons were invited to attend the meeting and participate in Committee deliberations. Like all Committee meetings, the June 1, 2010, meeting was a public meeting and all entities, both large and small, were able to express their views on this issue.

Comments on the interim rule were required to be received on or before September 21, 2010. No comments were received. Therefore, for the reasons given in the interim rule, we are adopting the interim rule as a final rule, without change.

To view the interim rule, go to: *http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480b1fd84.*

This action also affirms information contained in the interim rule concerning Executive Orders 12866 and 12988, the Paperwork Reduction Act (44 U.S.C. chapter 35), and the E-Gov Act (44 U.S.C. 101).

After consideration of all relevant material presented, it is found that finalizing the interim rule, without change, as published in the **Federal Register** (75 FR 43039, July 23, 2010) will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 924

Prunes, Marketing agreements, Reporting and recordkeeping requirements.

PART 924—FRESH PRUNES GROWN IN DESIGNATED COUNTIES IN WASHINGTON AND IN UMATILLA COUNTY, OREGON

■ Accordingly, the interim rule that amended 7 CFR part 924 and was published at 75 FR 43039 on July 23, 2010, is adopted as a final rule, without change.

Dated: October 21, 2010.

David R. Shipman,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 2010–27196 Filed 10–26–10; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

14 CFR Part 97

[Docket No. 30750; Amdt. No. 3397]

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective October 27, 2010. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of October 27, 2010.

ADDRESSES: Availability of matter incorporated by reference in the amendment is as follows:

For Examination—

1. FAA Rules Docket, FAA Headquarters Building, 800

Independence Avenue, SW., Washington, DC 20591;

2. The FAA Regional Office of the region in which the affected airport is located;

3. The National Flight Procedures Office, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or

4. 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.*

Availability—All SIAPs are available online free of charge. Visit *nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from:

1. FAA Public Inquiry Center (APA–200), FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591; or

2. The FAA Regional Office of the region in which the affected airport is located.

FOR FURTHER INFORMATION CONTACT: Harry J. Hodges, Flight Procedure Standards Branch (AFS–420) Flight Technologies and Programs Division, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082 Oklahoma City, OK 73125) telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This rule amends Title 14, Code of Federal Regulations, Part 97 (14 CFR part 97) by amending the referenced SIAPs. The complete regulatory description of each SIAP is listed on the appropriate FAA Form 8260, as modified by the National Flight Data Center (FDC)/Permanent Notice to Airmen (P–NOTAM), and is incorporated by reference in the amendment under 5 U.S.C. 552(a), 1 CFR part 51, and § 97.20 of Title 14 of the Code of Federal Regulations.

The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained in FAA form documents is unnecessary. This amendment provides the affected CFR sections and specifies the types of SIAP and the corresponding effective dates. This amendment also identifies the airport and its location, the procedure and the amendment number.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP as amended in the transmittal. For safety and timeliness of change considerations, this amendment incorporates only specific changes contained for each SIAP as modified by FDC/P–NOTAMs.

The SIAPs, as modified by FDC P–NOTAM, and contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these changes to SIAPs, the TERPS criteria were applied only to specific conditions existing at the affected airports. All SIAP amendments in this rule have been previously issued by the FAA in a FDC NOTAM as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for all these SIAP amendments requires making them effective in less than 30 days.

Because of the close and immediate relationship between these SIAPs and safety in air commerce, I find that notice and public procedure before adopting these SIAPs are impracticable and contrary to the public interest and, where applicable, that good cause exists for making these SIAPs effective in less than 30 days.

Conclusion

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Air Traffic Control, Airports, Incorporation by reference, and Navigation (Air).

Issued in Washington, DC, on October 15, 2010.

John M. Allen,

Director, Flight Standards Service.

Adoption of the Amendment

■ Accordingly, pursuant to the authority delegated to me, Title 14, Code of Federal regulations, part 97, 14 CFR part 97, is amended by amending Standard Instrument Approach Procedures, effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

§§ 97.23, 97.25, 97.27, 97.29, 97.31, 97.33, and 97.35 [Amended]

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, MLS, MLS/DME, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, Identified as follows:

Effective Upon Publication

AIRAC date	State	City	Airport	FDC No.	FDC date	Subject
18–Nov–10 ...	AK	Kotzebue	Ralph Wien Memorial	0/0475	10/5/10	RNAV (GPS) Rwy 9, Amdt 2.
18–Nov–10 ...	WI	Prairie Du Chien	Prairie Du Chien Muni	0/1058	10/5/10	Takeoff Minimums and Obstacle Dp, Amdt 3.
18–Nov–10 ...	VA	Manassas	Manassas Rgnl/Harry P. Davis Field.	0/3905	10/5/10	ILS or LOC Rwy 16L, Amdt 4D.
18–Nov–10 ...	RI	North Kingstown	Quonset State	0/5262	10/5/10	VOR A, Amdt 5.
18–Nov–10 ...	AL	Bay Minette	Minette Muni	0/6129	10/5/10	RNAV (GPS) Rwy 26, Orig-A.
18–Nov–10 ...	AL	Bay Minette	Minette Muni	0/6131	10/5/10	RNAV (GPS) Rwy 8, Orig.

AIRAC date	State	City	Airport	FDC No.	FDC date	Subject
18–Nov–10 ...	AL	Huntsville	Madison County Executive/ Tom Sharp Jr Fld.	0/6169	10/5/10	VOR/DME B, Amdt 6A.
18–Nov–10 ...	AL	Huntsville	Madison County Executive/ Tom Sharp Jr Fld.	0/6175	10/5/10	ILS or LOC/DME Rwy 18, Orig.
18–Nov–10 ...	AL	Huntsville	Madison County Executvie/ Tom Sharp Jr Fld.	0/6184	10/5/10	RNAV (GPS) Rwy 18, Amdt 1.
18–Nov–10 ...	TN	Smyrna	Smyrna	0/6782	10/5/10	NDB Rwy 32, Amdt 9.
18–Nov–10 ...	TN	Smyrna	Smyrna	0/6785	10/5/10	RNAV (GPS) Rwy 14, Orig.
18–Nov–10 ...	TN	Smyrna	Smyrna	0/6786	10/5/10	RNAV (GPS) Rwy 32, Orig.
18–Nov–10 ...	TN	Smyrna	Smyrna	0/6787	10/5/10	VOR/DME Rwy 14, Amdt 7.
18–Nov–10 ...	TN	Smyrna	Smyrna	0/6788	10/5/10	VOR/DME Rwy 32, Amdt 13.
18–Nov–10 ...	OH	Painesville	Concord Airpark	0/6793	10/5/10	VOR or GPS A, Orig-A.
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18–Nov–10 ...	SC	Summerville	Summerville	0/7009	10/5/10	NDB Rwy 6, Amdt 1.
18–Nov–10 ...	SC	Summerville	Summerville	0/7010	10/5/10	RNAV (GPS) Rwy 6, Orig.
18–Nov–10 ...	ID	Idaho Falls	Idaho Falls Rgnl	0/7136	10/5/10	RNAV (RNP) Z Rwy 20, Orig.
18–Nov–10 ...	NY	White Plains	Westchester County	0/7137	10/5/10	VOR/DME A, Amdt 4.
18–Nov–10 ...	MS	Indianola	Indianola Muni	0/7258	10/5/10	NDB Rwy 35, Amdt 5.
18–Nov–10 ...	MS	Indianola	Indianola Muni	0/7261	10/5/10	NDB Rwy 17, Amdt 5.
18–Nov–10 ...	WI	Madison	Dane County Rgnl–Truax Field.	0/7436	10/5/10	RADAR–1, Amdt 17A.
18–Nov–10 ...	FL	Orlando	Kissimmee Gateway	0/7453	10/5/10	VOR/DME or GPS A, Orig-B.
18–Nov–10 ...	MN	International Falls ..	Falls Intl	0/7456	10/5/10	ILS or LOC/DME Rwy 13, Amdt 1A.
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18–Nov–10 ...	MS	Meridian	Key Field	0/7466	10/5/10	RNAV (GPS) Rwy 19, Orig.
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18–Nov–10 ...	PA	Lancaster	Lancaster	0/7470	10/5/10	VOR/DME Rwy 31, Amdt 4.
18–Nov–10 ...	RI	Providence	Theodore Francis Green State.	0/7473	10/5/10	VOR Rwy 34, Amdt 4D.
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18–Nov–10 ...	TX	Longview	East Texas Rgnl	0/7564	10/5/10	ILS or LOC Rwy 13, Amdt 13.
18–Nov–10 ...	OH	Caldwell	Noble County	0/7836	10/5/10	VOR or GPS A, Amdt 1.
18–Nov–10 ...	CA	Hawthorne	Jack Northrop Field/Hawthorne Muni.	0/9210	10/5/10	LOC Rwy 25, Amdt 11.

[FR Doc. 2010–26948 Filed 10–26–10; 8:45 am]
BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 30749; Amdt. No. 3396]

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective October 27, 2010. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of October 27, 2010.

ADDRESSES: Availability of matters incorporated by reference in the amendment is as follows:

For Examination—

1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591;

2. The FAA Regional Office of the region in which the affected airport is located;

3. The National Flight Procedures Office, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or

4. 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.*

Availability—All SIAPs and Takeoff Minimums and ODPs are available online free of charge. Visit *http://www.nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from:

1. FAA Public Inquiry Center (APA–200), FAA Headquarters Building, 800

Independence Avenue, SW., Washington, DC 20591; or

2. The FAA Regional Office of the region in which the affected airport is located.

FOR FURTHER INFORMATION CONTACT: Harry J. Hodges, Flight Procedure Standards Branch (AFS–420), Flight Technologies and Programs Divisions, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082, Oklahoma City, OK 73125) Telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This rule amends Title 14 of the Code of Federal Regulations, Part 97 (14 CFR part 97), by establishing, amending, suspending, or revoking SIAPS, Takeoff Minimums and/or ODPS. The complete regulators description of each SIAP and its associated Takeoff Minimums or ODP for an identified airport is listed on FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR part 97.20. The applicable FAA Forms are FAA Forms 8260–3, 8260–4, 8260–5, 8260–15A, and 8260–15B when required by an entry on 8260–15A.

The large number of SIAPs, Takeoff Minimums and ODPs, in addition to their complex nature and the need for a special format make publication in the **Federal Register** expensive and impractical. Furthermore, airmen do not use the regulatory text of the SIAPs, Takeoff Minimums or ODPs, but instead refer to their depiction on charts printed by publishers of aeronautical materials. The advantages of incorporation by reference are realized and publication of the complete description of each SIAP, Takeoff Minimums and ODP listed on FAA forms is unnecessary. This amendment provides the affected CFR sections and specifies the types of SIAPs and the effective dates of the associated Takeoff Minimums and ODPs. This amendment also identifies the airport and its location, the procedure, and the amendment number.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP, Takeoff Minimums and ODP as contained in the transmittal. Some SIAP and Takeoff Minimums and textual ODP amendments may have been issued previously by the FAA in a Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for some SIAP and Takeoff Minimums and ODP amendments may require making them effective in less than 30 days. For the remaining SIAPS and Takeoff Minimums and ODPS, an effective date at least 30 days after publication is provided.

Further, the SIAPs and Takeoff Minimums and ODPS contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these SIAPS and Takeoff Minimums and ODPs, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedures before adopting these SIAPS, Takeoff Minimums and ODPs are impracticable and contrary to the public interest and, where applicable, that good cause exists for making some SIAPs effective in less than 30 days.

Conclusion

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "significant regulatory action" under Executive Order 12866;(2) is not a "significant rule " under DOT Regulatory Policies and Procedures (44 FR 11034; February 26,1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Air Traffic Control, Airports, Incorporation by reference, and Navigation (Air).

Issued in Washington, DC, on October 15, 2010.

John M. Allen,

Director, Flight Standards Service.

Adoption of the Amendment

■ Accordingly, pursuant to the authority delegated to me, Title 14, Code of Federal Regulations, part 97 (14 CFR part 97) is amended by establishing, amending, suspending, or revoking Standard Instrument Approach Procedures and/or Takeoff Minimums and/or Obstacle Departure Procedures effective at 0902 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

Effective 18 NOV 2010

Platinum, AK, Platinum, RNAV (GPS) RWY 14, Amdt 1
St. Paul Island, AK, St. Paul Island, ILS OR LOC/DME RWY 36, Amdt 3
St. Paul Island, AK, St. Paul Island, LOC/DME BC RWY 18, Amdt 4
St. Paul Island, AK, St. Paul Island, RNAV (GPS) RWY 18, Amdt 2
St. Paul Island, AK, St. Paul Island, RNAV (GPS) RWY 36, Amdt 1
St. Paul Island, AK, St. Paul Island, Takeoff Minimums and Obstacle DP, Amdt 3
Glendale, AZ, Glendale Muni, RNAV (GPS) RWY 19, Amdt 2
Concord, CA, Buchanan, VOR RWY 19R, Amdt 13
Davis/Woodland/Winters, CA, Yolo County, RNAV (GPS) RWY 16, Amdt 1
Davis/Woodland/Winters, CA, Yolo County, RNAV (GPS) RWY 34, Amdt 1
Lodi, CA, Lodi, Takeoff Minimums and Obstacle DP, Amdt 2
Sacramento, CA, Sacramento Mather, RNAV (GPS) RWY 22L, Amdt 1
San Jose, CA, Norman Y. Mineta San Jose Intl, RNAV (RNP) Z RWY 30R, Orig-A
Saipan Island, CQ, Francisco C. Ada/Saipan Island, NDB RWY 7, Amdt 5
Miami, FL, Miami Intl, Takeoff Minimums and Obstacle DP, Amdt 17
Winter Haven, FL, Winter Haven's Gilbert, VOR/DME–A, Amdt 7
Perry, GA, Perry-Houston County, ILS OR LOC RWY 36, Orig
Perry, GA, Perry-Houston County, LOC RWY 36, Amdt 1, CANCELLED
Perry, GA, Perry-Houston County, RNAV (GPS) RWY 36, Amdt 1
Pine Mountain, GA, Harris County, NDB RWY 9, Amdt 9
Pine Mountain, GA, Harris County, Takeoff Minimums and Obstacle DP, Amdt 1
Winterset, IA, Winterset Muni, Takeoff Minimums and Obstacle DP, Amdt 2
New Orleans, LA, Lakefront, ILS OR LOC RWY 18R, Amdt 1
New Orleans, LA, Lakefront, RNAV (GPS) RWY 18R, Amdt 2
Raleigh/Durham, NC, Raleigh-Durham Intl, RNAV (RNP) Z RWY 5L, Amdt 1
Raleigh/Durham, NC, Raleigh-Durham Intl, RNAV (RNP) Z RWY 5R, Amdt 1
Raleigh/Durham, NC, Raleigh-Durham Intl, RNAV (RNP) Z RWY 23L, Amdt 1
Raleigh/Durham, NC, Raleigh-Durham Intl, RNAV (RNP) Z RWY 23R, Amdt 1
Akron, OH, Akron-Canton Rgnl, Takeoff Minimums and Obstacle DP, Amdt 6
Bluffton, OH, Bluffton, RNAV (GPS) RWY 23, Orig-A

Bluffton, OH, Bluffton, VOR RWY 23, Amdt 7A
Baker City, OR, Baker City Muni, Takeoff Minimums and Obstacle DP, Amdt 2
Medford, OR, Rogue Valley Intl-Medford, RNAV (RNP) RWY 32, Orig
Portland, OR, Portland Intl, ILS OR LOC RWY 10R, ILS RWY 10R (SA CAT I), ILS RWY 10R (CAT II), ILS RWY 10R (CAT III), Amdt 33A
Hondo, TX, Hondo Muni, Takeoff Minimums and Obstacle DP, Orig
Lancaster, TX, Lancaster Rgnl, NDB RWY 31, Amdt 3
Lancaster, TX, Lancaster Rgnl, RNAV (GPS) RWY 31, Amdt 1
Victoria, TX, Victoria Rgnl, ILS OR LOC/DME RWY 12L, Amdt 11
Fillmore, UT, Fillmore Muni, RNAV (GPS) RWY 4, Orig
Fillmore, UT, Fillmore Muni, RNAV (GPS) RWY 22, Orig
Fillmore, UT, Fillmore Muni, Takeoff Minimums and Obstacle DP, Orig
Price, UT, Carbon County Rgnl/Buck Davis Field, ILS OR LOC/DME RWY 36, Orig-A
Pasco, WA, Tri-Cities, ILS OR LOC/DME RWY 21R, Amdt 12
Pasco, WA, Tri-Cities, RNAV (GPS) RWY 3L, Amdt 1
Pasco, WA, Tri-Cities, RNAV (GPS) RWY 12, Amdt 1
Pasco, WA, Tri-Cities, RNAV (GPS) RWY 21R, Amdt 1
Pasco, WA, Tri-Cities, RNAV (GPS) RWY 30, Amdt 2
Pasco, WA, Tri-Cities, VOR/DME RWY 21R, Amdt 6
Pasco, WA, Tri-Cities, VOR/DME RWY 30, Amdt 4
Richland, WA, Richland, RNAV (GPS) RWY 26, Amdt 1
Seattle, WA, Boeing Field/King County Intl, ILS RWY 13R, Amdt 30
Spokane, WA, Spokane Intl, ILS OR LOC RWY 3, ILS RWY 3 (SA CAT I), ILS RWY 3 (CAT II), ILS RWY 3 (CAT III), Amdt 6
Spokane, WA, Spokane Intl, RNAV (GPS) Y RWY 3, Amdt 2
Spokane, WA, Spokane Intl, RNAV (GPS) Y RWY 7, Amdt 2
Spokane, WA, Spokane Intl, RNAV (GPS) Y RWY 21, Amdt 1
Spokane, WA, Spokane Intl, RNAV (GPS) Y RWY 25, Amdt 3
Spokane, WA, Spokane Intl, VOR RWY 3, Amdt 13

On September 15, 2010 (75 FR 178) the FAA published an Amendment in Docket No. 30743, Amdt 3390 to Part 97 of the Federal Aviation Regulations under section 97.23 and 97.33. The following entries that were effective November 18, 2010, are changed to effective December 16, 2010:

Fort Lauderdale, FL, Fort Lauderdale/Hollywood Intl, ILS OR LOC RWY 9L, Amdt 21
Fort Lauderdale, FL, Fort Lauderdale/Hollywood Intl, ILS OR LOC RWY 27R, Amdt 9
Fort Lauderdale, FL, Fort Lauderdale/Hollywood Intl, LOC RWY 9R, Amdt 5
Fort Lauderdale, FL, Fort Lauderdale/Hollywood Intl, LOC/DME RWY 13, Amdt 1

[FR Doc. 2010–26949 Filed 10–26–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 35

[Docket No. RM10–13–000; Order No. 741]

Credit Reforms in Organized Wholesale Electric Markets

Issued October 21, 2010.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule.

SUMMARY: Pursuant to section 206 of the Federal Power Act, the Federal Energy Regulatory Commission amends its regulations to improve the management of risk and the subsequent use of credit in the organized wholesale electric markets. Each Regional Transmission Organization (RTO) and Independent System Operator (ISO) will be required to submit a compliance filing including tariff revisions to comply with the amended regulations or to demonstrate that its existing tariff already satisfies the regulations.

DATES: *Effective Date:* This Final Rule will become effective on November 26, 2010.

FOR FURTHER INFORMATION CONTACT:

Christina Hayes (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–6194.

Lawrence Greenfield (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–6415.

Scott Miller (Technical Information), Office of Energy Policy and Innovation, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8456.

SUPPLEMENTARY INFORMATION:

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

I. Introduction

1. This Final Rule adopts reforms to credit policies used in organized wholesale electric power markets.[1]

2. The Commission has a statutory mandate to ensure that all rates charged for the transmission or sale of electric energy in interstate commerce are just, reasonable, and not unduly discriminatory or preferential;[2] clear and consistent credit practices are an important element of those rates. The management of risk and credit necessarily involves balance. If access to credit is too restrictive, competition suffers because fewer entities are eligible to participate, which can potentially reduce competition. Conversely, if more risk is tolerated and access to credit is too easy to obtain, then the market is more susceptible to defaults and customers bear the burden of the costs that flow from such defaults. In organized wholesale electric markets, defaults not supported by collateral are socialized among all other market participants.

3. The organized wholesale electric markets have developed their own individual credit practices through their own tariff revisions crafted through their stakeholder processes. This evolutionary process has led to varying credit practices among the organized markets. Because the activity of market participants is not confined to any one region/market and because the credit rules differ, a default in one market could weaken that participant and have ripple effects in another market. In this way, the credit practices in all ISOs and RTOs may be only as strong as the weakest credit practice. Moreover, rapid market changes can quickly escalate the costs of the transmission and sale of electric energy.

4. For these reasons, and in light of recent experiences in both the broader economy and the organized wholesale electric markets, the Commission has revisited the risk and credit procedures pertaining to the organized wholesale

[1] For purposes of this Final Rule, organized wholesale electric markets include energy, transmission and ancillary service markets operated by independent system operators (ISO) and regional transmission organizations (RTO). These entities are responsible for administering electric energy and financial transmission rights markets. As public utilities, they have on file as jurisdictional tariffs the rules governing such markets. The organized wholesale electric markets currently include the markets administered by the following RTOs and ISOs: PJM Interconnection, L.L.C. (PJM), New York Independent System Operator, Inc. (NYISO), Midwest Independent Transmission System Operator, Inc. (Midwest ISO), ISO New England Inc. (ISO–NE), California Independent Service Operator Corporation (CAISO), and Southwest Power Pool, Inc. (SPP).

[2] 16 U.S.C. 824d, 824e (2006).

markets under its jurisdiction. The Commission is thus issuing this Final Rule, requiring shortened settlement timeframes, restrictions on the use of unsecured credit, elimination of unsecured credit in all financial transmission rights (FTR) or equivalent markets,[3] steps to address the risk that RTOs and ISOs may not be allowed to use netting and set-offs, the establishment of minimum criteria for market participation, clarification regarding the organized market administrators' ability to invoke "material adverse change" to demand additional collateral from participants, adopting a standardized grace period for "curing" collateral calls, and establishing a general policy with regard to the differentiation in the applicability of these standards and reforms.

II. Background

A. Development of Credit Practices in Organized Wholesale Electric Markets

5. The Commission has long been actively interested in the credit practices of the wholesale electric markets. In crafting the *pro forma* Open Access Transmission Tariff (OATT) in Order No. 888, the Commission directed that each transmission provider's tariff include reasonable creditworthiness standards.[4] However, in response to the credit downgrades in the energy industry of 2001–2002,[5] and the resulting severe contraction in the credit markets, the Commission held a technical conference in which it received significant testimony that it should take action regarding credit practices in the organized electricity markets.[6]

6. This led the Commission to issue a Policy Statement on Electric Creditworthiness,[7] which provided market participants and market administrators with guidance to develop more robust credit practices.

7. Since it was issued, the ISOs and RTOs have made incremental progress in implementing the suggestions contained in the Policy Statement. However, the results of these efforts have been varied, leading to a wide range of risk management and creditworthiness practices among ISOs and RTOs. Because currently a default by one market participant is routinely socialized among all of the others in an ISO or RTO, this variable development of risk management practices has left many utilities at risk for a disruption in the market.

B. Credit Crunch of 2008 and Subsequent Events

8. During the autumn of 2008, large disruptions in the financial markets affected the credit markets and reduced the availability of credit. The electricity markets were vulnerable to the effects of this broader financial crisis as concern grew that default in the organized markets could lead to a damaging drop in market liquidity placing the markets themselves in jeopardy.[8] And one of the other effects of the crisis in the financial markets at that time was that credit went from being relatively plentiful and inexpensive to relatively scarce and expensive.[9]

9. The Commission held a technical conference in January of 2009 to investigate the role of credit in light of the recent financial crisis.[10] While the organized wholesale electric markets had generally functioned well overall, there were representations that improvements could be made based on the recent experience. Mr. Philip Leiber of CAISO stated that defaults in the PJM FTR markets spurred credit reforms at CAISO, but the threat of problems from larger market participants, especially related to a Bear Stearns subsidiary, also "tested our concerns."[11] Others testified about "recent near-misses" in the organized wholesale markets and suggested that the Commission should consider improvements in credit practices.[12]

10. In light of these events, the Commission proposed that the different credit practices among the organized wholesale electric markets must be strengthened.

C. Notice of Proposed Rulemaking on Credit Reforms in Organized Wholesale Electric Markets

11. On January 21, 2010, the Commission issued a NOPR pursuant to the Commission's responsibility under section 206 of the Federal Power Act (FPA).[13] The Commission proposed the following reforms related to the administration of credit in the organized markets: (1) Implementation of a billing period of no more than seven days and a settlement period of no more than seven days; (2) reduction in the allocation of unsecured credit to no more than $50 million per market participant and a further aggregate cap per corporate family; (3) elimination of unsecured credit for FTR markets, (4) clarification of the ISOs/RTOs' status as a party to each transaction so as to eliminate any ambiguity or question as to their ability to net and manage defaults through the offset of market obligations; (5) establishment of minimum criteria for market participation; (6) clarification of when

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[3] References to FTR markets in this rule also include the Transmission Congestion Contracts (TCC) markets in NYISO and the Congestion Revenue Rights (CRR) markets in CAISO.

[4] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities,* Order No. 888, 61 FR 21540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036, at 31,937 (1996) (*pro forma* OATT, section 11 (Creditworthiness)), *order on reh'g,* Order No. 888–A, 62 FR 12274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g,* Order No. 888–B, 81 FERC ¶ 61,248, *order on reh'g,* Order No. 888–C, 82 FERC ¶ 61,046 (1998), aff'd in relevant part sub nom. *Transmission Access Policy Study Group* v. *FERC,* 225 F.3d 667 (D.C. Cir. 2000), aff'd sub nom. *New York* v. *FERC,* 535 U.S. 1 (2002).

[5] *See Electric Creditworthiness Standards,* Notice of Technical Conference, Docket No. AD04–8–000 (issued May 28, 2004).

[6] *See* Testimony in Technical Conference on *Electric Creditworthiness Standards,* Docket No. AD04–8–000, Tr. 120:2–6 (Mr. Alan Yoho, CAISO) (stating that CAISO was in favor of the Commission standardizing a number of credit practices among ISOs and RTOs); *Id.* at Tr. 128:22–129:11 (Mr. Dan Doyle, Vice President and CFO, American Transmission Company) (stating that the Commission should initiate a generic rulemaking proceeding to standardize credit practices among ISOs and RTOs).

[7] *Policy Statement* on Electric Creditworthiness, 109 FERC ¶ 61,186 (2004) (*Policy Statement*).

[8] In the technical conference hosted by Commission staff in May 2010, Mr. Vincent Duane of PJM stated that PJM feared it was within 24 hours of default that would cost $100 million or more. Testimony at Technical Conference on *Credit Reforms in Organized Wholesale Electric Markets,* Tr. 32 (May 11, 2010) (Mr. Vince Duane, General Counsel and Vice President, PJM). Additional testimony was submitted at the Commission's technical conference in January 2009. Testimony at Technical Conference on Credit and Capital Issues Affecting the Electric Power Industry, Docket No. AD09–2–000, presentation of Robert Ludlow, Vice President and CFO, ISO–NE at 3 ("Several recent 'near misses' with one of the largest investment grade players in the region publicly announcing that without financial relief bankruptcy was imminent."); *Id.* at 9 ("we believe concerns of a damaging drop of market liquidity are much more likely to occur given a major uncovered default"); *Id.* at Tr. 93:24–25; 94:1–2 (Jan. 13, 2009) (Mr. Robert Ludlow, CFO ISO–NE) ("we believe further damage from drops in liquidity and therefore people not clearing their transactions could exacerbate the problems and put the markets themselves in jeopardy.").

[9] A review of commercial bond spreads for creditworthy entities versus three-month Treasury bill (T–Bill) yields indicates the ability to obtain commercial credit: the wider the spread, the harder it is to obtain commercial credit. According to Bloomberg, the spread for 90 day T–Bills to 90 day commercial paper was 448 basis points on October 13, 2008, compared to an average spread of 53 basis points between April 1, 1997 and December 31, 2009.

[10] *Technical Conference on Credit and Capital Issues Affecting the Electric Power Industry,* Docket No. AD09–2–000, held January 13, 2009.

[11] *Id.* at Tr. 100:22–101:13 (Mr. Philip Leiber, Chief Financial Officer and Treasurer, CAISO).

[12] *Id.* at Tr. 91:23–25 (Mr. Robert Ludlow, Vice President and Chief Financial Officer, ISO–NE); *see also Id.* at Tr. 126–162 (question and answer).

[13] *Credit Reforms in Organized Wholesale Electric Markets,* Notice of Proposed Rulemaking, 75 FR 4310 (Jan. 27, 2010), FERC Stats. & Regs. ¶ 32,651 (2010) (NOPR).

the ISO or RTO may invoke a "material adverse change" clause in requiring additional collateral; and (7) establishment of a standard grace period to "cure" collateral calls.

12. The Commission reasoned that the proposed reforms were necessary to address the lack of standardized credit practices and the potential for mutualized default risk.[14]

D. The Need for Credit Reform in the Organized Wholesale Electric Markets

13. Sound credit practices are necessary to prevent a disruption in the system, and it is not acceptable to wait until after a disruption to implement the necessary standards. The Commission acknowledges the short-term costs of compliance with the credit practices required in this Final Rule but finds that they are outweighed by the stability that those credit practices provide to the markets and their participants. Therefore, in compliance filings to be submitted providing tariff revisions to comply with the Final Rule, ISOs and RTOs should apply these standards to market participants.

14. The Commission has considered the comments submitted, as well as the practices of electricity markets outside the United States and in other commodity markets.[15] The Commission has used the experience of these markets in addition to its own review of the organized markets in issuing this Final Rule.

15. Comments were due on or before March 29, 2010.[16] Commission staff held a subsequent technical conference on May 11, 2010 on whether ISOs and RTOs should adopt tariff revisions to clarify their status as a party to each transaction so as to eliminate ambiguity regarding their ability to "set-off" market obligations. Additional comments on that subject were due on or before June 8, 2010.[17]

III. Discussion

A. Shortening the Settlement Cycle

16. As noted above, in developing this Final Rule, the Commission has considered the practices of other commodity markets, as well as electricity markets around the world. While we note that many other commodity markets employ risk management practices that are useful in minimizing the risk of a socialized default among other participants in those markets, we are also mindful of the importance of the continued reliable delivery of electricity and that some market participants have "provider of last resort" obligations that require them to continue transacting in a market, even under challenging financial conditions.

17. The Commission and participants in the electric industry have recognized a correlation between a reduction in the "settlement cycle" [18] and a reduction in costs attributed to a default. As the Commission noted in its Policy Statement, "the size of credit risk exposure is, in large part, a function of the length of time between completion of various parts of electricity transactions, i.e., the provision of service, the billing for service, and the payment of service." [19]

18. Currently, each ISO and RTO has its own time period for billing and settlement. ISO–NE has weekly billing (soon to be twice-weekly), with payment due no later than the second business day after the invoice is issued.[20] Midwest ISO has weekly billing, with payment due seven days after the weekly invoice is issued.[21] PJM has weekly billing and settlement.[22] SPP has weekly billing, with payment due the Wednesday after the invoice is issued.[23] CAISO has semi-monthly billing, with five additional days for settlement.[24] NYISO has monthly billing, with payment due by the first banking day common to all parties after the 15th day of the month that the invoice is rendered by the ISO.[25]

19. To minimize the risk associated with the duration of the settlement period, the Commission proposed in the NOPR to require no more than seven days for each ISO/RTO market billing period plus no more than seven calendar days for settlement. The Commission cited a PJM study that found that movement from monthly to weekly billing would reduce credit risk exposure by $2.1 billion (68 percent), and that necessary financial security provided by members would be reduced by $700 million (73 percent).[26] Further, the Commission's earlier Policy Statement cited an ISO–NE report that its movement to a weekly billing period resulted in a 67 percent reduction in financial assurances that had to be produced by its market participants.[27] The Commission also sought comment on the practicality of moving organized wholesale electric markets to daily billing within one year of implementation of weekly billing.

20. The Commission recognized that net buyers in organized markets might incur cash management costs because they would be obligated to pay their debts on a seven-day basis, but receive cash from retail sales on a 30-day basis. In the NOPR, the Commission thus recognized that cash management facilities to facilitate more frequent payments might be necessary and sought comments on this particular issue.

21. The Commission also noted that ISOs and RTOs may need to make software changes to accommodate a shortened settlement cycle and encouraged ISOs and RTOs to use software that is already in use in markets that are currently operating on a seven-day settlement cycle.

1. Comments

22. Parties in favor of the proposal include a number of the ISOs and RTOs, as well as financial entities such as "Financial Marketers," [28] Citigroup Energy (Citigroup), J.P. Morgan Ventures Energy Corporation (J.P. Morgan), and

[14] *Id.* P 9.

[15] Committee of Chief Risk Officers (CCRO) submitted comments about the credit practices of electricity markets outside the United States, such as NordPool Clearing ASA (Scandinavian countries), Powernext (France), NEMMCO (Australia), SEMO (Ireland), Elexon (Britain), and EMC (Singapore). CCRO March 29, 2010 Comments at 4 and Attachment B at 25–26. *See* also, *e.g.,* Market Reform, "PJM Credit and Clearing Analysis Project Findings and Recommendations" (June 2008), for a review of other markets, at *http://www.pjm.com//media/committees-groups/committees/mc/20080626/20080626-item-03d-crmsc-market-reform-credit-recommendations.ashx;* and CME market requirements at *http://www.cmegroup.com/clearing/financial-and-collateral-management.*

[16] The commenters are listed in an appendix to this Final Rule.

[17] Notice Establishing Date for Comments, 75 FR 27552 (May 17, 2010).

[18] Some parties sought clarification of the Commission's definition of "settlement cycle" in the NOPR, recognizing that settlement encompasses both the billing period and the additional time for final payment of the billed amount. The Commission will therefore refer to each period separately as the "billing period" and the "settlement period."

[19] *Policy Statement,* 109 FERC ¶ 61,186, at P 21.

[20] *ISO New England, Inc. and New England Power Pool,* 132 FERC ¶ 61,046 (2010).

[21] Midwest ISO March 29, 2010 Comments at 4.

[22] PJM March 29, 2010 Comments at 21.

[23] SPP March 29, 2010 Comments at 3.

[24] CAISO March 29, 2010 Comments at 8.

[25] Northeast ISOs March 29, 2010 Comments at n.17; NYISO OATT at section 2.7.3.2.

[26] NOPR, FERC Stats. & Regs. ¶ 32,651 at P 14 & n.20 (citing PJM Credit & Clearing Analysis Project: Findings & Recommendations (June 2008) (found on Dec. 31, 2009 at: *http://www.pjm.com/~/media/committees-groups/committees/mc/20080626/20080626-item-03d-crmsc-market-reform-credit-recommendations.ashx*)).

[27] *See Policy Statement,* 109 FERC ¶ 61,186, at P 22 (citing Memorandum to NEPOOL Participants Committee re: Amendments to Billing Policy and Financial Assurance Policies to Implement Weekly Billing, Paul Belval and Scott Myers, NEPOOL Counsel, Feb. 21, 2004).

[28] SESCO Enterprises LLC, Jump Power LLC, Energy Endeavors LP, Big Bog Energy LP, Silverado Energy LP, Gotham Energy Marketing LP, Rockpile Energy LP, Coaltrain Energy LP, Longhorn Energy LP, and GRG Energy LLC.

Morgan Stanley Capital Group (Morgan Stanley). The staff of the Division of Clearing & Intermediary Oversight at the Commodity Futures Trading Commission (CFTC staff) also supports moving the billing cycle to, at most, seven days.[29]

23. Many industry participants who are normally "net sellers" of supply such as Constellation, NRG, Calpine, Dominion, Mirant, and Powerex also support the proposed shortened billing time-period.[30] CCRO supports a standard seven-day billing period as "consistent" with its review of best practices in the electric industry.[31] The New York Suppliers note that NYISO is the lone organized market in the nation with a monthly billing period.[32] The New York Suppliers contend that allowing NYISO—or CAISO which currently has a two-week billing cycle—to remain out of step with a weekly standard elsewhere increases the risks to participants in New York and California.[33] The Independent Power Producers of New York (IPPNY) comments that, since the beginning of weekly billing in ISO–NE, the number of market participants has increased in every sector and the total number of market participants increased by over 60 percent,[34] suggesting that not only was liquidity enhanced by shorter billing but the change did not pose a barrier to entry.

24. Powerex states that moving to a weekly standard for billing will lower the amount of financial security required which should address concerns of smaller or municipal market participants. Powerex also agrees with the Commission's suggestion that ISOs and RTOs should use existing software that can accommodate this billing cycle, in order to minimize any transition delays.[35]

25. CAISO, alone among the organized markets, doubts that moving to a weekly billing standard would result in significant benefits as it would reduce aggregated outstanding liabilities by only an additional 10 percent. CAISO expresses concern that weekly billing could significantly affect market participants given that it has already shortened the cycle from 90 days and that going further now might be disruptive. Nevertheless, CAISO also explains that its future plans are to move to weekly billing.[36]

26. Parties opposing the proposal include the City of New York, the New York State Public Service Commission (NYPSC) and "Six Cities."[37] Indeed, the City of New York and the NYPSC argue that the Commission should not impose a shorter settlement period just for the sake of uniformity and that the Commission should give deference to the policies adopted through ISO and RTO governance processes.[38] The NYPSC and the New York State Consumer Protection Board (NYSCPB) further contend that weekly billing could result in a wealth transfer from some market participants to others.[39]

27. Other parties oppose movement to weekly billing based on data concerns, including net sellers such as Midwest Transmission Dependent Utilities (Midwest TDU)[40] and Consolidated Edison Solutions.[41] This point was similar to the concerns of Bonneville Power Administration (BPA) who, while supportive of weekly billing, has concerns about the ability of CAISO to effectively manage the resulting increased demands. PG&E argues against reducing billing cycles in the organized wholesale market without a similar billing period in the bilateral market, because it would create an opportunity for sellers to operate with reduced need for working capital and shifts liquidity risk from sellers to buyers.[42]

28. Regarding the Commission's request for comment on the practicality of organized wholesale electric markets implementing daily settlement periods within one year of implementation of weekly settlement periods, there was very little commenter support for this proposal. Most of the support for this proposal came from financial entities. CFTC staff, J.P. Morgan and Morgan Stanley support this proposal.[43] CFTC staff argues that routine and frequent settlement imposes discipline on participants, in that it discourages participants from entering into new positions without first ensuring that they have adequate liquidity to support such positions. CFTC staff also states that the collection of payments from FTR market participants should happen promptly, within hours or overnight.[44]

29. Calpine also supports daily settlement. Calpine notes that this is achievable, as shown by ISO–NE in its plans to implement twice weekly billing.[45] Calpine also notes that some stakeholders oppose compression of the settlement cycle, arguing that operational issues and the quality of data available do not support daily settlements. Calpine states that these concerns may be true for the real time market (RTM), but they do not apply to the day-ahead market (DAM).[46] Calpine requests that the Commission consider moving towards daily billing by requiring ISOs/RTOs to split the DAM from other markets and settle the DAM daily.[47]

30. However, many stakeholder group members opposed daily settlement. CAISO, the IRC, Midwest ISO, and PJM do not support daily invoicing. CAISO, Midwest ISO and PJM all cite financial and logistical concerns as reasons to oppose daily billing. The IRC does not believe the Commission should mandate a move to daily settlement periods, but should allow ISOs/RTOs to work with stakeholders to research the proposal further to evaluate the daily costs and benefits. PJM states that stakeholder discussions should occur prior to determining whether such a change would be cost beneficial to the market participants in the PJM region. PJM also states that its current settlement system does not have the flexibility to issue daily invoices.[48]

31. APPA, NRECA, NYAPP, and New Jersey Public Power cite the cost of daily settlements as their reason not to support it.[49] Basin Electric believes daily settlements would be administratively burdensome.[50]

[29] Although the comments submitted by CFTC staff were focused on the FTR markets, they also recommend requiring each ISO or RTO to establish daily settlement as soon as practicable. CFTC staff March 29, 2010 Comments at 5.

[30] New York Suppliers March 29, 2010 Comments at 7; Calpine March 29, 2010 Comments at 1; Dominion March 29, 2010 Comments at 2; Mirant March 29, 2010 Comments at 3–4; Powerex March 29, 2010 Comments at 4–5.

[31] CCRO March 29, 2010 Comments at 3.

[32] New York Suppliers March 29, 2010 Comments at 9.

[33] *Id.* at 9–10.

[34] IPPNY March 29, 2010 Comments at 12–13.

[35] Powerex March 29, 2010 Comments at 6–7.

[36] CAISO March 29, 2010 Comments at 7–8.

[37] The "Six Cities" include the cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, all located in California.

[38] City of New York March 29, 2010 Comments at 6–7; NYPSC March 29, 2010 Comments at 3–4.

[39] NYPSC March 29, 2010 Comments at 7–8; NYSCPB March 29, 2010 Comments at 3.

[40] Indiana Municipal Power Agency, Madison Gas & Electric Company, Missouri River Energy Services, Southern Minnesota Municipal Power Agency and WPPI Energy.

[41] Midwest TDU March 29, 2010 Comments at 7–9; Consolidated Edison Solutions March 29, 2010 Comments at 3–4.

[42] PG&E March 29, 2010 Comments at 2.

[43] J.P. Morgan Comments at 6; MSCG Comments at 2–3.

[44] CFTC staff Comments on 5.

[45] Calpine Comments at 4 & n.8 (citing *ISO New England, Inc. and New England Power Pool* March 26, 2010 filing, Docket No. ER10–942–000).

[46] Calpine Comments at 4.

[47] *Id.* at 5.

[48] CAISO Comments at 9; IRC Comments at 4–5; MISO Comments at 5; PJM Comments at 21–23.

[49] APPA Comments at 17; NRECA Comments at 10; NYAPP Comments at 10; PPANJ Comments at 10–11.

[50] Basin Electric Comments at 3.

Midwest TDUs state that daily settlements are unworkable now and in the foreseeable future, and should be addressed by the individual ISOs/RTOs.[51] NRECA also points out that the movement to shortened settlement cycles would occur at the same time utilities implement "smart grid" applications and NRECA questions whether all metering and computer hardware and software systems can be done at the same time.[52] Western Area Power Administration (WAPA) believes daily settlements are impractical and it would not allow the opportunity to correct errors which could use up all available funds unnecessarily in a matter of a few days. WAPA is concerned about daily settlements and the timing of the CAISO invoices, which are issued at midnight, because it would unfairly shorten the daily settlement processing period to less than 24 hours.[53]

2. Commission Determination

32. In this Final Rule, the Commission adopts the NOPR proposal to direct each ISO and RTO to submit a compliance filing that includes tariff revisions to establish billing periods of no more than seven days and settlement periods of no more than seven days after issuance of bills. This compliance filing must be submitted by June 30, 2011, with the tariff revisions to take effect October 1, 2011. While the Commission has, in the past, not required shortened billing periods, in order to promote market liquidity,[54] we find it is a necessary component of a package of reforms designed to reduce default risk, the costs of which would be socialized across market participants and, in certain events, of market disruptions that could undermine overall market function. We find unpersuasive comments that shortened billing and settlement cycles will compromise the liquidity of the organized wholesale electric markets.

33. The basic premise for shorter billing periods is that the reduced amount of unpaid debt left outstanding reduces the size of any default and therefore reduces the likelihood of the default leading to a disruption in the market such as cascading defaults and dramatically reduced market liquidity. In addition, the reduction in outstanding obligation also decreases the amount of collateral that market participants must post, which mitigates the affect on market participants of reducing the amount of unsecured credit the ISOs and RTOs can extend. The Commission's decision is supported by the studies performed by ISO–NE and PJM.[55]

34. The Commission does not agree with the statement of the NYPSC or the City of New York that the movement to a weekly billing period will be a "wealth transfer" from buyers to sellers. The Commission is focused on the benefits of reduced risk afforded to all market participants by a minimum standard of weekly billing. While short-run working capital costs may be shifted, the result is that the overall cost of default will be lower for every market participant. Thus, all participants will benefit in this circumstance.

35. The Commission also disagrees that there may be problems verifying data. ISO–NE, SPP, and Midwest ISO have shown that they can administer weekly billing without significant incident. The experience of these markets suggests that data handling and verification should not pose insurmountable challenges. Regarding PG&E's discussion of reduction of billing time in the bilateral markets, the Commission believes that individual counterparties to bilateral contracts may negotiate their own billing terms.

36. As for parties that urged the Commission to not mandate a "one size fits all" approach in establishing minimum billing periods or that the Commission should defer to stakeholders in this matter, the Commission disagrees. Nothing in this record suggests that any of the organized wholesale electric markets is differently situated in a manner that warrants deviating from this minimum standard for billing periods.

37. Recognizing the benefits that will flow from requiring billing to be at least weekly, and balancing the incremental benefits and incremental burdens of daily billing, we will not require daily billing at this time. Instead we will require, as discussed above, weekly billing.

B. Use of Unsecured Credit

38. The use of unsecured credit varies among the organized markets. SPP currently limits extensions of unsecured credit to any single entity or affiliated group of entities to $25 million.[56] CAISO and PJM extend no more than $50 million per market participant.[57] Midwest ISO and ISO–NE allow up to $75 million per market participant,[58] and NYISO extends up to $150 million per market participant.[59]

39. In the NOPR, the Commission proposed to require each ISO and RTO to revise its tariff provisions to reduce the extension of unsecured credit to no more than $50 million per market participant. The Commission sought comment on whether there should be a further corporate cap to cover an entire corporate family. Consideration of an overall corporate family cap on the use of unsecured credit was based on experience in the RTO and ISO markets where many entities have multiple subsidiary companies operating in the same market. Since these entities often use the same balance sheet for credit purposes, limits on the entire corporate family would ensure that multiple, related market participants could not defeat the purpose of limiting unsecured credit. Finally, the Commission sought comment on whether it should eliminate the extension of unsecured credit in connection with adopting daily settlements.

1. Comments

a. Individual Market Participant Cap

40. Many commenters support the proposal to limit the extension of unsecured credit to no more than $50 million per participant, but make more nuanced comments in how the credit limit should be applied. CAISO, the Northeast ISOs,[60] and the ISO–RTO Council (IRC) favor a generic $50 million "cap" on the use of unsecured credit per participant, rather than a mandated limit of $50 million per participant, such that individual ISOs or RTOs may file with the Commission to establish lower limits on unsecured credit as appropriate.

41. The proposed limit on unsecured credit is supported by financial participants (Citigroup Energy Inc., Financial Marketers), some public power participants (Northern California Power Agency, Public Power Association of New Jersey and Madison, New Jersey (New Jersey Public Power), and Basin Electric), some retail providers (Direct Energy), and suppliers (the Electric Power Supply Association

[51] Midwest TDUs Comments at 11–12.

[52] NRECA Comments at 10.

[53] WAPA Comments at 5–6.

[54] *Policy Statement,* 109 FERC ¶ 61,186, at P 24.

[55] *See,* e.g., Market Reform, "PJM Credit and Clearing Analysis Project Findings and Recommendations" (June 2008) see *http://www.pjm.com/~/media/committees-groups/committees/mc/20080626/20080626-item-03d-crmsc-market-reform-credit-recommendations.ashx;* NEPOOL Participants Committee, Weekly Billing Presentation, (January 9, 2004).

[56] SPP March 29, 2010 Comments at 4.

[57] CAISO March 29, 2010 Comments at 10–11 and PJM Tariff at Sixth Revised Sheet No. 523G.

[58] Midwest ISO March 29, 2010 Comments at 6 and Exhibit IA (ISO New England Financial Assurance Policy) of ISO New England Inc. Transmission, Markets and Services Tariff.

[59] NYISO March 29, 2010 Comments at 10.

[60] The Northeast ISOs refer to joint comments filed by ISO–NE, PJM, and NYISO.

(EPSA)). While they support the proposed limit on unsecured credit, New Jersey Public Power state that there may come a time when a $50 million cap is not adequate and preventing full participation in PJM markets so the Commission should provide flexibility to allow municipal utility participation without such an unsecured credit cap.[61] One party, DC Energy, does not believe that the use of unsecured credit should be allowed in any market. Powerex suggests that, not only should the Commission adopt a $50 million limit on the use of unsecured credit, the Commission should attempt to determine if the amount could be further reduced as a consequence of a minimum standard on billing periods.[62] The National Rural Electric Cooperative Association (NRECA) specifically does not oppose the proposed limit on unsecured credit. Hess Corporation (Hess) states that the limit of unsecured credit should be no more than $50 million and should apply to all market participants.

42. The CPUC asserted that the Commission should not arbitrarily limit unsecured credit. To the extent the Commission decides to limit unsecured credit, CPUC suggests limiting unsecured credit to a level that corresponds to the settlement cycle.[63] When determining the amount of unsecured credit for a given entity, the CPUC recommends using a process which is based on a consistent, systematic, and non-discriminatory approach. The CPUC states that market participants with higher credit ratings should be allowed to have higher unsecured credit.[64]

43. A number of commenters support the continued use of unsecured credit, and state that the Commission should allow each ISO/RTO, through the stakeholder process, to determine a formula or method to limit the amount of unsecured credit.[65] EEI states that the Commission should require the ISO/RTO to justify the maximum amount of unsecured credit that the ISO/RTO permits to any participants using a formula. Morgan Stanley states that credit should be extended based upon an application of objective financial criteria to evaluate carrying capacity and default probabilities.[66] Consolidated Edison Solutions states that a national cap would not recognize the creditworthiness of financially strong companies and may set the level too low for regions with high energy costs.[67] APPA believes that each RTO should tailor their credit policies to take into account the respective financial strengths and business models of the various market participants.[68]

44. Similarly, Consumers Energy indicates that a uniform $50 million cap would be an illusory goal given the differing methods for analyzing credit in the ISOs/RTOs.

b. Aggregate Corporate Family Cap

45. Most parties also support an aggregate family cap but debate whether it should be mandated by the Commission or determined by each ISO/RTO through a stakeholder process. The Northeast ISOs argue that, due to regional variations, market operators should have flexibility in determining the appropriate level of any aggregate corporate cap.[69] Basin Electric agrees with this approach, but argues that the criteria should be consistently applied.[70]

46. NRECA indicates it does not oppose an aggregate cap on corporate families and suggests an unsecured credit limit of $100 million per corporate family.[71] Shell Energy, on the other hand, agrees with the proposal to have an aggregate corporate cap but suggests that it be the same as the $50 million cap suggested in the NOPR for an individual participant.[72]

47. Morgan Stanley opposes an aggregate cap and further urges the Commission to explicitly mandate that, in determining how much credit to extend to a market participant, the ISOs and RTOs consider the parent company guarantees of a market participant's market activity.[73] EPSA states that an aggregate cap does not make sense for a holding company that holds both regulated utility subsidiaries and unregulated market participants.[74] San Diego Gas & Electric (SDG&E) also opposes an aggregate cap, stating that it is both unnecessary in California and would frustrate the CPUC affiliate transaction rules, which "requires that a parent backing its affiliates be subject to a $50 million maximum unsecured credit limit."[75]

c. Different Cap for Markets of Different Size

48. In the NOPR, the Commission asked whether the caps on unsecured credit should differ as a result of differing market size. BP Energy specifically notes that the size of the market should make a difference in terms of the amount of unsecured credit allowed and that the Commission should not mandate a particular amount. MidAmerican agrees and states that any limit should be formulaic. Mirant favors avoiding a "one size fits all" approach to setting unsecured credit limits. PSEG suggests that the cap should be based upon the risk of each individual market participant and factors unique to each ISO/RTO. Consequently, PSEG argues, this issue is best left to each ISO/RTO and its stakeholders.

2. Commission Determination

49. The Commission adopts the NOPR proposal to require each ISO and RTO to revise its tariff provisions to reduce the extension of unsecured credit to no more than $50 million per market participant.

50. The Commission is concerned that RTOs and ISOs, even after analyzing the creditworthiness of market participants, have allowed large amounts of unsecured credit in their markets (during the financial crisis in fall 2008, ranging from 50 to 80 percent). The Commission recognizes that unsecured credit may provide increased liquidity in the organized wholesale electric markets and is only extended after the ISO/RTO has performed a credit analysis of the market participant receiving the unsecured credit. However, the Commission is concerned that the assumptions upon which any credit analysis is made can change rapidly. For instance, Lehman Brothers was rated as "investment grade" by all ratings agencies on Friday, September 12, 2008, only to file for bankruptcy on Monday, September 15, 2008.[76] The Commission considered several factors, as well as the comments, in establishing the $50 million cap on unsecured credit per market participant. We note that CAISO and PJM have adopted a $50

[61] New Jersey Public Power Comments at 10.

[62] Powerex March 29, 2010 Comments at 7–8.

[63] CPUC March 29, 2010 Comments at 3.

[64] *Id.* at 3–4.

[65] AMP, APPA, CES, EEI, MSCG, NIPSCO, SPP, Midwest TDUs, and Wisconsin parties.

[66] NSCG March 29, 2010 Comments at 4.

[67] Consolidated Edison Solutions March 29, 2010 Comments at 4.

[68] APPA March 29, 2010 Comments at 4.

[69] Northeast ISOs March 29, 2010 Comments at 6–7.

[70] Basin Electric March 29, 2010 Comments at 3.

[71] NRECA March 29, 2010 Comments at 11.

[72] Shell Energy March 29, 2010 Comments at 7.

[73] Morgan Stanley March 29, 2010 Comments at 4–5.

[74] EPSA March 29, 2010 Comments at 7.

[75] SDG&E March 29, 2010 Comments at 4.

[76] While Lehman Brothers was not itself a public utility, it was in many ways no different from other financial institutions that are or are affiliated with public utilities. In a June 17, 2009 email to market participants, PJM indicated that Lehman Brothers Commodity Services, Inc., defaulted on $18.1 million in obligations to PJM. *http://www.pjm.com//media/about-pjm/member-services/default-notification/lbcs-default-update.ashx.*

million cap on unsecured credit for a single market participant, indicating that this level has already been accepted and incorporated into the business practices of market participants throughout the country. Most importantly, based on experience with past defaults, we are persuaded that the organized wholesale electric markets could withstand a default of this magnitude by a single market participant.[77] The Commission further believes that this cap on unsecured credit per market participant balances the interests of market participants by not raising costs by an unreasonable amount while still protecting the markets and their participants from unacceptable disruption.

51. Moreover, as noted in the NOPR, as the timeframe of settlement shrinks, so does the amount of unsecured credit that a participant may need. This is because the number of outstanding transactions and the size of the amounts outstanding become smaller, thus minimizing the credit exposure to any market participant.[78] Reducing the amount of unsecured credit extended before there is a crisis, combined with a shortened settlement cycle, should reduce the risk of a mutualized default and any potential market disruption.

52. As discussed earlier, the Commission must balance the needs of market liquidity with overall risk. To achieve this balance, the Commission directs each ISO and RTO to submit a compliance filing that includes tariff revisions to establish a limit on unsecured credit of no more than $50 million per market participant. This compliance filing must be submitted by June 30, 2011, and the tariff revisions will take effect October 1, 2011. In response to commenters who argue that markets that are a different size should have different caps on unsecured credit, we note that the $50 million limit on unsecured credit is a ceiling, not a mandated amount. Any organized wholesale electric market may establish a lower limit, either for individual market participants or based on the market administrator's credit analysis of a particular market participant.

53. The Commission further establishes, for each organized wholesale electric market, a maximum level of $100 million of unsecured credit for all entities within a corporate family. This level would allow multiple market participants within one corporate family to each have access to a significant level of unsecured credit, up to $50 million in each organized wholesale electric market as indicated above, to conduct business. Adoption of an overall corporate family cap of $100 million of unsecured credit in each organized wholesale electric market reflects our experience in the RTO and ISO markets where many entities have multiple subsidiary companies operating in the same market. By implementing a cap on a corporate family, the Commission avoids a scenario in which multiple market participants within one corporate family have $50 million in unsecured credit per participant, and a bankruptcy of the entire corporate family results in a significant default in an organized wholesale electric market.[79] As indicated by Mr. Duane's testimony at the technical conference, a default of $100 million in an organized wholesale electric market would be significant, even in a market the size of PJM. Moreover, we believe that this level of unsecured credit strikes a balance by not raising costs for market participants by an unreasonable amount while still protecting the markets and their participants from unacceptable disruption.

54. The Commission thus directs each ISO and RTO to submit a compliance filing that includes tariff revisions to establish an aggregate cap on unsecured credit per corporate family of no more than $100 million. This compliance filing likewise must be submitted by June 30, 2011, and the tariff revisions will take effect October 1, 2011. Similar to the cap on individual market participants, each ISO or RTO may establish a lower level for the aggregate cap.

55. The Commission views the limits as an upper ceiling or limit which will allow for varied amounts below the $50 million and $100 million thresholds. The Commission agrees that limits below the Commission-prescribed levels can be set depending on relative market size, the price of energy, the number of megawatt hours, and the size and number of the members, for example.

56. The Commission also believes that the contention of Morgan Stanley, that ISOs and RTOs should explicitly consider parent guarantees in their evaluation of credit, is contrary to the point of this rulemaking. Parent guarantees are simply another form of unsecured credit that will not necessarily protect a market from default by market participants if the parent company experiences financial distress, and the Commission directs ISOs and RTOs to not take them into account in establishing the appropriate level of unsecured credit for a market participant or aggregate cap.

57. The Commission further disagrees that an aggregate cap is not needed in a corporate family structure that has both unregulated entities and regulated utilities. Regulated entities, even those with cost-of-service rates, do not necessarily have a revenue stream guaranteed to cover wholesale market costs, and thus should not be assumed to be without risk of default.

C. Elimination of Unsecured Credit for Financial Transmission Rights Markets

58. The proposal to eliminate the allocation of unsecured credit in FTR markets or their equivalent is based on the unique nature of FTRs.[80] The value of the FTR can vary widely over very short periods of time. Further, owing to the relationship to the physical state of the electric grid, the state of which is known to all market participants, there are few if any participants who would be willing to "step into" the shoes of a party that is nearing default as a FTR position deteriorates financially. FTR markets entail obligations that are normally active over a long period of time, often a year or more, and their potential change in value over this time frame is quite large.

59. The value of so-called "prevailing flow" FTRs [81] are generally predictable when there are no substantial changes in fuel prices or the physical state of the electric grid. However, outages on the transmission system and substantial changes in fuel prices can cause

[77] To date, the Power Edge LLC default of $51.7 million in PJM was the most significant in total value in an organized wholesale electric market. *PJM Interconnection, L.L.C.* v. *Accord Energy, LLC,* 127 FERC ¶ 61,007, Enforcement Staff Report at 1 n.5 (2009).

[78] NOPR, FERC Stats. & Regs. ¶ 32,651 at P 17 (*citing California Independent System Operator Corp.,* 129 FERC ¶ 61,142 at P 14 (2009) (adopting limit of $50 million of unsecured credit per market participant); *PJM Interconnection, L.L.C.,* 127 FERC ¶ 61,017 at P 5 (2009) (adopting limit of $50 million for a member company and $150 million for an affiliated group)).

[79] For instance, Lehman Brothers declared bankruptcy as a corporate family, disrupting the financial markets. *See* Report of Anton R. Valukas, Examiner, submitted in *In re Lehman Brothers Holdings Inc., et al.,* (Bankr. S.D.N.Y., Mar. 11, 2010), found at: *http://lehmanreport.jenner.com/VOLUME%201.pdf.* A similar default by a market participant could result in a significant disruption in an organized wholesale electric market.

[80] A firm transmission right or FTR is a "financial instrument[] used to hedge the risk of transmission congestion by entitling the holders of [this] instrument[] to compensation for transmission congestion charges." *PJM Interconnection, LLC,* 127 FERC ¶ 61,025, at P 2 (2009).

[81] A "prevailing flow" FTR is one in which the historic movement of power from a lower priced area to a higher priced area occurs under normal transmission system operation. This is normally defined over a period of years by the ISO/RTO and may reflect contractual obligations that predate ISO or RTO establishment.

unforeseen flow patterns and result in a rapid and dramatic drop in the value of an FTR position.[82] For example, a large transformer or major transmission line can fail, thus changing flows of electricity and causing increased congestion in other areas. This will happen nearly instantaneously and the effect on the flows of electricity will remain in effect for whatever period of time it takes to repair or replace the equipment. In some cases, this could be months or longer. Thus the use of unsecured credit in a market with risk that is difficult to quantify can lead to unforeseen and substantial costs in the event of a default.

60. In the NOPR, the Commission proposed to revise its regulations to require that each RTO and ISO include in the credit provisions of its tariff provisions that eliminate unsecured credit in financial transmission rights markets.

1. Comments

61. The response to the Commission's proposal to eliminate the use of unsecured credit in FTR markets is mixed. Parties that support the proposal include SPP, Basin Electric, the Organization of Midwest ISO States (OMS), Calpine, Citigroup, DC Energy, Dominion, Shell Energy, the Northeast ISOs, the New York Transmission Owners (NYTO), National Energy Marketers Association (NEMA), and J.P. Morgan.[83]

62. NYISO states general support for the elimination of unsecured credit for its TCC[84] market but argues that the Commission should clarify that those holding "fixed price" TCCs should be exempt.[85] Similarly, CAISO states that it supports the elimination of unsecured credit for FTRs, but asserts that a variety of specific practices would meet this requirement.[86] CAISO allows netting of collateral posted for their equivalent FTR market participation and the auction of these rights, which CAISO suggests eases capital burdens while mitigating risk. Additionally, CAISO does not distinguish between credit for their FTR equivalent market and all other markets. Consequently, collateral posted for all markets can effectively be used interchangeably.

63. The CPUC advises against elimination of unsecured credit in FTRs because load serving entities (LSE) use FTRs for hedging congestion risk on behalf of consumers, and elimination of unsecured credit in FTRs could result in higher costs passed on to ratepayers.[87]

64. Joint Commenters,[88] Wisconsin Public Service Corporation and Upper Peninsula Power Company (Wisconsin Parties), and the Edison Electric Institute (EEI) state that risks associated with FTRs are not addressed by simply requiring FTR market participants to be fully collateralized. The Joint Commenters suggest that the Commission should instead direct the ISOs and RTOs to work together to develop a set of "Best Practices" for valuing FTRs and, to the extent possible, standardize valuation methodologies across ISOs and RTOs.[89] Similarly, EEI states that the Commission should require ISOs and RTOs to reassess their methodology for valuing FTRs and report back to the Commission in one year.[90] The Wisconsin Parties do not take a position with regard to the issue but note that the real credit issue relates to calculating the FTRs' future value and the resulting future liability exposure.[91]

65. Similarly, MidAmerican and PSEG state that the NOPR proposal to eliminate unsecured credit in FTR markets is misguided because it does not address valuation of FTRs. MidAmerican states that, if the Commission is intent on eliminating unsecured credit for FTRs, it should require each ISO/RTO to allow a market participant to offer the ISO/RTO a security interest in receivables from non-FTR market activities as an acceptable form of collateral for FTR market activity.[92]

66. SDG&E also states that eliminating unsecured credit in the FTR market will require even LSEs to post collateral which increases costs. SDG&E argues in favor of allowing such entities to be exempt from the prohibition on unsecured credit in FTRs and adds that CAISO should provide for a transparent mechanism to calculate collateral for FTR positions on a daily or weekly basis.[93]

67. Midwest ISO states that the Commission should avoid applying the same approach to all market participants, regardless of their business model. APPA also opposes any standardized Commission action in this regard, arguing that elimination of unsecured credit for LSEs holding FTRs could deal a fatal blow to the ability of public power systems to secure long-term FTRs. However, APPA favors FTR collateral requirements for RTO market participants that are not participating in FTR markets to hedge congestion associated with physical transmission service taken to serve their loads, but instead are doing so for speculative reasons.[94]

68. First Energy, EMCOS, IMEA, Midwest TDUs, NRECA, NYAPP, NCPA, Western, CPUC, MSCG, MidAmerican, PSEG, and SCE oppose the Commission's proposal to eliminate unsecured credit in the FTR markets. First Energy Service Company (First Energy) argues that defaults that occurred in the PJM market in December 2007 were not due to the use of unsecured credit, but rather the abuse of FTR markets.[95] First Energy recommends that the Commission not eliminate unsecured credit, but instead use independent market monitors that are in place in each ISO/RTO, in addition to the enforcement capabilities granted to the Commission in the Energy Policy Act of 2005, to ensure that no market manipulation is taking place.[96] MidAmerican and the PSEG state that the Commission's proposal is misguided and should be abandoned because it fails to address the most important underlying issue with respect to FTRs, which is one of valuation.[97] In addition, Midwest TDUs, NRECA, NYAPP, and NCPA state that the elimination of unsecured credit for FTRs could create unnecessary collateral obligations on LSEs.[98]

69. Some parties such as Northern Indiana Public Service Company

[82] Division of Market Oversight, Federal Energy Regulatory Comm'n, 2009 State of the Markets Report at 20 (April 15, 2010), available at *http://www.ferc.gov/market-oversight/st-mkt-ovr/som-rpt-2009.pdf.*

[83] SPP March 29, 2010 Comments at 5–6; Basin Electric March 29, 2010 Comments at 4; OMS March 29, 2010 Comments at 3; Calpine March 29, 2010 Comments at 7; Citigroup March 29, 2010 Comments at 4; DC Energy March 29, 2010 Comments at 9; Dominion March 29, 2010 Comments at 7; Shell Energy March 29, 2010 Comments at 6; Northeast ISOs March 29, 2010 Comments at 7; NYTO March 29, 2010 Comments at 8; NEMA March 29, 2010 Comments at 6; and J.P. Morgan March 29, 2010 Comments at 10.

[84] A fixed-price TCC is a series of TCCs, each with a duration of one year, renewed annually for a period of at least five years at a fixed price that is obtained through the conversion of expired or expiring Existing Transmission Agreements. NYISO OATT, Section 1.6 Definitions—F. These are legacy obligations that predate the ISO.

[85] NYISO March 29, 2010 Comments at 12–13.

[86] CAISO March 29, 2010 Comments at 12–14.

[87] CPUC March 29, 2010 Comments at 4.

[88] Joint Commenters include Constellation Energy Commodities Group, Inc., Constellation NewEnergy, Inc., and Integrys Energy Services, Inc.

[89] Joint Commenters March 29, 2010 Comments at 12.

[90] EEI March 29, 2010 Comments at 11.

[91] Wisconsin Parties March 29, 2010 Comments at 6–7.

[92] MidAmerican March 29, 2010 Comments at 7.

[93] SDG&E March 29, 2010 Comments at 3–4.

[94] APPA March 29, 2010 Comments at 6.

[95] First Energy March 29, 2010 Comments at 3.

[96] *Id.* at 5.

[97] MidAmerican March 29, 2010 Comments at 6–7; PSEG March 29, 2010 Comments at 12.

[98] Midwest TDUs March 29, 2010 Comments at 13–14; NRECA March 29, 2010 Comments at 13; NYAPP March 29, 2010 Comments at 12; NCPA March 29, 2010 Comments at 6–7, 9.

(NIPSCO), and Xcel Energy Services (Xcel) did not oppose elimination of unsecured credit for FTR markets *per se.* NIPSCO and Xcel suggested that a stakeholder process develop an unsecured credit policy appropriate to each ISO/RTO.[99]

2. Commission Determination

70. The Commission adopts the NOPR proposal to eliminate unsecured credit for FTR positions. The Commission understands the value that FTR markets provide to market participants that need to hedge congestion risk. Nevertheless, the risk associated with the potentially rapidly changing value of FTRs warrants adoption of risk management measures, including the elimination of unsecured credit. Because financial transmission rights have a longer-dated obligation to perform which can run from a month to a year or more, they have unique risks that distinguish them from other wholesale electric markets, and the value of a financial transmission right depends on unforeseeable events, including unplanned outages and unanticipated weather conditions.[100] Moreover, financial transmission rights are relatively illiquid, adding to the inherent risk in their valuation.[101]

71. For example, PJM suffered a significant default in December 2007 in its FTR market [102] and moved to eliminate the use of unsecured credit in that market due to its risk.[103] That default illustrates the unique risk of FTRs. Given a change in market conditions, a set of FTR positions became highly unprofitable. Because FTR obligations cannot be terminated prior to the expiration of the contract, from one month to several years, losses can mount to the point that the FTR holder goes bankrupt.

72. It is difficult to quantify, and therefore limit, the risks inherent in FTR markets, as evidence by the substantial difference between FTR auction values and realized day ahead congestion value experienced over the past few years.[104] For instance, the outage of a transformer at a key node in a network system during a peak season can have enormous financial consequences. Such an outage may be prolonged because replacement parts are expensive and not standardized, and thus not likely to be readily available. Under such circumstances, FTRs that had been "prevailing flow" or "in the money" may suddenly be counter-flow during an entire peak season or longer with costs that continue to widen depending on usage, flows, temperature and other factors. Because FTR market participants are all aware of large transmission events affecting FTR values, an FTR that is suddenly "out of the money" will be difficult to sell or liquidate. Thus the owner can be stuck with a financial position that continues to be a burden and that could force a large default. While elimination of unsecured credit may not necessarily have prevented previous defaults, requiring collateral to support all FTR transactions, rather than continued reliance on unsecured credit, will reduce the risk, and resulting costs, of defaults that are mutualized across all market participants.

73. As for the assertion of the CPUC that the elimination of unsecured credit should be avoided as it will raise the costs of LSEs who use FTRs for hedging congestion risk, the Commission acknowledges this possibility. However, as discussed above, even LSEs using FTRs to hedge costs are not without risk. Further, just as there are costs associated with the reduction of unsecured credit in energy transactions, the overall savings to all parties can be significant. The Commission is persuaded that the benefits of the elimination of unsecured credit over the long term, through reducing risk and minimizing the effect of defaults that would be socialized among all market participants, will compensate all parties for the short-term costs of fully securing FTR transactions.[105]

74. As for those that argue against a uniform, nationwide prohibition on the use of unsecured credit in FTR markets, the Commission notes that there has been no evidence to suggest that the generation mix or transmission system of any particular ISO or RTO is inherently unique in its physical performance or equipment that would allow it to avoid the risks discussed above. In response to those that argue that the nature of the participants and their business model should exempt those participants from this aspect of the Final Rule, the Commission addresses this issue below.

75. Thus, the Commission directs each ISO and RTO to submit a compliance filing that includes tariff revisions to eliminate the use of unsecured credit in its FTR, or FTR-equivalent, markets. This compliance filing must be submitted by June 30, 2011, and the tariff revisions will take effect October 1, 2011.

76. The Commission acknowledges the parties that suggest that valuation of FTRs is important to protecting against the risk to participants associated with possible defaults. While the Commission agrees that ISOs and RTOs may face challenges in valuing FTRs, those comments are beyond the scope of this rulemaking proceeding.

77. The Commission disagrees with commenters that assert that LSEs using FTRs to hedge for congestion should be exempt from the prohibition on the use of unsecured credit in the FTR market. Even an LSE with generation backing the FTR may encounter changes in the system that outstrip (perhaps substantially outstrip) the hedge, as in the transmission outage example used above. Similarly, municipal utilities that hold an FTR position can find that their position is "out of the money" due to an unforeseen, but large, transmission outage. The Commission also notes that low risk activities may be subject to lower security and collateral requirements for FTR positions. Thus, if LSEs, municipal utilities and other entities are engaged in "low-risk" transactions in the FTR markets, then this lower risk will be reflected in the credit analysis done by the market administrator in setting security and collateral requirements for their transactions in the FTR market, in contrast to higher requirements that may be established for those engaged in high-risk speculative transactions.

78. The Commission also disagrees with the assertion of CAISO and Mid-American that "netting" of credit requirements between FTR and non-FTR activity should be allowed. Intermingling credit for these distinctly different markets would defeat the purpose of the Commission's attempt to reduce market-disrupting risk. Such a practice could lead to reduction in the daily market activity, for example, to engage in more speculative activity in

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[99] NIPSCO March 29, 2010 Comments at 6; Xcel March 29, 2010 Comments at 12.

[100] For a financial transmission right, an unexpected outage can cause unforeseen congestion or movement in flows and the resulting charges or credits can swing very substantially either way.

[101] *PJM Interconnection, L.L.C.,* 127 FERC ¶ 61,017 at P 36.

[102] *PJM Interconnection, L.L.C.,* 122 FERC ¶ 61,279 at P 26 n.10 (2008) (citing defaults by Excel and Power Edge in PJM's financial transmission rights market).

[103] *PJM Interconnection, L.L.C.,* 127 FERC ¶ 61,017 at P 8, 36.

[104] In 2008, dramatic changes in fuel prices at mid-year led to FTR values that differed dramatically from realized day-ahead congestion values. Division of Market Oversight, Federal Energy Regulatory Comm'n, 2008 State of the Markets Report at 18 (2009), *available at http://www.ferc.gov/market-oversight/st-mkt-ovr/2008-som-final.pdf.* In 2009, changes in demand similarly led to divergence of FTR values and day-ahead congestion values. Division of Market Oversight, Federal Energy Regulatory Comm'n, 2009 State of the Markets Report at 20 (April 15, 2010), *available at http://www.ferc.gov/market-oversight/st-mkt-ovr/som-rpt-2009.pdf.*

[105] *PJM Interconnection, L.L.C.,* 131 FERC ¶ 61,017 at P 31–34, *order on reh'g,* 132 FERC ¶ 61,180 (2010).

FTR markets. This would serve to have the effect of "loosening" credit in an area where the Commission desires to see less risk.

79. Additionally, the Final Rule does not provide exemptions for holders of "fixed price TCCs," or other products, from the prohibition on the use of unsecured credit in this market as they may vary in value despite being called "fixed price."

D. Ability To Offset Market Obligations

80. In order to help market participants manage their capital as efficiently as possible, market participants who are buying and selling energy and other products to and from the organized wholesale electric markets seek to net those transactions against each other for the purpose of determining the collateral requirement, thereby reducing the amount of collateral that a market participant must hold with the ISO/RTO. In this way, the ISO/RTO can administer the market, while imposing fewer demands on the limited capital of its participants.

81. However, if a market participant files for bankruptcy protection, it may assert that the ability of the ISO/RTO to offset accounts receivable against accounts payable is not valid and seek a claim to amounts owed to the market participant by the ISO/RTO. To ensure that ISOs/RTOs are not left owing the market participant without the ability to net amounts owed by the market participant, there must be an adequate legal basis to protect the ISOs/RTOs in the bankruptcy context.

82. This concern provided the basis for the Commission's proposal in the NOPR to clarify the ISO's/RTO's legal status to take title to transactions, thereby becoming the central counterparty for transactions in an effort to establish mutuality in the transactions as legal support for set-off in bankruptcy.

1. Comments

83. PJM supports the Commission's approach. Besides providing certainty, PJM argues that credit clearing solutions could provide attractive opportunities to RTO market participants to optimize the credit value of off-setting the positions that these companies hold in different market or trading environments, including across several RTOs.[106] In addition, PJM argues that the Commission's approach is not without precedent. In support, it notes that Elexon, the company that serves the balancing and settlement function in the United Kingdom, created a wholly-owned subsidiary to act as the counterparty to trading charge and reconciliation charge transactions to address the same type of mutuality concern. PJM also states that ISO–NE has effectively identified itself as counterparty to FTR transactions that are undertaken in its markets by defining itself as a forward contract merchant and/or swap participant within the meaning of the Bankruptcy Code.[107]

84. Similarly, CFTC staff believes that the proposal would materially reduce credit risk for ISOs and RTOs. CFTC staff also states that it is unusual to rely on credit arrangements that are not iron-clad and that the legal theory underlying Mirant's claims is well-known and easily available to any similarly-situated debtor in the future.[108]

85. J.P. Morgan supports the Commission's proposal because it will provide an ability to manage defaults, offset market obligations in instances of bankruptcy, and minimize the collateral requirements of market participants. J.P. Morgan agrees with the Commission that there is legitimate uncertainty as to whether the netting provisions will withstand a challenge in a bankruptcy proceeding because of the ambiguity related to the identity of the counterparty. In addition, J.P. Morgan notes that some ISOs and RTOs have tried to address the concern by requiring market participants to assign the ISO or RTO a perfected security interest in the receivables from the ISO or RTO.[109] J.P. Morgan is concerned that this approach is a substantial administrative burden that, if not executed flawlessly, might not fully protect against the bankruptcy of a market participant.

86. CCRO explains that it reviewed this issue through a designated subcommittee of member companies that conducted a comprehensive study on netting. It asserts that it is emerging "best practice" in intra-ISO netting for an ISO to create or designate a central counterparty entity through which market participants may execute transactions. CCRO encourages the Commission to formulate policy and regulations which enable cost-effective implementation of this best practice. In addition, it encourages the Commission to support innovations in netting consistent with emerging best practice.

87. Many commenters voice strong views in opposition to this proposal. CAISO and Midwest ISO note that the argument that transactions between a market participant and ISO/RTO are not mutual, and therefore cannot be set-off in bankruptcy, has only been raised once and that there may be reasons why the argument has not been raised again.[110] They encourage consideration of less burdensome alternatives.

88. Other commenters question whether, absent steps taken in this rulemaking, there will really be a problem in upholding netting in the bankruptcy context. For instance, Shell Energy urges the Commission to more clearly define the problem and that a speculative problem is not an adequate basis to change the fundamental nature and role of an RTO.[111] NRECA also asserts that the bankruptcy set-off risk to RTOs is largely hypothetical. MidAmerican Energy concurs with the joint comments of CAISO and Midwest ISO and asserts that the Mirant bankruptcy proceeding only marginally supports the proposition that an ISO or RTO may not be able to offset market participant obligations due to lack of mutuality.[112]

89. Dominion argues that the set-off risk has not yet been demonstrated and asserts that the proposal is unreasonable.[113] In addition, NYISO states that it has found no case law supporting the proposition that a creditor must be a central counter-party in a transaction to set-off payment obligations.[114] EPSA does not take a position on the proposal and instead asks the Commission to more clearly define the problem that it is trying to solve.

90. In contrast, NYISO argues that, because ISO and RTO tariffs specifically establish a contractual obligation of payment to the ISO or RTO, a bankruptcy court would likely allow an ISO or RTO to set-off the obligations of a market participant. Moreover, NYISO

[106] PJM March 29, 2010 Comments at 18–19.

[107] *Id.* at 10–11.

[108] CFTC March 29, 2010 Comments at 2 n.7.

[109] Midwest ISO has adopted an approach similar to this, discussed below.

[110] In the NOPR, the Commission cited the Mirant bankruptcy and resulting default in the CAISO market as support for its proposal that ISOs/RTOs clarify their ability to offset market obligations. NOPR, FERC Stats. & Regs. ¶ 32,651 at P 24 (2010). Mirant argued in bankruptcy that CAISO would not be able to show the mutuality required to establish a right of setoff under section 553 of the bankruptcy code. Memorandum by Wachtell, Lipton, Rosen & Katz to PJM regarding Setoffs and Credit Risk of PJM in Member Bankruptcies at 10–11 (Mar. 17, 2008) (found on Sept. 7, 2010 at *http://www.pjm.com/~/media/committees-groups/committees/crmsc/20080423/20080423-wachtell-netting-memo.ashx*). CAISO has since clarified that Mirant settled with CAISO, thus no court ever ruled on Mirant's arguments. Joint Comments of CAISO and Midwest ISO, March 15, 2010 Comments at 2–3.

[111] Shell Energy March 29, 2010 Comments at 8.

[112] MidAmerican Energy March 29, 2010 Comments at 7–8.

[113] Dominion March 29, 2010 Comments at 7–10.

[114] NYISO March 29, 2010 Comments at 15.

believes that a bankruptcy court may, for policy reasons, defer to the Commission-approved tariff provisions of the ISO or RTO, or uphold ISO or RTO netting under the doctrine of recoupment,[115] thereby circumventing a challenge for mutuality.[116]

91. Many commenters argue that it could increase costs, raise jurisdictional concerns, and create legal issues and tax implications. They recommend that the Commission consider alternative solutions, allowing ISOs and RTOs to work through their stakeholder processes, or requiring each ISO and RTO to report back to the Commission concerning their rights to net transactions and what rights they would assert in bankruptcy proceedings.

92. Six Cities urges the Commission to not adopt the proposal because it could increase the complexity of the settlement process and potentially create additional costly obligations and liabilities for market operators that market participants would have to pay. Six Cities believes that other mechanisms, such as net invoicing as utilized by CAISO, can be used to protect market participants.[117]

93. Citigroup agrees that netting, and set-off in bankruptcy, is an important tool for managing risk, but states that the proposal presents many complex issues related to netting, offsets, defaults and bankruptcy that will be different for each ISO and RTO. Citigroup states that each ISO and RTO has its own unique tariff terms and markets, thus implementation would have to be tailored to each market.[118] Therefore, Citigroup argues that each ISO and RTO should consider these issues through its stakeholder process. OMS is of two minds on this issue in that it supports the Commission's desire to clarify the legal foundation for the ISO/RTO to net, but believes that it is important that the proposal does not expose the ISOs and RTOs to unforeseen ramifications, such as increased liability or the incurrence of additional obligations.[119]

2. Technical Conference

94. The Commission held a technical conference to delve further into the issues raised by its proposal. The technical conference provided additional evidence on the ISOs and RTOs ability to net obligations and conduct setoff in the bankruptcy context. Mutuality was identified by several participants as important in allowing the ISOs and RTOs to perform this vital function, who asserted that mutuality was most easily achieved by the market administrator "taking title" or being the buyer to all sellers and seller to all buyers in all transactions in the market. Mr. Duane from PJM supported the Commission's proposal by stating: "* * * the obvious and direct way to establish mutuality is simply to be a contract party to the transactions that you're setting up."[120] Mr. Duane further stated: "I would regard the Commission's initiatives here as overdue" and "the proposal here would remove a real disability that is a cloud over the enforcement of a broad set of rights that the RTOs have in outside forums, particularly beyond this Commission."[121] According to Mr. Novikoff a "best practice" is "to create mutuality by using a central counterparty and have that counterparty deal with all of the participants."[122]

95. However, the Midwest ISO participant and the CAISO participant represented two different ways in which their organizations sought to deal with the issue, as opposed to the PJM proposal to change its tariff to allow an entity to explicitly take title and act as the central counterparty to achieve mutuality.

96. At the technical conference, Mr. Holstein of Midwest ISO discussed the "first short-pay, then uplift" system used by Midwest ISO, stating that it works well and is revenue neutral in all transactions. Mr. Holstein stated that, if a market participant doesn't pay a charge that it owes, which is the net charge of the invoice, Midwest ISO short-pays the other market participants who are net-owed funds in that billing cycle, thus remaining revenue neutral for that billing cycle. Midwest ISO later makes up the difference by "uplifting" the default to all market participants, that is, charging extra in the next billing cycle and redistributing the proceeds to those who were initially short-paid.[123] Further, any party in Midwest ISO who wishes to net their obligations across its various markets (e.g., real time, day ahead, reserves, etc.) must provide Midwest ISO a security interest in these transactions. By doing this, Midwest ISO asserts that it is able to safely set credit exposure to a net, rather than a gross, obligation. Midwest ISO stated that ten percent of its market participants grant Midwest ISO a security interest, but certain public power entities are not able to use that approach.[124] During the technical conference, participants noted the difficulties raised by using the security interest approach given that many lending agreements prohibit granting liens and some entities, such as municipalities, cannot engage in such practices.[125] For these reasons stakeholders in Midwest ISO decided against mandatory requirements of security interest and opted for voluntary use of security interest.

97. Mr. Daniel Shonkwiler of CAISO did not perceive a potential inability to offset market participants' claims and obligations as a risk, because CAISO's ordinary monthly settlements involve net invoices. Under CAISO's tariff, CAISO asserts that market participants only have the right to receive the net payment from CAISO for market sales, with no competing claims and obligations. CAISO indicates that a legal issue arises where a market participant fails to pay an invoice, but in a subsequent month, has a payment due back to it. In such a situation, CAISO states that its tariff allows it to recoup that later payment to pay the previous month's default. CAISO does not see a material risk because it does not assume a right to set-off when it is calculating the amount of financial security required. CAISO further states that its market is not at risk because it ensures that its market participants are adequately secured; many market participants are exclusively buyers or sellers, and thus netting their invoices would not reduce their exposure; litigating the issue would be so expensive as not to be worthwhile for a market participant in bankruptcy; and bankruptcy is rare in the CAISO

[115] "In bankruptcy, both recoupment and setoff are sometimes invoked as exceptions to the rule that all unsecured creditors of a bankrupt stand on equal footing for satisfaction. Recoupment or setoff sometimes allows particular creditors preference over others. Setoff is allowed in only very narrow circumstances in bankruptcy. But a creditor properly invoking the recoupment doctrine can receive preferred treatment even though setoff would not be permitted. A stated justification for this is that when the creditor's claim arises from the same transaction as the debtor's claim, it is essentially a defense to the debtor's claim against the creditor rather than a mutual obligation, and application of the limitations on setoff in bankruptcy would be inequitable." *Newbery Corp.* v. *Fireman's Fund Ins. Co.,* 95 F.3d 1392, 1400 (9th Cir. 1996) (quoting *In re B & L Oil Co.,* 782 F.2d 155, 157 (10th Cir. 1986)).

[116] NYISO March 29, 2010 Comments at 16–17.

[117] Six Cities March 29, 2010 Comments at 6.

[118] Citigroup March 29, 2010 Comments at 5.

[119] OMS March 16, 2010 Comments at 4–5.

[120] Testimony at Technical Conference on *Credit Reforms in Organized Wholesale Electric Markets,* Tr. 13:5–7 (May 11, 2010) (Mr. Vince Duane, General Counsel and Vice President, PJM).

[121] *Id.* at Tr. 15:25–16:1; 16:12–16 (Mr. Vince Duane, General Counsel and Vice President, PJM).

[122] *Id.* at Tr. 72:2–4; 72:15–16 (Mr. Harold S. Novikoff, Esquire, Wachtell, Lipton, Rosen & Katz).

[123] *Id.* at Tr. 18:1–20:2 (May 11, 2010) (Mr. Michael Holstein, Chief Financial Officer, Midwest ISO).

[124] *Id.* at Tr: 45:18–48:13.

[125] *Id.* at Tr: 87: 6–25 (Mr. Stephen J. Dutton; Barnes & Thornburg).

market.[126] CAISO's method of "net invoicing" characterizes a market participant's monthly bill as one transaction with multiple line items. One bankruptcy expert testified that such a "tariff" approach to the problem is weaker than the establishment of mutuality and even weaker than the use of "collateral" or security interest to allow netting, and that a hostile creditors committee would be unlikely to agree to claims made on the basis of a tariff, rather than established mutuality.[127]

98. The Commission also invited parties to submit further comment in response to the issues discussed in the technical conference.

3. Comments Submitted After the Technical Conference

99. Several commenters assert that it is unlikely that a bankruptcy court would refuse an ISO/RTO's netting a market participant's obligations and therefore the Commission's concern does not justify the Commission's central counterparty proposal.[128] Dominion states that CAISO has identified a number of practical reasons why the risk is minimal, such as that many market participants are unlikely to be in a position to use setoff because they are not both a buyer and seller in a given market. Dominion and SPP state that most market participants that want to continue to operate post-bankruptcy require transmission service and therefore will work with the ISO/RTO during bankruptcy proceedings. According to Midwest ISO, only an estimated 20 percent of its market participants are not dependent on transmission service, and thus do not net any transactions, and potentially would challenge the ISO's/RTO's ability to off-set. NYISO believes that its credit exposure is limited because most market participants in New York are not both buyers and sellers of energy in NYISO-administered markets.

100. CCRO acknowledges that a market participant going into bankruptcy and challenging the ISO's/RTO's ability to net transactions is a low probability event, but it argues that the Commission cannot ignore such potentially high risk events. However, CAISO believes that the Commission needs additional evidence regarding the scope of the risk. CAISO suggests that the Commission first determine the number of market participants that likely would challenge set-off and then gather historical data about the difference between their net position and gross credits. NYISO also questions the scope of the risk, and asserts that it would have sufficient collateral available to recover the market participant's payment obligations to the NYISO because it calculates distinct credit requirements for each of its markets without assuming that it will be able to net across markets in a bankruptcy proceeding. NYISO also asserts that its tariff allows it to draw from its pre-funded working capital fund to facilitate timely payment to market participants and maintain the liquidity of the NYISO-administered markets.

101. Many commenters argue that the central counterparty approach does not definitively eliminate the risk that a bankruptcy court would refuse an ISO/RTO's netting obligations between the ISO/RTO and the debtor market participant. For instance, Eastern Massachusetts, Dominion and NYISO believe that a bankruptcy court that is hostile to set-off would question whether the ISO/RTO is the central counterparty in form only and not substance. NYISO explains that taking title is just one factor that a bankruptcy court may consider in determining whether there is mutuality between the ISO/RTO and the market participant. NYISO points out that under PJM's proposal, PJM is only obligated to pay market sellers to the extent of its collections from market buyers. Thus, NYISO argues that PJM may not truly be taking on the debt obligation for market purchases, but rather be acting as an agent for many different buyers. Although NYISO acknowledges that this argument is unlikely to succeed, it demonstrates that the risk is not eliminated. In addition, Dominion points to Midwest ISO's argument that the central counterparty model does not defend against a challenge based on the absence of mutuality in netting across commodities and services. However, bankruptcy counsel noted that there would have to be a major change in case law for a challenge to an identified central counterparty to be successfully upheld regarding its ability to set-off in a bankruptcy.[129]

102. Numerous commenters oppose the central counterparty proposal because they believe that it will require the ISOs/RTOs to expend significant resources to implement it and may have negative consequences for the ISOs/RTOs and their market participants. According to Dominion, EPSA, Shell Energy, and SPP, the proposal is not a clarification in status, but instead is a radical departure from the current business model used for ISO/RTO transactions. Shell Energy believes that, as a result of the clarification, existing ISOs/RTOs will be administrators only and the new central counterparty will be a new public utility that should be treated similar to other public utilities. Thus, Shell Energy argues that implementing central counterparty status will require a radical restructuring of ISOs/RTOs.

103. As for potential consequences and impacts on the ISOs/RTOs, Constellation cites Midwest ISO's Chief Financial Officer's comment that if an ISO/RTO is the central counterparty to energy market transactions, then its revenue neutrality may be jeopardized and liquidity and insolvency risk is introduced to the market.[130] Similarly, EPSA states that Midwest ISO believes that it would be obligated to pay for defaults in the event other parties to the transaction could not pay, and that an event like this potentially could bankrupt the ISO/RTO. Eastern Massachusetts highlights CAISO's comments regarding the potential for increased cost of credit used to fund market operations.

104. CAISO also states that, by becoming a central counterparty to transactions within its market, it could become a "point of regulation" under greenhouse gas regulatory schemes. CAISO states that the Air Resources Board of California is regulating greenhouse gas emissions which extend to electricity produced and/or consumed within California. CAISO is concerned that if it is required to take title to the transactions, it will be subject to greenhouse gas regulations with no ability to procure alternative, non-carbon intensive fuels in the power pool. In fact, CAISO states that such a construct could provide an incentive for electricity exporters into California to dump the energy onto CAISO's system prior to entering California, so the exporters would not be subject to the greenhouse gas regulations. CAISO further states that national clearing could take place without ISOs and RTOs becoming the counterparty to transactions within their markets.[131]

105. Dominion, NYISO, Shell Energy and SPP argue that the central counterparty model potentially exposes ISOs/RTOs to new requirements, risks

[126] *Id.* at Tr: 21:22–26:14 (Mr. Daniel J. Shonkwiler, Senior Counsel, CAISO).

[127] *Id.* at Tr: 89: 1–25–90: 1–19 (Mr. Harold Novikoff, Wachtell, Lipton, Rosen & Katz).

[128] NYISO June 8, 2010 Comments at 11; CAISO June 8, 2010 Comments at 5; Dominion June 8, 2010 Comments at 8; Midwest ISO June 8, 2010 Comments at 3.

[129] *Id.* at Tr: 101:1–12 (Mr. Harold Novikoff, Wachtell, Lipton, Rosen & Katz).

[130] Constellation June 8, 2010 Comments at 4.

[131] CAISO July 23, 2010 Comments at 6.

and costs associated with complying with generally acceptable accounting principles requirements, loss of legal status, indemnification, and tax liability. They also believe that there may be unintended consequences that could cause significant harm, such as the imposition of state and local sales taxes on ISOs/RTOs, implications regarding the independence of an ISO/RTO, regulatory uncertainty resulting from potential multi-agency jurisdictional oversight of ISOs/RTOs, negative impacts on financing options, and increases in financing costs. In light of these uncertainties, Constellation argues that the Commission should develop a full record, particularly regarding the consequences for ISOs/RTOs.

106. PG&E also believes that CAISO already is considering and implementing numerous changes and improvements to its tariffs and markets and therefore does not have sufficient time to undertake additional effort.

107. Eastern Massachusetts argues that the central counterparty proposal could result in interference with the ability of eligible municipal market participants to continue existing tax exempt financing or to use such financing to expand productive assets. Although NEPOOL does not take a formal position in its comments, it also believes that the central counterparty proposal could have profound and unintended consequences on market participants. SPP is concerned that, if the ISOs/RTOs operate as clearinghouses, then market participants such as cooperatives or municipalities will be unable to meet credit requirements.

108. CCRO generally supports the Commission's proposal and believes that any approved procedure should be standardized across the ISOs/RTOs to the extent practical. CCRO also encourages the Commission to adopt rules that do not deter the development of innovations that can further limit credit exposure, such as the advent of netting of transactions across all the ISOs/RTOs and the over-the-counter markets.

109. Some commenters argue that there are less costly approaches that ISOs/RTOs can employ to address the Commission's concerns without adopting the central counterparty proposal.[132]

110. Eastern Massachusetts argues that other changes in credit policies proposed under the NOPR may reduce the magnitude of any potential exposure without any need to adopt a central counterparty provision. Dominion and Midwest ISO believe the risk has been significantly mitigated by other risk management tools that ISOs/RTOs already have implemented, including shorter settlement periods. Dominion urges the Commission to fine tune these tools before making any radical changes to the ISO/RTO structure. Along those lines, Shell Energy argues that the better solution is to rely on a combination of a cap on unsecured credit and a seven-day billing cycle.

111. Other comments identify different approaches to addressing the Commission's concerns. EPSA believes that, in addition to the central counterparty proposal, there are two other possible solutions, including creating a collateral arrangement that will reach the same economic result and rewriting tariffs so that they establish a net obligation, rather than a gross obligation. EPSA argues that the Commission either should conduct a more thorough exploration of these three options or allow each ISO/RTO to work with its stakeholders to create a regionally tailored solution.

112. CAISO, NYISO, and SPP also point to Midwest ISO's voluntary security interest approach as an alternative to the central counterparty approach. Although CAISO believes that Midwest ISO's approach is less costly and simpler to implement, it also believes it would require a long lead time to facilitate discussions between market participants and their lenders. SPP notes concerns with the security interest approach, because it may be difficult for most market participants to supply such a security interest due to existing financing arrangements and the burden of perfecting a security interest.

113. Dominion argues that it may not be necessary to amend ISO/RTO tariffs because there are existing defenses of netting under the current ISO/RTO structure that moot the need for the NOPR proposal. For instance, SPP notes that a bankruptcy court may be hesitant to set aside a Commission-approved tariff that requires payment netting or set-off. Dominion points to Midwest ISO's and NYISO's comments that the tariff, which market participants agree to be bound by, satisfies the mutuality of party requirement.

114. NYISO also argues that its existing tariff may provide sufficient protection in the event a market participant raises the mutuality argument. According to NYISO and SPP, the commercial relationship between ISOs/RTOs and their market participants is distinguishable from the typical scenarios in which parties have successfully challenged setoff rights in a bankruptcy proceeding. According to NYISO, the important distinction is that the net obligations are between NYISO and a specific debtor market participant directly and NYISO is acting in the same capacity on both sides of market transactions.

115. As an alternative to seeking setoff in bankruptcy, CAISO, NYISO and SPP believe that a bankruptcy court likely would allow it to net obligations under the equitable defense of recoupment. According to NYISO, a bankruptcy court would likely uphold the NYISO's right to recoupment within each market because it would be inequitable for a market participant to benefit from its participation in a single market without also having to meet its obligations related to its transactions in that market.

4. Commission Determination

116. Organized wholesale electric markets typically arrange for settlement and netting of transactions entered into between market participants and the market administrator, but do not take title to the underlying contract position of a participant at the time of settlement. The Commission is concerned that, if a market participant files for bankruptcy protection, it may argue against setting-off amounts owed against amounts to be paid to an ISO or RTO, which could lead to a larger default in the market that must be socialized among all other participants. The Commission supports netting, which allows ISOs and RTOs to collect less collateral from market participants,[133] but netting must be established in a way that helps ensure that market participants are protected from a substantial default should a participant file for bankruptcy protection.

117. While the Commission, in response to what it still considers to be a legitimate concern, originally proposed requiring ISOs and RTOs to establish themselves as the central counterparty to transactions with market participants, the Commission is open to considering other solutions to this concern. The Commission directs each ISO and RTO to submit a compliance filing that includes tariff revisions to include one of the following options:

- Establish a central counterparty as discussed above.
- Require market participants to provide a security interest in their transactions in order to establish collateral requirements based on net exposure.

[132] CAISO June 8, 2010 Comments at 6–7.

[133] *Policy Statement,* 109 FERC ¶ 61,186 at P 29.

• Propose another alternative, which provides the same degree of protection as the two above-mentioned methods.

• Choose none of the three above alternatives, and instead establish credit requirements for market participants based on their gross obligations.

118. This compliance filing must be submitted by June 30, 2011, with the tariff revisions to take effect October 1, 2011.

119. Evidence put before the Commission has demonstrated the need for establishing better protection against loss due to bankruptcy of a market participant. Allowing netting without adequate protection could pose a risk to the ISO and RTO markets and particularly their participants who would be assessed any shortfall. The ability for an ISO or RTO to net amounts owed to and owed by a market participant that has filed for bankruptcy protection is not clear. At the technical conference, Mr. Novikoff testified that "bankruptcy courts are quite hostile to setoff." [134] The Commission also notes that a recent court decision affirmed a bankruptcy court's finding that, "the mutuality required by Section 553, 'cannot be supplied by a multi-party agreement contemplating a triangular setoff.' " [135] Our effort to limit the amount of unsecured credit extended in ISO and RTO is less meaningful if an ISO or RTO establishes a collateral requirement based on net exposure that can not withstand a challenge in bankruptcy court. As to the view that there is a low probability that a market participant will file for bankruptcy and then challenge an ISO's/RTO's ability to net, the Commission agrees with CFTC staff and the CCRO that that this low probability is balanced by a high cost to market participants and the stability of the market if it does occur.

120. While we continue to believe that the NOPR proposal provides a sound approach to this issue, we are open to considering other solutions. Two alternatives to the central counterparty solution were presented; one proposed by the CAISO and one proposed by Midwest ISO, described in more detail in the comment section above. The Commission is convinced that Midwest ISO's approach, in which market participants grant a security interest in their transactions to Midwest ISO, provides a basis for the ISO or RTO to net market obligations. A security interest is a form of collateral which provides certain protection in the bankruptcy context, but it may be unworkable under some lender agreements.[136] The Commission notes that not all parties may be able to grant a security interest in their transactions, however, this method provides an alternative for ISOs and RTOs that wish to allow market participants to continue to net their transactions. However, the Commission is concerned that CAISO's method of "net invoicing," which treats all events on a market participant's monthly invoice as one transaction, may not be adequate in the context of a bankruptcy.[137] Because of the uncertainties about the viability of CAISO's theory under bankruptcy law, the Commission does not believe that market participants should be allowed to net their financial obligations based on CAISO's "net invoicing" solution.

121. Some participants have suggested that the Commission direct that all ISO/RTO tariffs have explicit language allowing these markets to perform netting and set-off to provide legal cover in bankruptcy. While RTOs and ISOs may propose such tariff language as an additional measure, the Commission believes that it is not sufficient protection to simply direct the ISOs and RTOs to include the ability to net in their tariff. Based on testimony cited above, the Commission is concerned that, if the issue were raised in bankruptcy court, the existence of a Commission-approved tariff, even with such language, may not persuade a bankruptcy court to allow the set-off of financial obligations between an ISO/RTO and a market participant who is in bankruptcy. For this reason, the Commission will require more than mere tariff language to ensure the right of an ISO/RTO to net in the bankruptcy context. In the absence of a central counterparty, security interest, or another method that provides the same degree of protection to support netting, the remaining solution is to establish credit requirements to gross market obligations rather than net obligations.

122. Many parties also state that the Commission should not pursue the counterparty model due to tax and administrative costs. Given that ISOs and RTOs already function in ways similar to a central counterparty, it is not clear how it will lead to increased administrative costs.[138] As to possible tax implications, no specific evidence has been presented showing that the central counterparty model will lead to increased tax obligations. However, we need not decide these points here, and RTOs and ISOs may consider these points in deciding how to comply with this Final Rule.

E. Minimum Criteria for Market Participation

123. The Commission has always been wary of unnecessary barriers to entry to market participants, with a goal of ensuring sufficient participation, adequate liquidity, and competitive results. However, this consideration must be balanced with protecting the market from risks posed by under-capitalized participants without adequate risk management procedures in place. Having minimum criteria in place can help minimize the dangers of mutualized defaults posed by inadequately prepared or under-capitalized participants.

124. Consequently, the Commission proposed that each ISO and RTO have tariff language to specify minimum participant criteria for all market participants. The Commission sought comment on the type of process used to arrive at the criteria and recommendations on what the criteria should be.

1. Comments

125. The proposal to require minimum participation criteria has widespread support. Parties such as Citigroup Energy, Dynegy, NEMA, NEPOOL, and PG&E favor the proposal. The OMS suggests requiring market participants in FTR markets to have a minimum net worth. CFTC staff suggests something similar; participants in FTR markets should have a minimum capitalization. CFTC staff also states that the Commission should establish a system to evaluate the risk management capabilities of each prospective participant at the time of admission and of each participant on a periodic basis after admission.

126. DC Energy suggests that the CFTC and Securities and Exchange Commission (SEC) requirements for participation in their markets could be a basis for determining minimum

[134] Testimony at Technical Conference on *Credit Reforms in Organized Wholesale Electric Markets,* Tr: 65: 23–25 (May 11, 2010) (Mr. Harold Novikoff, Wachtell, Lipton, Rosen & Katz).

[135] *Chevron Products Co.* v. *SemCrude, L.P.,* 428 B.R. 590, at 594 (D. Del. 2010) (*quoting In re SemCrude, L.P.,* 399 B.R. 388, 397–398 (Bankr. D. Del. 2009)). The court goes on to note that a "contract exception" does not exist under section 553, 11 U.S.C. 553, which governs set-off under the bankruptcy code. *Id.*

[136] *Id.* at Tr. 84:5–25, 85:1–22 (Iskender H. Catto; Kirkland & Ellis on behalf of the Committee of Chief Risk Officers).

[137] *Id.* at Tr: 73:16–21 (May 11, 2010) (Mr. Harold Novikoff, Wachtell, Lipton, Rosen & Katz).

[138] As to the effect on costs of establishing a counterparty in each ISO or RTO, experience with PJM to date suggests costs will not increase. *See,* e.g., *PJM Interconnection, L.L.C.,* 132 FERC ¶ 61,207, at P 47 (2010) (noting that, in establishing PJM Settlement as a counterparty, PJM is not changing its administrative charges and "that the costs that PJM Settlement will incur are costs that PJM already incurs today.")

requirements. J.P. Morgan, likewise, recommended that every market participant in the ISO/RTO markets meet the requirements of an "Eligible Contract Participant" as defined in the Commodity Exchange Act.[139]

127. APPA supports development of ISO/RTO rules that limit the activities of "financial-only" market participants, including maximum position and credit limits for financial-only ISO/RTO market participants and suggests a follow-on NOPR dealing specifically with these issues. NRECA suggests that ISOs/RTOs should be encouraged to develop minimum participation criteria for cooperative utilities that would be different than investor-owned utilities.

128. Morgan Stanley agrees that certain risk management capabilities and minimum capital requirements be established but cautioned against making these criteria too onerous. Moreover, Morgan Stanley stated that criteria applied only to financial-only participants should be avoided. A similar argument was made by the Western Power Trading Forum (WPTF), which states that objective criteria should apply to all market participants. WPTF further states that, if the Commission seeks to "enhance certainty and stability in the markets," then it should require each ISO/RTO to apply their credit policies to all market participants.

129. Many parties, such as Detroit Edison, Direct Energy, PSEG and SCE, recommend that the stakeholder process should determine appropriate criteria in each ISO and RTO. On the other hand, Dominion asserts that the proper forum for establishing such criteria is the current rulemaking proceeding, and not the "popular vote" of market participants with competing interests in the stakeholder process.

130. Other parties did not agree on the need for minimum criteria.[140] Midwest TDUs suggest the Commission is not well positioned to design such criteria. The NYTOs argue the need for such criteria has not been established. Consumers Energy states that, as long as each RTO accurately determines creditworthiness, there is no need to further specify minimum criteria for participation. Financial Marketers argue that erecting barriers to market entry through the establishment of market participation criteria, such as minimum net worth or minimum size requirements, would be anticompetitive, unjust, and unreasonable.[141]

2. Commission Determination

131. The Commission is persuaded that each ISO and RTO should include in its tariff language to specify minimum participation criteria to be eligible to participate in the organized wholesale electric market, such as requirements related to adequate capitalization and risk management controls. This will help protect the markets from risks posed by under-capitalized participants or those who do not have adequate risk management procedures in place. Minimum criteria for market participation could include the capability to engage in risk management or hedging or to out-source this capability with periodic compliance verification, to make sure that each market participant has adequate risk management capabilities and adequate capital to engage in trading with minimal risk, and related costs, to the market as a whole.

132. However, the Commission will not specify criteria at this time, and instead directs that each ISO and RTO develop these criteria through their stakeholder processes. Consequently, the Commission directs each ISO and RTO to submit a compliance filing that includes tariff revisions to establish minimum criteria for market participation. Each ISO and RTO will need to consider the minimum criteria that are most applicable to its markets, this compliance filing must be submitted by June 30, 2011 and to take effect by October 1, 2011.

133. In taking this approach, the Commission is aware that stakeholder groups with competing interests may disagree on these criteria, and so the Commission will review proposed tariff language to ensure that it is just and reasonable and not unduly discriminatory. The Commission believes that such standards might address adequate capitalization, the ability to respond to ISO/RTO direction and expertise in risk management. The Commission directs that these criteria apply to all market participants rather than only certain participants.

134. The Commission does not agree with the argument that minimum criteria are not necessary if ISOs and RTOs apply vigorous standards in determining the creditworthiness of each market participant. While an analysis of creditworthiness may capture whether the market participant has adequate capital, it may not capture other risks, such as whether the market participant has adequate expertise to transact in an ISO/RTO market. Moreover, the ISOs' and RTOs' ability to accurately assess a market participant's creditworthiness is not infallible, and this additional safeguard should not be unduly burdensome compared to the need to protect the stability of the organized markets.

F. Use of "*Material Adverse Change*"

135. Events in credit markets can change the fortunes of a participant very quickly.[142] Consequently, risk management is not a static endeavor. Every market administrator needs to perform frequent risk analysis on its participants to ensure that existing collateral and creditworthiness standards are sufficient. Nevertheless, even with such scrutiny, events may transpire that require the market administrator to invoke a "material adverse change" clause to justify changing the risk assessment of a participant and requiring additional collateral.

136. The Commission is concerned that ambiguity as to when an ISO or RTO may invoke a "material adverse change" clause could itself have damaging effects on a market administrator's ability to manage risk on behalf of all the participants. If a market administrator is concerned about when it may invoke a "material adverse change" clause, it could delay requests for collateral or orders for the cessation of a participant's right to transact, which could further endanger the other participants and, in extreme cases, the market function itself.

137. In addition, material adverse change clauses need to be sufficiently forward-looking to allow market administrators to request additional collateral before a crisis starts. The Commission is concerned that any attempt to acquire additional collateral during or after a crisis has begun would either fail or destabilize the party asked to provide additional credit. Specifically, news that a market participant was unable to secure additional collateral could negatively affect the perception of the market participant's viability and potentially undermine confidence in an organized market's viability.

138. The Commission therefore proposed in the NOPR to require ISOs

[139] J.P. Morgan Comments at 14 (referring to the Commodity Exchange Act definition of Eligible Contract Participant. 7 U.S.C. 1a(12)). Examples of criteria-determined Eligible Contract Participants include financial institutions, insurance companies, mutual funds, and corporations with assets in excess of $10 million.

[140] Midwest TDUs, NYTOs, Consumers Energy, Wisconsin Parties and Financial Marketers.

[141] Financial Marketers March 29, 2010 Comments at 2–3.

[142] As noted above, Lehman Brothers was rated as "investment grade" by all ratings agencies on Friday, September 12, 2008, only to file for bankruptcy on Monday, September 15, 2008.

and RTOs to include in their tariffs language to more clearly specify circumstances when the market administrator may invoke a "material adverse change" clause.

1. Comments

139. CAISO, Midwest ISO, NYISO, SPP, California Department of Water Resources State Water Project (SWP), Midwest TDUs, NRECA, Detroit Edison, EPSA, Mirant, NIPSCO, Powerex, Xcel, and IRC state that the Commission should preserve the authority for each ISO/RTO to maintain flexibility as to when to request a collateral call for unforeseen events. IRC presents an example of language of such a material adverse change provision:

> A "Material Change" in financial status may include, but is not limited to, the following:
> (i) A downgrade from any rating by any rating agency;
> (ii) Being placed on credit watch with negative implication by any rating agency;
> (iii) A bankruptcy filing or other insolvency;
> (iv) A report of a significant quarterly loss or decline of earnings;
> (v) The resignation of key officer(s); or
> (vi) The filing of a material lawsuit that could materially adversely impact current of future financial results.[143]

140. Hess states that the material adverse change clauses in the ISO/RTO tariffs must include non-exclusive illustrative lists of potential material change events, and require ISO/RTO credit officers to exercise caution prior to invoking the "material adverse change" clause.

141. CFTC staff notes that it is critical for a market administrator to have the ability to call for additional collateral in unusual or unforeseen circumstances. Therefore, CFTC staff recommends either: (1) Removing any requirement for a market administrator to wait until a participant experiences a "material adverse change" in credit status before calling for additional collateral to support FTR positions; or (2) permit a market administrator to define "material adverse change" in a manner that would allow a market administrator to have broad discretion in calling for additional collateral to support FTR positions.

142. CPUC, Dynegy, and SCE state that they support clear guidelines on the definition of "material adverse change." CPUC and SCE argue that CAISO's current tariff provision specifying under what circumstances a market administrator may invoke a "material adverse change" clause to require additional collateral is adequate.[144] Therefore, CPUC requests that the Commission adopt guidelines that would allow the CAISO to maintain the status quo. Shell Energy also states that the Commission should propose a generic material adverse change provision, then allow the ISOs and RTOs to work with stakeholders to produce an illustrative list of instances where material adverse change provisions would or should be triggered and to file that language with the Commission. However, even then, the tariff language should still allow a market administrator to act in the event that special circumstances arise.

143. EEI states that the ISO/RTO should be able to explain its procedures and provide the types of circumstances under which it would invoke the "material adverse change" clause that requires a market participant to post collateral within two days. EEI also states that the procedures that the ISO/RTO employs should, at a minimum, provide written notice of the reasons for its action within thirty days and an opportunity to appeal to the Chief Executive Officer of the ISO/RTO. Additionally, EEI states that the Commission should require the ISOs/RTOs to incorporate in their tariffs examples of the conditions under which they will invoke a "material adverse change" clause with the explicit requirement that the ISO/RTO put the rationale for its determination in writing and allow the market participant an opportunity for an appeal.

144. MidAmerican states that it is not practical nor prudent to require a comprehensive and all-inclusive list of circumstances in which an ISO/RTO may invoke a material adverse change, but the required justification provided by an ISO/RTO for invoking a material adverse change provision should include reasonable, objective evidence of the occurrence of an identifiable event or condition with respect to the affected market participant. MidAmerican also states that the Commission should require each ISO/RTO to specify a reasonable process for resolving any disagreement between the ISO/RTO and market participants with respect to the impact of any identified event or condition on the ability of the market participant to continue as a going concern or otherwise honor its obligations to the ISO/RTO.

145. APPA proposes a committee on "material adverse changes," that is, a balanced advisory group of RTO employees dealing with credit issues and their counterparts from representatives of various types of RTO market participants. This group would be responsible for developing "model" protocols, to be the subject of a subsequent NOPR, which would guide an RTO in invoking the material adverse change provisions of the credit provisions of its tariff and business practices.[145]

146. Because "material adverse change" is ambiguous and could be inconsistently and inappropriately applied, PG&E recommends that it not be incorporated into ISO/RTO tariff language. However, if the Commission does incorporate such language, PG&E recommends an initiative to develop clearer definitions. In addition, PG&E states that invocation of a "material adverse change" clause should be selective and limited to only adverse conditions due to a participant's financial strength or ability to meet its contractual obligations, but not the requirements of the customers and/or the regulators.

2. Commission Determination

147. We adopt the NOPR proposal to require ISOs and RTOs to specify in their tariffs the conditions under which they will request additional collateral due to a material adverse change. However, we are persuaded by commenters that this list should not be exhaustive and the tariff provisions should allow the ISOs and RTOs to use their discretion to request additional collateral in response to unusual or unforeseen circumstances. We are also persuaded that a market participant should receive a written explanation explaining the invocation of the material adverse change clause.

148. While market participants are generally familiar with "material adverse change" clauses, a market administrator's right to invoke such a

[143] IRC March 29, 2010 Comments at 9.

[144] CAISO's current "material adverse change" clause is as follows:

> CAISO may review the Unsecured Credit Limit for any Market Participant whenever the CAISO becomes aware of information that could indicate a Material Change in Financial Condition. In the event the CAISO determines that the Unsecured Credit Limit of a Market Participant must be reduced as a result of a subsequent review, the CAISO shall notify the Market Participant of the reduction, and shall, upon request, also provide the Market Participant with a written explanation of why the reduction was made.
>
> Material negative information in these areas may result in a reduction of up to one hundred percent (100%) in the Unsecured Credit Limit that would otherwise be granted based on the six-step process described in Section 12.1.1.1 of the ISO Tariff. A Market Participant, upon request, will be provided a written analysis as to how the provisions in Section 12.1.1.1 and this section were applied in setting its Unsecured Credit Limit.

"Material Change in Financial Condition," CAISO Tariff Appendix A at Original Sheet No. 894.

[145] APPA March 29, 2010 Comments at 35.

clause must be clarified in order to avoid any confusion, particularly during times of market duress, as to when such a clause may be invoked. Specifically, the Commission is concerned that a market participant in financial straits could exploit ambiguity as to when a market administrator may invoke a "material adverse change," or a market administrator may be uncertain as to when it may invoke a "material adverse change," and so delay, or even prevent entirely, actions that would insulate the market from unnecessary damage.

149. The Commission therefore directs each ISO and RTO to submit a compliance filing that includes tariff revisions to establish and clarify when a market administrator may invoke a "material adverse change" clause to compel a market participant to post additional collateral, cease one or more transactions, or take other measures to restore confidence in the participant's ability to safely transact. The tariff revisions should state examples of which circumstances entitle a market administrator to invoke a "material adverse change" clause, but this list should be illustrative, rather than exhaustive. The tools used to determine "material adverse change" should be sufficiently forward looking to allow the market administrator to take action prior to any adverse effect on the market, but provide the market participants with notice as to what events could trigger a collateral call or a change in activity in the market. We believe that the language proposed by the IRC is a good start, but note that it generally includes items that potentially lag the events that constitute a material adverse change. For instance, credit ratings tend to change slowly. As discussed above, the several ISOs have noted that they were concerned about large, destabilizing defaults from investment-grade companies. Other criteria, like large changes in the price for a collateralized debt security, are potentially more forward looking and would allow the ISO or RTO to request collateral before a market participant is in financial distress.

150. The Commission agrees with those parties that suggest that it would be short-sighted to limit the discretion of the market administrator to only those specified instances when it could invoke a "material adverse change" clause to compel certain actions. Experience has demonstrated that unforeseen circumstances can arise, which will require action to protect the markets from ongoing disruption. We are not adopting a *pro forma* list ourselves, but allowing the ISOs and RTOs to develop their own "material adverse change" clauses. Nevertheless the compliance filing related to this directive must be submitted by June 30, 2011 to take effect no later that October 1, 2011.

151. The Commission is also sensitive to the need for a record of the market administrator's actions when exercising this discretion. Therefore, the Commission directs the ISOs and RTOs to provide reasonable advance notice [146] to a market participant, when feasible, when the ISOs and RTOs are compelled to invoke a "material adverse change" clause. The notification should be in writing, contain the reasoning behind invocation of the "material adverse change" clause, and be signed by a person with authority to represent the ISO/RTO in such actions. This will allow for a timely remedy for continued market participation, but also provide for a possible dispute to be resolved after the fact.

G. Grace Period to "Cure" Collateral Posting

152. Under certain circumstances, a market administrator may require the market participant to post additional collateral in order to continue to transact. Currently the organized wholesale electric markets vary as to the amount of time they allow a market participant to post additional collateral to "cure" its position. NYISO and PJM allow two days to provide additional collateral.[147] Midwest ISO allows two to three days (the market participant gets an additional business day if notice of invocation of the material adverse change clause occurs after noon Eastern Daylight Time).[148] CAISO and SPP allow three days.[149] In general, ISO–NE requires almost immediate remedy from market participants who exceed all of the credit tests. By 10 a.m. the next morning, all typical market functions of the market participant are suspended (some functions are lost immediately). In the event that this credit test failure was caused by the market participant or a guarantor dropping a single rating grade or from a bank issuing a letter of credit being downgraded, however, it may have five to ten days to "cure" this situation.[150]

153. Establishing a brief but standard time period to "cure" a collateral posting will bring certainty to the market which can stabilize the market and its prices, while controlling the risk and costs of a default. However, the Commission is aware of the importance of the continued reliable delivery of electricity and that some market participants have "provider of last resort" obligations. Consequently, the Commission attempted to strike a balance that allows an entity who is required to post additional collateral a reasonable chance to find a provider of capital—a bank or similar creditworthy institution—to assist in maintaining that participant's activity, while at the same time not posing a risk to the market. The Commission therefore proposed in the NOPR a two-day time limit for entities to post additional collateral and sought comment on the appropriate time limit.

1. Comments

154. The IRC agrees that establishing an outer limit on the amount of time granted for the posting of additional collateral will promote confidence in the ISO/RTO markets by limiting default exposure and by shortening collateral posting periods.[151] The Joint Commenters, EEI, PSEG, and Wisconsin Parties support standardization across the ISOs/RTOs, while NRECA, NIPSCO, and SCE support allowing the ISOs/RTOs and their stakeholders discretion to decide whether to revise their tariffs' time periods for curing collateral calls. NIPSCO claims that the Commission and ISOs/RTOs should be mindful that shortening the time a market participant has to react to margin calls could result in a higher rate of defaults.[152] APPA believes the time period to cure collateral calls should be referred to the working group APPA recommends for Material Adverse Changes.[153] NEPOOL argues that the ISO–NE Financial Assurance Policy [154] currently provides a suitable level of protection and urges that the Commission not issue any final

[146] We will leave to the discretion of the individual ISOs and RTOs how much notice may be reasonable in particular circumstances.

[147] NYISO Tariff, Attachment K (June 30, 2010) Section 26.8.3 for wholesale transmission service charges (virtual transactions and demand side resources offering ancillary services policies differ and may be result in shorter required response times); PJM Interconnection Tariff (6th Revised Version), Seventh Revised Sheet No. 523K.

[148] Midwest ISO Tariff (4th Revision), Sheet No. 2481.

[149] California Independent System Operator Corporation, Fifth Replacement FERC Electric Tariff, Section 12.4; Southwest Power Pool, Fifth Revised Electric Tariff, Original Sheet No. 717.

[150] ISO New England Inc. Transmission, Markets and Services Tariff at 106–09 (Aug. 30, 2010).

[151] IRC March 29, 2010 Comments at 9.

[152] NIPSCO March 29, 2010 Comments at 9.

[153] APPA March 29, 2010 Comments at 33–35.

[154] The ISO–NE Financial Assurance Policy includes credit review procedures to assess the ability of an applicant or of a market participant to pay for service transactions under the Tariff, identifies alternative forms of security deemed acceptable to the ISO, and provides the conditions under which the ISO will conduct business in a non-discriminatory way so as to avoid the possibility of failure of payment and to deal with market participants who are delinquent. ISO–NE Tariff, Section I, Exhibit IA.

rule that would require changes to that policy.[155]

155. Certain parties believe there should be different time periods for certain market participants. For example, while SWP supports a standardized time period across ISOs/RTOs, it believes the time period should also recognize the differences in market participants. SWP states that entities that participate in markets on a purely financial basis should post additional collateral within two days, but entities with an obligation to serve should have a minimum of three days.[156] Basin Electric believes the length of the cure period should be related to the severity of the material adverse change giving rise to the need to cure.[157] New Jersey Public Power suggests that a longer, sixty-day period is more appropriate for municipal utilities.[158]

156. Regarding the appropriate time period to post additional collateral, several parties from California [159] support keeping the current CAISO rule of a three-day cure period. These parties express concerns about the burdens of a shorter time period. For example, Six Cities argue that the internal review and authorization processes applicable to collateral commitments for Six Cities would make it difficult to post additional collateral within two business days, so the current three-day period should remain in effect, at least for governmental entities.[160]

157. Other parties, however, believe a two-day period to post additional collateral is more appropriate. Calpine requests that the Commission require ISOs and RTOs to adopt a standardized two-day cure period.[161] DC Energy, Direct Energy, Dominion, and Dynegy all support a standardized two-day cure period across all ISOs/RTOs. Midwest ISO and NRECA support a two-day cure period. Midwest ISO states that it views this proposal as generally being a standard practice in wholesale electric markets.[162] NRECA acknowledges that the standard financial industry practice allows two business days to post additional collateral after receipt of the demand, but the ISO/RTO stakeholder process is the best vehicle for addressing this on a regional basis.[163] Morgan Stanley and the NYTOs find that the current two-day period is sufficient in PJM and NYISO, respectively.[164] OMS, Consumers Energy, EPSA, FirstEnergy, Shell Energy, and CEI and MidAmerican state that two days is a reasonable amount of time to post additional collateral.

158. Additional parties have various opinions on the appropriate time period to post additional collateral. While SPP currently requires market participants to post additional security within three days, it states a two-day period strikes a reasonable balance between the need to reduce identified risk and the challenges a demand for collateral might place on a market participant. Midwest TDUs state that the Commission should not adopt a limit to the time period for collateral calls, but if it does, three business days would be appropriate and two days is the minimum.[165] J.P. Morgan supports a cure period of one or two business days, recognizing that market participants have the ability to post cash immediately and then subsequently replace such cash deposits with permitted financial instruments of their choosing (e.g., letters of credit).[166]

159. Finally, CFTC staff believes that a two-day cure period may be too long for collateral calls.[167] CFTC staff states that a cure period of more than one day is inconsistent with the purpose of such a call, since the risk exposure of the ISO/RTO is diminished by the posting of additional collateral.[168]

2. Commission Determination

160. The Commission adopts the NOPR proposal to require each ISO and RTO to include in the credit provisions of its tariff language to limit the time period allowed to post additional collateral. In addition, we require each ISO and RTO to allow no more than two days to "cure" a collateral call. The Commission directs each ISO and RTO to submit a compliance filing that includes tariff revisions to establish a two-day limit to post additional collateral due to invocation of a "material adverse change" clause or other provision of an ISO/RTO tariff. This compliance filing must be submitted by June 30, 2011, and the tariff revisions will take effect October 1, 2011.

161. The Commission recognizes the difficult position parties can find themselves in when additional collateral is required on short notice. Nevertheless, the time allowed for a "cure" needs to be short to minimize uncertainty as to a participant's ability to participate in the market, and to minimize the risk and costs of a default by a participant (which, as noted elsewhere, affects other participants). The Commission also understands the rationale presented by CFTC staff when they suggest that any period longer than a day can be hazardous to the market. We thus seek to strike a balance: to minimize the potential for market disruptions and the risk and costs of a default, while allowing participants sufficient time to obtain additional capital so that they can continue to participate in the market. The Commission is persuaded that a limit of no more than two days to cure a collateral call achieves the desired balance.

162. Two days should be sufficient for a market participant which is called upon to "cure" to arrange reasonable capital requirements. In reaching this determination, we note that some of the ISO/RTO markets already have a two-day cure period, so it should not prove overly burdensome to mandate this standard for all markets.[169] Additionally, commenters point out that a two-day limit is a standard financial industry practice.[170]

163. We disagree with the argument that the Commission should not apply the same limit to all the ISO/RTO markets. We see no distinction between the ISO/RTO markets that warrant differentiation.

H. General Applicability

164. When the Commission issued the NOPR, we requested comment "on whether the credit practices discussed below should be applied in the same way to all market participants or whether they should be applied differently to certain market participants depending on their characteristics." [171] The Commission received substantial comment on this question both for uniform applicability of credit practices and against uniform application but received little in the way of verifiable evidence to support either contention. The Commission has also reviewed historic and recent developments in debt markets which tend to reflect risk of default—a central element of this

[155] NEPOOL March 29, 2010 Comments at 20.

[156] SWP March 29, 2010 Comments at 8.

[157] Basin Electric March 29, 2010 Comments at 6.

[158] New Jersey Public Power March 29, 2010 Comments at 15.

[159] CAISO, NCPA, CPUC, the Six Cities, and PG&E.

[160] Six Cities March 29, 2010 Comments at 6–7.

[161] Calpine March 29, 2010 Comments at 11–12.

[162] Midwest ISO March 29, 2010 Comments at 21.

[163] NRECA March 29, 2010 Comments at 19.

[164] Morgan Stanley March 29, 2010 Comments at 10; NYTO March 29, 2010 Comments at 10.

[165] Midwest TDUs March 29, 2010 Comments at 20–21.

[166] J.P. Morgan March 26, 2010 Comments at 13.

[167] CFTC staff notes its comments are focused on FTRs even though they may be applicable to other markets as well. CFTC staff March 29, 2010 Comments at 2.

[168] *Id.* at 10.

[169] *See* Midwest ISO March 29, 2010 Comments at 21.

[170] NRECA March 29, 2010 Comments at 19.

[171] NOPR, FERC Stats. & Regs. ¶ 32,651 at P 8.

rulemaking process—in order to obtain additional information to consider the question asked in the NOPR.

165. Based on, among other things, a review of comments, Commission experience, and our review of the historic and recent developments in the debt markets, the Commission determines that the credit practices in this Final Rule will apply to all market participants. In making this determination, the Commission is aware that ISOs and RTOs may, through their stakeholder processes, ask for specific exemptions based on their experience and appropriate supporting evidence, particularly for individual entities whose participation is such that a default would not risk significant market disruptions. The Commission, however, will not, at this time in this generic rulemaking, adopt any exemptions.

IV. Information Collection Statement

166. The Office of Management and Budget's (OMB) regulations require approval of certain information collection requirements imposed by agency rules. Upon approval of a collection(s) of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the filing requirements of a rule will not be penalized for failing to respond to these collections of information unless the collections of information display a valid OMB control number.

167. This Final Rule amends the Commission's regulations pursuant to section 206 of the Federal Power Act, to reform credit practices of organized wholesale electric markets to limit potential future market disruptions. To accomplish this, the Commission requires RTOs and ISOs to adopt tariff revisions reflecting these credit reforms. Such filings would be made under Part 35 of the Commission's regulations. The information provided for under Part 35 is identified as FERC–516.

168. Under section 3507(d) of the Paperwork Reduction Act of 1995,[172] the reporting requirements in this rulemaking will be submitted to OMB for review. In their notice of March 18, 2010, OMB took no action on the NOPR, instead deferring their approval until review of the Final Rule.

169. The Commission solicited comments on the need for this information, whether the information will have practical utility, the accuracy of provided burden estimates, ways to enhance the quality, utility, and clarity of the information to be collected, and any suggested methods for minimizing the respondent's burden, including the use of automated information techniques. The Commission did not receive any specific comments regarding its burden estimates. The Public Reporting burden for the requirements contained in the Final Rule is as follows:

Data collection	Number of respondents	Number of responses	Hours per response	Total annual hours
FERC–516:				
Transmission Organizations with Organized Electricity Markets	6	1	100	600

Information Collection Costs: The Commission has projected the average annualized cost of all respondents to be the following:

600 hours @ $300 per hour = $180,000 for respondents. No capital costs are estimated to be incurred by respondents.

Title: FERC–516, Electric Rate Schedule Tariff Filings.

Action: Information Collection.

OMB Control No: 1902–0096.

Respondents: Businesses or other for profit and/or not-for-profit institutions.

Necessity of the Information: The information from FERC–516 enables the Commission to exercise its wholesale electric power and transmission oversight responsibilities in accordance with the Federal Power Act. The Commission needs sufficient detail to make an informed and reasonable decision concerning the appropriate level of rates, and the appropriateness of non-rate terms and conditions, and to aid customers and other parties who may wish to challenge the rates, terms, and conditions proposed by the utility.

170. This Final Rule amends the Commission's regulations to ensure that credit practices currently in place in organized wholesale electric markets reasonably protect consumers against the adverse effects of default. To promote confidence in the markets, the Commission believes it is appropriate to adopt specific requirements regarding credit practices for organized wholesale electric markets. These requirements include shortening of billing and settlement periods and reducing the amount of unsecured credit. The Commission believes these actions will enhance certainty and stability in the markets, and in turn, ensure that costs associated with market participant defaults do not result in unjust or unreasonable rates.

171. *Internal Review:* The Commission has reviewed the requirements pertaining to organized wholesale electric markets and determined the proposed requirements are necessary to its responsibilities under section 206 of the Federal Power Act.

172. These requirements conform to the Commission's plan for efficient information collection, communication and management within the energy industry. The Commission has assured itself, by means of internal review, that there is specific, objective support for the burden estimates associated with the information requirements.

173. Interested persons may obtain information on this information collection by contacting the following: Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, Attention: Ellen Brown, Office of the Executive Director, phone: (202) 502–8663, fax: (202) 273–0873, e-mail: *DataClearance@ferc.gov.*

174. Comments concerning this information collection can be sent to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission, phone: (202) 395–4650, fax: (202) 395–7285].

V. Environmental Analysis

175. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[173] The Commission concludes that neither an Environmental Assessment nor an Environmental Impact Statement is

[172] 44 U.S.C. 3507(d).

[173] *Regulations Implementing the National Environmental Policy Act,* Order No. 486, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. ¶ 30,783 (1987).

required for this Final Rule under Section 380.4(a)(15) of the Commission's regulations, which provides a categorical exemption for approval of actions under sections 205 and 206 of the FPA relating to rates and charges and terms and conditions for transmission or sales subject to the Commission's jurisdiction.[174]

VI. Regulatory Flexibility Act Certification

176. The Regulatory Flexibility Act of 1980 (RFA) [175] requires a description and analysis of rules that will have a significant economic impact on a substantial number of small entities.[176] The Commission is not required to make such analyses if a rule would not have such an effect.

177. The RTOs and ISOs regulated by the Commission do not fall within the RFA's definition of small entity. In addition, the vast majority of market participants in RTOs and ISOs are, either alone or as part of larger corporate families, not small entities. And the protections proposed here will protect all market participants, including small market participants, by reducing risk by reducing the likelihood of defaults and minimizing the impact of any defaults.

178. California Independent Service Operator Corp. is a nonprofit organization comprised of more than 90 electric transmission companies and generators operating in its markets and serving more than 30 million customers.

179. New York Independent System Operator, Inc. is a nonprofit organization that oversees wholesale electricity markets serving 19.2 million customers. NYISO manages a 10,775-mile network of high-voltage lines.

180. PJM Interconnection, L.L.C. is comprised of more than 450 members including power generators, transmission owners, electricity distributors, power marketers and large industrial customers and serving 13 states and the District of Columbia.

181. Southwest Power Pool, Inc. is comprised of 50 members serving 4.5 million customers in eight states and has 52,301 miles of transmission lines.

182. Midwest Independent Transmission System Operator, Inc. (Midwest ISO) is a non-profit organization with over 131,000 megawatts of installed generation. Midwest ISO has 93,600 miles of transmission lines and serves 15 states and one Canadian province.

183. ISO New England Inc. is a regional transmission organization serving six states in New England. The system is comprised of more than 8,000 miles of high voltage transmission lines and several hundred generating facilities of which more than 350 are under ISO–NE's direct control.

184. Therefore, the Commission certifies that this Final Rule will not have a significant economic impact on a substantial number of small entities. As a result, no regulatory flexibility analysis is required. As discussed in Order No. 2000,[177] in making this determination, the Commission is required to examine only the direct compliance costs that a rulemaking imposes upon small businesses. It is not required to consider indirect economic consequences, nor is it required to consider costs that an entity incurs voluntarily. This rulemaking does not impose significant compliance costs upon small entities; the RTOs and ISOs directly affected—in that they have to adopt new or revised tariff language—are not small entities. Further, as to entities indirectly affected, *i.e.,* market participants, most of them are not small entities. And, in any event, as to all market participants large and small, as we explained in Order No. 2000, *supra,* they have a choice of whether to join an RTO and whether to be a market participant or not. Moreover, the Commission believes that, to the extent that the credit reforms required by this Final Rule indirectly may impose potentially higher costs on some entities in the short-term, these reforms will also protect the markets and their participants from unacceptable disruptions and resulting costly defaults.[178] Thus, this rulemaking will not have a significant economic impact upon any small entities.

VII. Document Availability

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

186. From the Commission's Home Page on the Internet, this information is available in the Commission's document management system, eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type "RM10–13" in the docket number field.

187. User assistance is available for eLibrary and the Commission's Web site during normal business hours. For assistance, please contact FERC Online Support at 1–866–208–3676 (toll free) or 202–502–6652 (e-mail at *FERCOnlineSupport@FERC.gov*), or the Public Reference Room at 202–502–8371, TTY 202–502–8659 (e-mail at *public.referenceroom@ferc.gov*).

VIII. Effective Date and Congressional Notification

188. This Final Rule will take effect November 26, 2010. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB, that this rule is not a major rule within the meaning of section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996.[179] The Commission will submit this Final Rule to both Houses of Congress and the General Accountability Office.[180]

List of Subjects in 18 CFR Part 35

Electric power rates, Electric utilities, Reporting and recordkeeping requirements.

[174] 18 CFR 380.4(a)(15).

[175] 5 U.S.C. 601–12.

[176] The RFA definition of "small entity" refers to the definition provided in the Small Business Act, which defines a "small business concern" as a business that is independently owned and operated and that is not dominant in its field of operation. 5 U.S.C. 601(3) (citing Section 3 of the Small Business Act, 15 U.S.C. 632). The Small Business Size Standards component of the North American Industry Classification System defines a small electric utility as one that, including its affiliates, is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and whose total electric output for the preceding fiscal years did not exceed 4 million MWh. 13 CFR 121.201.

[177] *See Regional Transmission Organizations,* Order No. 2000, 65 FR 809 (January 6, 2000), FERC Stats. & Regs., Regulations Preambles July 1996–December 2000 ¶ 31,089, at 31,237 & n.754 (1999), *order on reh'g,* Order No. 2000–A, 65 FR 12,088 (March 8, 2000), FERC Stats. & Regs., Regulations Preambles July 1996–December 2000 ¶ 31,092 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 of Snohomish, County Washington v. FERC, 272 F.3d 607, 348 U.S. App. D.C. 205 (D.C. Cir. 2001)* (*citing Mid-Tex Elec. Coop. v. FERC, 773 F.2d 327* (D.C. Cir. 1985) (Commission need only consider small entities "that would be directly regulated"); *Colorado State Banking Bd.* v. *RTC,* 926 F.2d 931 (10th Cir. 1991) (Regulatory Flexibility Act not implicated where regulation simply added an option for affected entities and did not impose any costs)).

[178] The credit practices required by this Final Rule are akin to insurance against a disruption in the market that could lead to a major default and result in costs being socialized among all market participants. The Commission believes that the benefit of avoiding major market disruptions outweighs the cost of such insurance.

[179] *See* 5 U.S.C. 804(2).

[180] *See* 5 U.S.C. 801(a)(1)(A).

By the Commission.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

■ In consideration of the foregoing, the Commission amends part 35, Subchapter B, Chapter I, Title 18, *Code of Federal Regulations,* as follows:

PART 35—FILING OF RATE SCHEDULES AND TARIFFS

■ 1. The authority citation for part 35 continues to read as follows:

Authority: 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

■ 2. Subpart J is added to read as follows:

Subpart J—Credit Practices In Organized Wholesale Electric Markets

Sec.

§ 35.45 Applicability.

This subpart establishes credit practices for organized wholesale electric markets for the purpose of minimizing risk to market participants.

§ 35.46 Definitions.

As used in this subpart:

(a) *Market Participant* means an entity that qualifies as a Market Participant under § 35.34.

(b) *Organized Wholesale Electric Market* includes an independent system operator and a regional transmission organization.

(c) *Regional Transmission Organization* means an entity that qualifies as a Regional Transmission Organization under 18 CFR 35.34.

(d) *Independent System Operator* means an entity operating a transmission system and found by the Commission to be an Independent System Operator.

§ 35.47 Tariff provisions regarding credit practices in organized wholesale electric markets.

Each organized wholesale electric market must have tariff provisions that:

(a) Limit the amount of unsecured credit extended by an organized wholesale electric market to no more than:

(1) $50 million for each market participant; and

(2) $100 million for all entities within a corporate family.

(b) Adopt a billing period of no more than seven days and allow a settlement period of no more than seven days.

(c) Eliminate unsecured credit in financial transmission rights markets and equivalent markets.

(d) Establish a single counterparty to all market participant transactions, or require each market participant in an organized wholesale electric market to grant a security interest to the organized wholesale electric market in the receivables of its transactions, or provide another method of supporting netting that provides a similar level of protection to the market and is approved by the Commission. In the alternative, the organized wholesale electric market shall not net market participants' transactions and must establish credit based on market participants' gross obligations.

(e) Limit to no more than two days the time period provided to post additional collateral when additional collateral is requested by the organized wholesale electric market.

(f) Require minimum participation criteria for market participants to be eligible to participate in the organized wholesale electric market.

(g) Provide a list of examples of circumstances when a market administrator may invoke a "material adverse change" as a justification for requiring additional collateral; this list does not limit a market administrator's right to invoke such a clause in other circumstances.

Note: The following Appendix will not be published in the Code of Federal Regulations.

APPENDIX LIST OF INTERVENORS AND COMMENTERS

Commenters	
Acronym	Name
AMP	American Municipal Power.
APPA	American Public Power Association.
Basin Electric	Basin Electric Power Cooperative.
BP Energy	BP Energy Company.
BPA	Bonneville Power Administration.
CAISO	California Independent System Operator Corporation.
Calpine	Calpine Corporation.
CCRO	Committee of Chief Risk Officers.
CFTC staff	Commodity Futures Trading Commission.
Citigroup	Citigroup Energy Inc.
City of New York	City of New York.
Constellation/NRG	Constellation Companies and NRG Companies.
CPUC	California Public Utility Commission.
DC Energy	DC Energy, LLC.
Detroit Edison	Detroit Edison Company.
Direct Energy	Direct Energy Services, LLC.
DMEC	Delaware Municipal Electric Corporation, Inc.
Dominion	Dominion Resources Services Inc.
Duke	Duke Energy Corporation.
Dynegy	Dynegy Power Marketing, Inc.
East Texas Electric Cooperatives	East Texas Electric Cooperatives.
EEI	Edison Electric Institute.
EMCOS	Eastern Massachusetts Consumer-Owned Systems, including Braintree Electric Light Department, Concord Municipal Light Plant, Hingham Municipal Lighting Plant, Reading Municipal Light Department, Taunton Municipal Lighting Plan, Wellesley Municipal Light Plant.
EPSA	Electric Power Supply Association.
Financial Marketers	Jump Power, LLC; Energy Endeavors LP; Big Bog Energy, LP; Silverado Energy LP; Gotham Energy Marketing LP; Rockpile Energy LP; Coaltrain Energy LP; Longhorn Energy LP; MET MA, LLC; Solios Power, LLC; and JPTC, LLC.

APPENDIX LIST OF INTERVENORS AND COMMENTERS—Continued

Commenters	
Acronym	Name
First Energy	First Energy Service Company, including American Transmission Systems, Inc., The Cleveland Electric Illuminating Company, Jersey Central Power & Light Company, Pennsylvania Power Company, The Toledo Edison Company, and FirstEnergy Solutions Corp.
Hess	Hess Corporation.
IMEA	Illinois Municipal Electric Agency.
IPPNY	Independent Power Producers of New York.
IRC	ISO/RTO Council.
ISO–NE	ISO New England Inc.
J.P. Morgan	J.P. Morgan Ventures Energy Corporation.
Joint Commenters	Constellation Energy Commodities Group, Inc., Constellation NewEnergy, Inc., and Integrys Energy Services, Inc.
MidAmerican	MidAmerican Energy Holdings Company.
Midwest ISO	Midwest Independent Transmission Operator, Inc.
Midwest TDUs	Indiana Municipal Power Agency, Madison Gas & Electric Company, Missouri River Energy Services, Southern Minnesota Municipal Power Agency, and WPPI Energy.
Mirant	Mirant Corporation.
Morgan Stanley	Morgan Stanley Capital Group Inc.
NEMA	National Energy Marketers Association.
NEPOOL	New England Power Pool Participants Committee.
New Jersey Public Power	Public Power Association of New Jersey and Madison, New Jersey.
New York Consumers	Multiple Intervenors, including more than 50 large industrial, commercial, and institutional end-use energy consumers located in New York.
New York Suppliers	Small Customer Marketer Coalition (The Constellation Companies, The CENG Companies, and The NRG Companies).
NIPSCO	Northern Indiana Public Service Company.
Northeast ISOs	ISO–NE, NYISO, and PJM Joint Comments.
Northern California Power Agency	Northern California Power Agency.
NRECA	National Rural Electric Cooperative Association.
NYISO	New York Independent System Operator, Inc.
NYPSC	New York Public Service Commission.
NYSCB	New York State Consumer Protection Board.
NYTOs	New York Transmission Owners, including Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Long Island Power Authority, New York Power Authority, New York State Electric & Gas Corporation, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation.
OMS	Organization of Midwest ISO States.
PG&E	Pacific Gas & Electric Company.
PJM	PJM Interconnection, L.L.C.
Powerex	Powerex.
PSEG	Public Service Electric and Gas Company, PSEG Power LLC, and PSEG Energy Resources & Trade LLC.
SCE	Southern California Edison Company.
SDG&E	San Diego Gas & Electric Company.
Shell Energy	Shell Energy.
Six Cities	Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California.
SPP	Southwest Power Pool, Inc.
SWP	California Department of Water Resources State Water Project.
WAPA	Western Area Power Administration.
Wisconsin parties	Wisconsin Public Service Commission and Upper Peninsula Power Company.
WPTF	Western Power Trading Forum.
Xcel	Xcel Energy Services.

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BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 40

[Docket No. RM09–15–000; Order No. 740]

Version One Regional Reliability Standard for Resource and Demand Balancing

Issued October 21, 2010.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule.

SUMMARY: Under section 215 of the Federal Power Act, the Commission hereby remands a revised regional Reliability Standard developed by the Western Electricity Coordinating Council and approved by the North American Electric Reliability Corporation, which the Commission has certified as the Electric Reliability Organization responsible for developing and enforcing mandatory Reliability Standards. The revised regional Reliability Standard, designated by WECC as BAL–002–WECC–1, would set revised Contingency Reserve requirements meant to maintain scheduled frequency and avoid loss of firm load following transmission or generation contingencies.

DATES: *Effective Date:* This rule will become effective November 26, 2010.

FOR FURTHER INFORMATION CONTACT:

Nick Henery (Technical Information), Office of Electric Reliability, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8636.

Scott Sells (Technical Information), Office of Electric Reliability, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–6664.

A. Cory Lankford (Legal Information), Office of General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–6711.

SUPPLEMENTARY INFORMATION:

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

1. Pursuant to section 215 of the Federal Power Act (FPA),[1] the Commission hereby remands a revised regional Reliability Standard developed by the Western Electricity Coordinating Council (WECC) and approved by the North American Electric Reliability Corporation (NERC), which the Commission has certified as the Electric Reliability Organization (ERO) responsible for developing and enforcing mandatory Reliability Standards.[2] The revised regional Reliability Standard, designated by WECC as BAL–002–WECC–1,[3] is meant to ensure that adequate resources are available at all times to maintain scheduled frequency, and avoid loss of firm load following transmission or generation contingencies. As discussed below, the Commission finds that the proposed regional Reliability Standard does not meet the statutory criteria for approval that it be just, reasonable, not unduly discriminatory or preferential, and in the public interest.[4]

2. The Commission remands the proposed regional Reliability Standard based on concerns that WECC has not provided adequate technical support to demonstrate that the requirements of the proposed regional Reliability Standard are sufficient to ensure the reliable operation of the Bulk-Power System within WECC. Specifically, WECC's data indicates that extending the reserve restoration period from 60 to 90 minutes presents an unreasonable risk that a second major contingency could occur before reserves are restored after an initial contingency. Without further technical justification demonstrating that this less stringent requirement will adequately support reliability in the Western Interconnection, the Commission is unable to determine that the proposed regional Reliability Standard is just, reasonable, not unduly discriminatory or preferential, and in the public interest. Accordingly, we remand WECC regional Reliability Standard BAL–002–WECC–1 to the ERO so that the Regional Entity may develop further modifications consistent with this final rule.[5]

[1] 16 U.S.C. 824o (2006).

[2] *North American Electric Reliability Corp.,* 116 FERC ¶ 61,062, order on reh'g & compliance, 117 FERC ¶ 61,126 (2006), *aff'd sub nom. Alcoa, Inc.* v. *FERC,* 564 F.3d 1342 (D.C. Cir. 2009).

[3] NERC designates the version number of a Reliability Standard as the last digit of the Reliability Standard number. Therefore, original Reliability Standards end with "-0" and modified version one Reliability Standards end with "-1."

[4] 16 U.S.C. 824o(d)(2).

[5] In Order No. 672, the Commission found that it should order only the ERO to modify a Reliability Standard because the ERO is the only entity that may directly submit a proposed Reliability Standard to the Commission for approval. *Rules Concerning Certification of the Electric Reliability Organization; Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards,* Order No. 672, 71 FR 8662 (Feb. 17, 2006), FERC Stats. & Regs. ¶ 31,204, at P 423, *order on reh'g,* Order No. 672–A, 71 FR 19814 (Apr. 18, 2006), FERC Stats. & Regs. ¶ 31,212 (2006).

I. Background

A. Mandatory Reliability Standards

3. Section 215 of the FPA requires a Commission-certified ERO to develop mandatory and enforceable Reliability Standards, which are subject to Commission review and approval. Once approved, the Reliability Standards may be enforced by the ERO, subject to Commission oversight, or by the Commission independently.[6]

4. Reliability Standards that the ERO proposes to the Commission may include Reliability Standards that are proposed to the ERO by a Regional Entity.[7] A Regional Entity is an entity that has been approved by the Commission to enforce Reliability Standards under delegated authority from the ERO.[8] When the ERO reviews a regional Reliability Standard that would be applicable on an interconnection-wide basis and that has been proposed by a Regional Entity organized on an interconnection-wide basis, the ERO must rebuttably presume that the regional Reliability Standard is just, reasonable, not unduly discriminatory or preferential, and in the public interest.[9] In turn, the Commission must give "due weight" to the technical expertise of the ERO and of a Regional Entity organized on an interconnection-wide basis.[10]

5. In Order No. 672, the Commission urged uniformity of Reliability Standards, but recognized a potential need for regional differences.[11] Accordingly, the Commission stated that:

> As a general matter, we will accept the following two types of regional differences, provided they are otherwise just, reasonable, not unduly discriminatory or preferential and in the public interest, as required under the statute: (1) A regional difference that is more stringent than the continent-wide Reliability Standard, including a regional difference that addresses matters that the continent-wide Reliability Standard does not; and
>
> (2) A regional Reliability Standard that is necessitated by a physical difference in the Bulk-Power System.[12]

B. Western Electricity Coordinating Council

6. On April 19, 2007, the Commission accepted delegation agreements between NERC and each of eight Regional Entities.[13] In its order, the Commission accepted WECC as a Regional Entity organized on an Interconnection-wide basis. As a Regional Entity, WECC oversees transmission system reliability in the Western Interconnection. The WECC region encompasses nearly 1.8 million square miles, including 14 western U.S. states, the Canadian provinces of Alberta and British Columbia, and the northern portion of Baja California in Mexico.

7. In June 2007, the Commission approved eight regional Reliability Standards for WECC including the currently effective regional Reliability Standard for operating reserves, WECC–BAL–STD–002–0.[14] The Commission found that the current regional Reliability Standard was more stringent than the corresponding NERC Reliability Standard, BAL–002–0, since WECC required a more stringent minimum reserve requirement than the continent-wide requirement.[15] Moreover, the Commission found that WECC's requirement to restore contingency reserves within 60 minutes was more stringent than the 90 minute restoration period as set forth in NERC's BAL–002–0.[16]

8. The Commission directed WECC to develop certain minor modifications to WECC–BAL–STD–002–0, as identified by NERC in its filing letter for the current standard.[17] For example, the Commission determined that: (1) Regional definitions should conform to definitions set forth in the NERC Glossary of Terms Used in Reliability Standards (NERC Glossary) unless a specific deviation has been justified; and (2) documents that are referenced in the Reliability Standard should be attached to the Reliability Standard. The Commission also found that it is important that regional Reliability Standards and NERC Reliability Standards achieve a reasonable level of consistency in their structure so that there is a common understanding of the elements. Finally, the Commission directed WECC to address stakeholder concerns regarding ambiguities in the terms "load responsibility" and "firm transaction."[18]

C. WECC Regional Reliability Standard BAL–002–WECC–1

9. On March 25, 2009, NERC submitted a petition (NERC Petition) to the Commission seeking approval of BAL–002–WECC–1[19] and requesting the concurrent retirement of BAL–STD–002–0.[20] In that March petition, NERC states that the proposed regional Reliability Standard was approved by the NERC Board of Trustees at its October 29, 2008 meeting. NERC also requests an effective date for the regional Reliability Standard of 90 calendar days after receipt of applicable regulatory approval.

10. The proposed regional Reliability Standard contains three main provisions. Requirement R1 provides that each reserve sharing group[21] or balancing authority must maintain a minimum contingency reserve that is the greater of (1) an amount of reserve equal to the loss of the most severe single contingency; or (2) an amount of reserve equal to the sum of three percent of the load and three percent of net generation. Requirement R2 states that each reserve sharing group or balancing authority must maintain at least half of the contingency reserve as spinning reserve. Requirement R3 identifies acceptable types of reserve to satisfy Requirement R1:

R3.1. Spinning Reserve;
R3.2. Interruptible Load;
R3.3. Interchange Transactions designated by the source Balancing Authority as non-spinning contingency reserve;
R3.4. Reserve held by the other entities by agreement that is deliverable on Firm Transmission Service;
R3.5. An amount of off-line generation which can be synchronized and generating; or
R.3.6. Load, other than Interruptible Load, once the Reliability Coordinator has declared a capacity or energy emergency.

In addition, compliance measure M1 provides that a reserve sharing group or balancing authority must have documentation that it maintained 100 percent of required contingency reserve levels "except within the first 105 minutes (15 minute Disturbance Recovery Period, plus 90 minute

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[6] 16 U.S.C. 824o(e)(3).

[7] 16 U.S.C. 824o(e)(4).

[8] 16 U.S.C. 824o(a)(7) and (e)(4).

[9] 18 CFR 39.5 (2010).

[10] 16 U.S.C. 824o(d)(2).

[11] Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 290.

[12] *Id.* P 291.

[13] *North American Electric Reliability Corp.,* 119 FERC ¶ 61,060, at P 432 (2007).

[14] *North American Electric Reliability Corp.,* 119 FERC ¶ 61,260, at P 53 (2007).

[15] *Id.*

[16] *Id.*

[17] *Id.* P 55.

[18] *Id.* P 56.

[19] *See* 18 CFR 39.5(a) (requiring the ERO to submit regional Reliability Standards on behalf of a Regional Entity).

[20] The proposed regional Reliability Standard is not attached to the NOPR. It is, however, available on the Commission's eLibrary document retrieval system in Docket No. RM09–15–000 and is on the ERO's Web site, *available at http://www.nerc.com.*

[21] A "reserve sharing group" is a group whose members consist of two or more balancing authorities that collectively maintain, allocate, and supply operating reserves required for each balancing authority's use in recovering from contingencies within the group. *See* NERC Glossary, *available at http://www.nerc.com/docs/standards/rs/Glossary_2009April20.pdf.*

Contingency Reserve Restoration Period) following an event requiring the activation of Contingency Reserves." [22]

11. The NERC Petition explains that, because WECC developed the modifications to the regional Reliability Standard submitted in the instant proceeding, and the standard applies on an Interconnection-wide basis, NERC must rebuttably presume that the WECC Reliability Standard is just, reasonable, not unduly discriminatory or preferential, and in the public interest.[23] NERC states that it agrees with WECC that the proposed WECC regional Reliability Standard establishes requirements that are more stringent than those provided in the corresponding NERC Reliability Standard.

12. On March 18, 2010, the Commission issued a Notice of Proposed Rulemaking (NOPR) proposing to remand the proposed regional Reliability Standard to the ERO so that the Regional Entity may develop further modifications.[24] The Commission's proposal to remand the proposed Regional Reliability Standard was based on a lack of technical support for the adoption of less stringent requirements than those in the currently effective WECC regional Reliability Standard and out of concern that the proposed regional Reliability Standard is less stringent than the NERC continent-wide Reliability Standard pertaining to contingency reserves. The Commission expressed particular concern with respect to a provision in the proposed regional Reliability Standard that would permit a balancing authority, when an emergency is declared, to count "Load, other than Interruptible Load" as contingency reserve. The Commission understood this provision to allow a balancing authority to shed firm load when a single contingency occurs instead of procuring and utilizing generation or demand response resource held in reserve for contingencies to balance the Bulk-Power System. The Commission also proposed to direct WECC to develop certain modifications to the regional Reliability Standard that would explicitly allow demand-side management to be used as a resource for contingency reserves.

13. In response to the NOPR, comments were filed by 16 interested parties.[25] Several commenters, including WECC, opposed the proposed remand, while others supported it. In its comments, WECC included supplemental data to support the Commission's approval of the proposed regional Reliability Standard. In the discussion below, we address the issues raised by these comments and, pursuant to section 215(d)(4) of the FPA, we adopt the NOPR proposal to remand the proposed regional Reliability Standard.

II. Discussion

14. Applying the principal of due weight to the technical expertise of NERC and WECC, the Commission finds that the proposed regional Reliability Standard BAL–002–WECC–1 does not meet the statutory criteria for approval, that it be just, reasonable, not unduly discriminatory or preferential, and in the public interest. In particular, the Commission is concerned that reliability would be reduced upon approval of the proposed regional Reliability Standard because WECC's data indicates that extending the reserve restoration period from 60 to 90 minutes would create an unreasonable risk that a second major contingency could occur before reserves are restored after an initial contingency. There must be sufficient technical justification showing that the Western Interconnection can be operated reliably with the reduced stringency. The Commission finds that the NERC and the Regional Entity have failed to demonstrate that the proposal is adequate to ensure the reliability of the Bulk-Power System within WECC. Accordingly, under section 215(d)(4) of the FPA, the Commission remands regional Reliability Standard BAL–002–WECC–1 to the ERO with instruction for the Regional Entity to develop modifications, as discussed below.

A. Due Weight and Effect of Remand

15. Several commenters point out that, under section 215(d)(2) of the FPA, the Commission must give due weight to the technical expertise of the ERO and WECC as the Regional Entity organized on an Interconnection-wide basis.[26] These parties argue that, applying the principal of due weight, the Commission should approve the proposed regional Reliability Standard. In addition, NERC states that it must rebuttably presume that a standard developed by WECC is just, reasonable, not unduly preferential, and in the public interest. NERC states that, as a Regional Entity organized on an interconnection-wide basis, WECC has exercised its technical expertise in regard to this interconnection-wide Reliability Standard, supplemented by the additional technical analyses provided in its response. Xcel agrees and states that the Commission has not allowed any deference to WECC and stakeholder experts that worked diligently to develop this Reliability Standard.

16. Several commenters contend that the proposed regional Reliability Standard offers significant benefits over the current version.[27] Sempra states that the proposed standard would advance three goals: It simplifies reserve accounting at balancing authorities by clarifying which party carries reserves for power imports and exports; it includes renewable resources; and it clarifies reserves responsibility. If the Commission decides to remand the proposed Reliability Standard, Sempra urges the Commission to require expedited procedures because of the importance of replacing the current regional Reliability Standard, which, Sempra contends, contains its own flaws and ambiguities. WECC argues that remand of the proposed standard would cause a greater probability of frequency-related instability, uncontrolled separation, or cascading outages because the current WECC standard does not take renewable resources, such as wind and solar, into account when calculating minimum contingency reserve requirements.

17. By contrast, Puget Sound states that, while FERC is required to give due weight to the technical expertise of the ERO no deference is due when the action of the ERO and Regional Entity are patently unreasonable and arbitrary. Puget Sound contends that a regulatory decision based on a review of only eight hours of data, as provided by WECC, cannot be reasonably explained or considered to be supported by substantial evidence. Powerex and NV Energy agree that WECC provided insufficient data in its request for approval with respect to whether the proposed regional Reliability Standard is just and reasonable.

Commission Determination

18. Section 215(d)(2) of the FPA provides that the Commission "shall give due weight to the technical expertise" of the ERO or a Regional Entity organized on an Interconnection-wide basis "with respect to the content of a proposed standard or modification." As the Commission explained in Order No. 672, the ERO or Interconnection-

[22] Proposed WECC Reliability Standard BAL–002–WECC–1, Compliance Measure M1.

[23] *See* NERC Petition at 8; and 16 U.S.C. 824o(d)(3).

[24] *North American Electric Reliability Corp.,* NOPR, 75 FR 14,103 (March 24, 2010), FERC Stats. & Regs. ¶ 32,653 (2010).

[25] *See* Appendix A, *List of Commenters.*

[26] *E.g.,* NERC, WECC, MISO, WIRAB, and Xcel.

[27] *E.g.,* NERC, WECC, Bonneville, Idaho Power, NV Energy, SCE, WIRAB, and Xcel.

wide Regional Entity "must justify to the Commission its contention that the proposed Reliability Standard is just, reasonable, not unduly discriminatory or preferential, and in the public interest."[28] Thus, consistent with our explanation in Order No. 672, it is necessary for the ERO or Regional Entity to explain adequately a Reliability Standard or modifications to a Reliability Standard.

19. The Commission has given due weight to the technical expertise of the Regional Entity as it is presented both in the NERC Petition and in WECC's comments and supporting data and we have determined that WECC provided inadequate support for approval of the proposed regional Reliability Standard. In its petition, NERC provides a detailed explanation of why it believes the proposal satisfies the statutory criteria for approval based on the guidance provided by the Commission in Order No. 672 regarding the factors it would consider in making that determination.[29] However, this explanation fails to adequately address the substantive modifications to the regional Reliability Standard. Moreover, WECC's comments and supplemental data did not adequately address the Commission's concerns expressed in the NOPR that the extension of the reserve restoration period will maintain reliable operation of the Western Interconnection. Without adequate explanation and technical justification, we are unable to determine whether the proposal satisfies the statutory criteria for approval and, therefore, remand the revised Reliability Standard to the ERO with instruction for the Regional Entity to develop modifications, as discussed below.

20. The Commission does not take lightly its authority to remand a Reliability Standard. We understand that before a Reliability Standard reaches the Commission it must be vetted through an intensive standard development process. Nevertheless, despite the efforts of the different drafting team members who contributed to the development of this regional Reliability Standard, for the reasons discussed below, we believe that the statutory standard for approval has not been met on the record before us.

21. We do not believe, as WECC suggests, that this remand will cause a greater probability of frequency-related instability, uncontrolled separation or cascading outages. WECC does not provide any supporting data or technical analysis to support this claim. By remanding the proposed regional Reliability Standard, the Commission is upholding the currently effective regional Reliability Standard. The Commission recognizes that the Western Interconnection is experiencing substantial growth in variable renewable generation. We believe that the current regional Reliability Standard has proved effective for many years and will continue to do so until WECC can modify as necessary, through the standards development process, this regional Reliability Standard to ensure adequate reserves to reliably accommodate this expansion. Furthermore, we decline to set expedited procedures for the development of a replacement regional Reliability Standard, but WECC is free to expedite its process to the extent WECC finds appropriate.

B. Contingency Reserve Restoration Period

22. The current regional Reliability Standard sets a maximum contingency reserve restoration period that is more stringent than the continent-wide requirement. NERC Reliability Standard BAL–002–0 provides that a balancing authority or reserve sharing group responding to a disturbance must fully restore its contingency reserves within 90 minutes following the disturbance recovery period, which is set at 15 minutes.[30] The current WECC regional BAL Reliability Standard requires reserve sharing groups and balancing authorities to maintain 100 percent of required operating reserve levels except within the first 60 minutes following an event requiring the activation of operating reserves.[31] In approving WECC–BAL–STD–002–0, the Commission found that WECC's requirement to restore contingency reserves within 60 minutes was more stringent than the 90 minute restoration period set forth in NERC's BAL–002–0.[32] WECC now proposes to replace the current 60 minute restoration period requirement with a new provision that would require the restoration of contingency reserves within 90 minutes from the end of the disturbance recovery period (15 minutes), thus matching the continent-wide requirement.

NOPR Proposal

23. In the NOPR, the Commission proposed to remand the regional Reliability Standard BAL–002–WECC–1 based on, among other things, a lack of any technical justification or analysis of the potential increased risk to the Western Interconnection resulting from the increase in the contingency reserve restoration period. The Commission noted that, without sufficient data and analysis, it is unable to determine whether the increase in contingency reserve restoration period is sufficient to maintain the reliable operation of the Bulk-Power System in the Western Interconnection. The Commission also noted that in the Western Interconnection a significant number of transmission paths are voltage or frequency stability-limited, in contrast to other regions of the Bulk-Power System where transmission paths more often are thermally-limited. Disturbances that result in a stability-limited transmission path overload, generally, must be responded to in a shorter time frame than a disturbance that results in a thermally-limited transmission path overload. The Commission stated its understanding that this physical difference is one of the reasons for the need for certain provisions of regional Reliability Standards in the Western Interconnection.

Comments

24. WECC, supported by Bonneville, Idaho Power, SCE, and Xcel, argues that additional studies are unnecessary because the proposed restoration period is identical to the continent-wide restoration period. WECC comments that the Commission should defer to WECC's technical expertise in concluding that more stringent contingency reserve restoration period is no longer necessary. WECC also offers historical data that demonstrates that a second contingency involving the loss of a resource greater than 1000 MW between 60 and 90 minutes after a first contingency occurred six times in the last 15 years or 0.4 events on an annual basis, which, WECC argues, is insufficient to require rejection of a proposed standard on the basis of reliability impact. Bonneville and Xcel argue that increasing the contingency reserve restoration period will result in more efficient system operation without sacrificing reliability. Xcel adds that it will allow for more efficient communication among balancing authorities because the restoration period will be closer to the e-tagging system approval cycle.

[28] Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 345.

[29] Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 320–337.

[30] Reliability Standard BAL–002–0, Requirements R4 and R6.

[31] WECC regional Reliability Standard WECC–BAL–STD–002–0, Measure of Compliance WM1.

[32] *North American Electric Reliability Corp.,* 119 FERC ¶ 61,260 at P 53.

25. MISO comments that it is imperative that the Commission give due consideration to approving modifications to Reliability Standards so that Regional Entities can implement changes as understanding grows and experience is gained. MISO contends that disallowance of reasonable modifications, such as those presented here, will have the unintended consequence of fostering a reluctance to develop other regional standards, or encouraging a minimalist approach when standards must necessarily be developed. WECC echoes these concerns and argues that there is no requirement that a regional Reliability Standard can only be modified in a manner that makes it even more stringent. Such a requirement, WECC contends, would create a "one-way ratchet" that would severely inhibit the ability to adjust Reliability Standards to meet changing conditions, would encourage proposed standards reflecting the "lowest common denominator" and would fail to provide deference to the technical expertise of an interconnection-wide Regional Entity.

Commission Determination

26. The Commission finds that the extension of the reserve restoration period has not been justified as an acceptable level of risk within the Western Interconnection. WECC's own analysis shows that, based on historical experience, replacing the 60 minute requirement with the continent-wide 90 minute requirement could result in a second major contingency before restoration of reserves would be required, and that a second major contingency occurred within WECC during this extended time frame six times in the last 15 years.[33] WECC argues that in the Western Interconnection "instability and/or underfrequency load shedding normally would not occur in the absence of a third contingency of significant magnitude within the restoration period." [34] WECC's generalization, however, is unsupported by historical quantification or documentation in this record and, thus, does not persuade us.[35]

27. While it is not inevitable that the proposed extension of the contingency reserve restoration period would result in adverse reliability impacts in the Western Interconnection, the data provided shows that the Western Interconnection could be exposed to the potential for a major disturbance every two to three years that could result in frequency-related instability, uncontrolled separation or cascading outages. The Commission is particularly concerned about these potential events occurring in the Western Interconnection because, as the Commission discussed in the NOPR, it is our understanding that a significant number of transmission paths in the Western Interconnection are voltage or frequency stability-limited, in contrast to other regions of the Bulk-Power System where transmission paths more often are thermally-limited. Disturbances that occur in a stability-limited transmission path overload, generally, must be responded to in a shorter time frame than a disturbance that occurs in a thermally-limited transmission path overload.[36] A thermal limit is determined by how much a line can overheat without damaging equipment; lines that are thermally-limited can have short-term emergency limits that are higher than the normal line rating, since heating occurs over a period of time. This is different from a stability limit, which is determined by a system-wide voltage or frequency stability constraint, and loading the line above this limit for any amount of time could result in instability and cascading outages.

28. The reliance on stability-limited transmission paths becomes a concern during the contingency reserve restoration period because balancing authorities rely on imported power from external sources until the entity that had the disturbance replaces the resource lost during the disturbance.[37] Since stability-limited lines do not have higher emergency ratings, as thermally-limited lines can, any disturbance that would result in increasing flows over a stability-limited line must be addressed in a shorter time-frame than a disturbance that only affects thermally-limited lines. There will be some situations in which imports stress stability-limited transmission lines. In those circumstances, extending the contingency reserve restoration period would extend the amount of time the imported power could stress the stability limited transmission lines, potentially leaving the Western Interconnection in a stressed condition that could result in adverse reliability impacts if another disturbance were to occur. On remand, we direct WECC to develop a modification to the reserve restoration period or provide evidence demonstrating that extending the reserve restoration period to 90 minutes and adding a disturbance recovery period of 15 minutes would not increase the risk of a major disturbance in the Western Interconnection.

29. The fact that the proposed extension of the reserve restoration period would match the continent-wide requirement and, thus, would foster certain operational efficiencies through the use of the e-tagging system does not allay our concerns that the extension could be harmful to the reliable operation of the Western Interconnection. The e-tagging system is an efficient tool used for day-ahead and hour-ahead market accounting and as input for day-ahead and hour-ahead transfer capability analysis of scheduled interchange transactions and development of day-ahead and hour-ahead capacity and energy resource schedules. As such, it may allow for more efficient communication among balancing authorities during operational planning periods. However, in 2008, a WECC task force expressed concern that the "e-Tag and communications processes are time consuming and cumbersome when scheduling and tagging the large amounts of energy required to recover from system emergencies, particularly in mid-hour."[38] Although adoption of the e-tagging system may result in more efficient communication among transmission operators and balancing

[33] WECC's analysis shows that, over the past 15 years, the proposed increased contingency reserve restoration period would have resulted in 139 more events within the proposed 90 minute contingency reserve restoration period. Limiting the analysis to losses of generation greater than 500 MW, there were only 58 events occurring within the proposed extended contingency reserve restoration period. Limiting the analysis to losses of generation greater than 1000 MW, there were only six events during the extended contingency restoration period. WECC contends that losses of less than 1,000 MW of generation have a minimal impact on the system frequency response of the Western Interconnection and have minimal impacts on the reliability of the interconnected system. WECC May 24, 2010 Comments at 13.

[34] WECC May 24, 2010 Comments at 13 n.10.

[35] WECC's statement is consistent with a statement made in a 2007 compliance filing that "WECC operates its system in such a manner that the system is at least two contingencies away from a cascading failure." WECC Compliance Filing, Docket No. RR07–11–000, at 5 (filed July 9, 2007). Nevertheless, WECC is proposing to change its operating conditions by extending the reserve restoration period. Thus, it must provide adequate technical justification that the revised requirements will maintain reliable operation of the Bulk-Power System in the Western Interconnection.

[36] NOPR, FERC Stats. & Regs. ¶ 32,653 at P 37.

[37] *See* NERC, *Balancing and Frequency Control,* at 6–10 (Nov. 2009), *available at http://www.nerc.com/docs/oc/rs/NERC_Balancing_and_Frequency_Control_Part_1_9Nov2009_(Revision2).pdf.*

[38] WECC Disturbance Task Force, *PacifiCorp East February 14, 2008 Detailed Disturbance Report* stated in Conclusion 17 (Aug. 2008) *available at http://www.wecc.biz/committees/BOD/081308/Lists/Agendas/1/PacifiCorp%20East%20Disturbance%20Board%20presentation%20Aug%2008%20Final.pdf.*

authorities for day-ahead and hour-ahead scheduling, this fact alone is not sufficient to justify the potential reliability impacts involved with extending the reserve restoration period.

30. The Commission's action in this proceeding does not create a "one-way ratchet" for the development of regional Reliability Standards. In specific circumstances, the Commission could approve retirement of a more stringent regional requirement if the Regional Entity demonstrates that the continent-wide Reliability Standard is sufficient to ensure the reliability of that region. In this case, however, WECC argued only three years earlier that the added stringency of the current regional Reliability Standard was critical to the reliable operation of the Western Interconnection.[39] We find that WECC provided insufficient technical detail and analysis for us to make a reasoned determination that the proposed requirement will adequately protect the reliability of the region. Regional Entities have the discretion to develop regional Reliability Standards and implement changes as understanding grows and experience is gained without concern that the Commission will always hold them to their more stringent requirements in all circumstances regardless of the provided justification. The Commission will evaluate such proposed changes, including those to a less stringent state, on their merit so long as adequate reliability is maintained. In this instance, given WECC's prior statements and its own analysis that such an extended restoration period could lead to major system disturbances, WECC has failed to demonstrate that its proposal will maintain adequate reliability, and therefore has failed to demonstrate that its proposal is just, reasonable, and in the public interest. Consequently, we remand this proposal.

C. Calculation of Minimum Contingency Reserve

31. NERC's Disturbance Control Standard, continent-wide Reliability Standard BAL–002–0, requires each balancing authority or reserve sharing group, at a minimum, to maintain at least enough contingency reserve to cover the most severe single contingency. Similarly, requirement WR1(a)(ii) of WECC's current WECC–BAL–STD–002–0 requires balancing authorities to maintain a contingency reserve of spinning and non-spinning reserves (at least half of which must be spinning), sufficient to meet the NERC Disturbance Control Standard, BAL–002–0, equal to the greater of: (1) the loss of generating capacity due to forced outages of generation or transmission equipment that would result from the most severe single contingency; or (2) the sum of five percent of load responsibility served by hydro generation and seven percent of the load responsibility served by thermal generation. In approving the regional BAL–STD–002–0 Reliability Standard, the Commission noted that the regional Reliability Standard is more stringent than the NERC Reliability Standard, BAL–002–0, because WECC requires a more stringent minimum reserve requirement than the continent-wide requirement.

32. As proposed, Requirement R1 of BAL–002–WECC–1 would require each reserve sharing group or balancing authority that is not a member of a reserve sharing group to maintain a minimum contingency reserve. NERC contends that the proposed minimum contingency reserve amount is more stringent than that required by the continent-wide Reliability Standard.[40] NERC explains that, whereas Requirement R3.1 of BAL–002–0 requires that each balancing authority or reserve sharing group carry, at a minimum, at least enough contingency reserve to cover the most severe single contingency, proposed Requirement R1.1 of BAL–002–WECC–1 requires that each balancing authority or reserve sharing group maintain, as a minimum, contingency reserves equal to the loss of the most severe single contingency or an amount of reserve equal to the sum of three percent of the load (generation minus station service minus net actual interchange) and three percent of net generation (generation minus station service).[41]

NOPR Proposal

33. The Commission proposed to find that the eight hours of data provided by WECC in its initial filing is insufficient to demonstrate that the proposed minimum contingency reserve requirements are sufficiently stringent to ensure that entities within the Western Interconnection will meet the requirements of NERC's continent-wide Disturbance Control Standard, BAL–002–0. The Commission noted that, in its March 2007 petition proposing the currently effective regional Reliability Standard, NERC stated that the eight proposed regional Reliability Standards "were critical to maintaining reliability within the Western Interconnection."[42] The Commission expressed concern that the proposed regional Reliability Standard was less stringent than the current regional Reliability Standard and that NERC had not demonstrated that the proposed regional requirements were sufficient to meet the requirements of NERC's continent-wide Disturbance Control Standard, BAL–002–0.

34. Although the proposed Reliability Standard offers some added clarity by eliminating reference to the term "load responsibility" and including renewable energy resources in the calculation of contingency reserves, the Commission proposed to find that NERC and WECC did not provide sufficient technical justification to support the proposed revised method for calculating contingency reserves. Thus, the Commission proposed to remand BAL–002–WECC–1 so that WECC could develop additional support and make modifications as appropriate for a future proposal.

Comments

35. Several commenters argue that the proposed calculation of minimum contingency reserve levels is more stringent than the continent-wide NERC requirements under BAL–002–0.[43] WECC comments that the Commission has failed to explain how the proposed regional Reliability Standard, which sets minimum contingency reserve level as the greater of the most severe single contingency or a calculation of net generation and load, could be less stringent than the continent-wide requirement, which sets a minimum contingency reserve level as equal to the most severe single contingency. NERC, Bonneville, Idaho Power, NV Energy, SCE, WIRAB, and Xcel all agree that the proposed regional requirement for calculating minimum contingency reserve levels is more stringent than the current continent-wide requirement. NERC adds that, in addition to including a more stringent calculation of minimum reserve levels, the proposed regional Reliability Standard is more stringent than the current

[39] In its letter requesting approval of the current regional Reliability Standards WECC states:

The WECC Operating Committee thereafter undertook a comprehensive review of all WECC criteria, policies, and guidelines in an effort to identify all unique (i.e., those not in NERC standards) and essential (*i.e.,* necessary to protect WECC reliability) criteria that it believed critical to the reliability of the Western Interconnection. The Operating Committee concluded that eight regional standards, proposed for adoption here, are of the highest priority."

NERC, Request for Approval of Regional Reliability Standards, Docket No. RR07–11–000, at 4 (filed March 26, 2007) (NERC 2007 Petition).

[40] NERC Petition at 9.

[41] *Id.* at 14.

[42] NERC 2007 Petition at 4.

[43] *E.g.,* WECC, NERC, Bonneville, Idaho Power, NV Energy, SCE, WIRAB, and Xcel.

continent-wide Reliability Standard because it includes a requirement that half of the contingency reserves must immediately and automatically respond proportionally to frequency deviations, e.g., through the action of a governor or other control system. Moreover, WECC points out that nothing in the proposed Reliability Standard excuses any balancing authority or reserve sharing group from satisfying the requirements of the continent-wide Reliability Standard BAL–002–0.

36. Several commenters argue that approval of the proposed Reliability Standard does not require any more technical justification to support the proposed calculation of minimum contingency reserve levels. WECC notes that the currently approved regional Reliability Standard was established through negotiations in the 1960s, and was based on engineering judgment, rather than on technical studies or simulations. Bonneville adds that the Commission did not require extensive data support when it approved the current regional Reliability Standard. NV Energy admits that NERC has provided insufficient data with respect to whether the requested revision is just and reasonable and that data may suggest that the proposed calculation may allow responsible entities to carry less contingency reserves than currently required under the existing regional Reliability Standard. Nevertheless, NV Energy argues that the Commission should approve the proposed Reliability Standard without requiring any further data because reserve levels required under the proposed Reliability Standard will be equal to or greater and, thus, more stringent than reserve levels required under the continent-wide Reliability Standard.

37. Although WECC argues that it should not be required to provide any further technical justification, along with its NOPR comments WECC provided additional data from a frequency responsive reserve study as support for the proposed regional Reliability Standard. WECC states that the summary of data demonstrates that, based on stability simulations applied to varying load scenarios, a minimum of 2,400 MW of response reserve is necessary to prevent underfrequency load shedding. Based on a review of all hours during 2007–2008, WECC contends that the proposed regional Reliability Standard would result in at least 2,927 MW of automatically responsive reserves; more than 500 MW above the amount required for stability purposes.

38. Powerex and Puget Sound argue that the data provided by WECC in the NERC Petition are insufficient to support the proposed Reliability Standard and support the Commission's proposed remand. Puget Sound contends that WECC's reliance on only eight hours of data to support the proposed standard was unreasonable and arbitrary and, therefore, the Commission could not reasonably approve the proposed Reliability Standard. Powerex argues that the eight hours of data provided by WECC in the NERC Petition is insufficient to demonstrate that the proposed minimum contingency reserve requirements are sufficiently stringent to ensure that entities within the Western Interconnection will meet the requirements of the continent-wide Reliability Standard. Powerex reiterates a concern that it expressed during the standard development process that the proposed regional Reliability Standard assumes the existence of a liquid ancillary service market when no such market exists in WECC. Powerex comments that the proposed standard shifts the operating reserve responsibility away from the source to the load and will, thereby, result in significant increases in operating reserve requirements of a number of jurisdictions that are primarily load-based and will, therefore, require them to procure operating reserves.

Commission Determination

39. We will accept WECC's proposal on this issue. We believe that WECC's proposed calculation of minimum contingency reserves is more stringent than the national requirement and could be part of a future proposal that the Commission could find to be just, reasonable, not unduly discriminatory or preferential, and in the public interest. In the NERC Petition for approval of the proposed regional Reliability Standard, WECC provided technical studies covering eight hours from each of the four operating seasons (summer, fall, winter, and spring, both on and off-peak). WECC acknowledges that this data illustrates that the methodology in the proposed regional Reliability Standard reduces the total reserves required in the Western Interconnection for each of the eight hours assessed when compared with the methodology in the current regional Reliability Standard.[44] However, WECC also states that the proposed regional Reliability Standard does not excuse "any non-performance with the continent-wide Disturbance Control Standard," which requires each balancing authority or reserve sharing group to activate sufficient contingency reserve to comply with the Disturbance Control Standard.[45] WECC's proposal would require reserves equal to the greater of: (i) The most severe single contingency; or (ii) the sum of three percent of the load and three percent of net generation. Moreover, the deliverability of these contingency reserves would continue to be assured under Requirement R7 of Reliability Standard TOP–002. Any lack of deliverability would violate TOP–002 regardless of whether the amount of contingency reserves is based on WECC's current requirement or its proposed requirement.

40. Should WECC resubmit its proposed calculation of minimum contingency reserves as part of its response to our remand on the issue of the restoration period, NERC and/or WECC could buttress its proposal with audits specifically focused on contingency reserves and whether balancing authorities are meeting the adequacy and deliverability requirements. This auditing could provide additional assurance to the Commission that the proposed requirement is just, reasonable, and in the public interest. This auditing also could address the concerns raised by some entities in WECC that the original eight hours of data provided in NERC's petition is insufficient to demonstrate that the proposed minimum contingency reserve requirements are sufficiently stringent to ensure that entities within the Western Interconnection will meet the requirements of NERC's continent-wide Disturbance Control Standard, BAL–002–0.[46] Thus, the auditing could provide adequate technical justification to support the proposed modification.

41. In response to Powerex's concerns, we believe that a calculation of minimum contingency reserves that is based on three percent of net generation and three percent of net load would fairly balance the responsibilities of contingency reserve providers with the financial obligations of those who would benefit most from those services. Under the current regional Reliability Standard, the total contingency reserve that a balancing authority must maintain is based only on generating resources. By contrast, under the proposed requirement, the total contingency reserve that a balancing

[44] *See* NERC Petition, Exhibit C at 1 ("The estimated impact of these changes to the required level of reserves in the WECC is a reduction of 650 MWs or less, a decrease of approximately 9 [percent] at most.").

[45] WECC May 24, 2010 Comments at 6 n.7.

[46] *See* Powerex Comments at 4; Puget Sound Comments at 2.

authority must maintain is based on a combination of the generating resources and the demand served within a balancing authority footprint. We agree with NERC that the equal split between load and generation represents a reasonable balance to moderate shifts in contingency reserve responsibility and costs among the applicable entities.[47]

D. Use of Firm Load To Meet Contingency Reserve Requirement

42. Requirement R3 of proposed BAL–002–WECC–1 would require that each reserve sharing group or balancing authority use certain types of reserves that must be fully deployable within ten minutes of notification to meet their contingency reserve requirement. Requirement R3.6 of Reliability Standard BAL–002–WECC–1 would allow entities to use "Load, other than Interruptible Load, once the Reliability Coordinator has declared a capacity or energy emergency."[48]

NOPR Proposal

43. In its NOPR, the Commission proposed to find that Requirement R3.6 is not technically sound because it would allow balancing authorities and reserve sharing groups within WECC to use firm load to meet their minimum contingency reserve requirements "once the Reliability Coordinator has declared a capacity or energy emergency," thus creating the possibility that firm load could be shed due to the loss of a single element on the system.[49] The Commission stated that the currently effective regional Reliability Standard does not allow the use of firm load to meet minimum contingency reserve levels.

Comments

44. WECC, supported by Bonneville, Idaho Power, and SCE, contends that the proposed regional Reliability Standard treats firm load no differently than the continent-wide Reliability Standard. WECC states that the proposed regional Reliability Standard permits the use of load, other than interruptible load, to meet a contingency only if "the Reliability Coordinator has declared a capacity or energy emergency."[50] By contrast, WECC comments, the continent-wide Reliability Standard provides that contingency reserve may be met by Operating Reserve-Spinning and Operating Reserve-Supplemental, which include "load fully removable from the system within the Disturbance Recovery Period following the contingency event" to be used to meet contingencies.[51] WECC points out that the continent-wide Reliability Standard does not refer to the declaration of an emergency. For the same reason, Idaho Power and Xcel state that the proposed provisions related to the use of firm load to meet contingency reserve requirements are more stringent than the continent-wide standards. They contend that, unlike the continent-wide Reliability Standard, the proposed regional Reliability Standard requires the declaration of an emergency prior to utilizing firm load to meet contingency reserve requirements.

45. Idaho Power comments that if balancing authorities are unable to count firm load towards contingency reserve requirements, balancing authorities may have no choice but to shed firm load to remain in compliance with the continent-wide Reliability Standard BAL–002–0. Idaho Power explains that Requirement R6.2 of Reliability Standard EOP–002–2.1 requires a balancing authority to deploy all available operating reserves if it cannot meet the Disturbance Control Standard. If the balancing authority deploys all available operating reserves, including interruptible loads pursuant to Reliability Standard EOP–002–2.1, but cannot declare firm load interruptible to satisfy contingency reserve requirements, Idaho Power contends that the balancing authority may have no choice but to shed firm load to maintain compliance with the continent-wide Reliability Standard BAL–002. Thus, Idaho Power argues that not all emergencies are created equal and the flexibility to count firm load toward contingency requirements, in limited circumstances, would promote reliability but avoid unnecessary outages.

46. WECC also states that nothing in the proposed standard directs any entity to take action that would violate the requirements relating to alert levels prescribed in EOP–002–2.1. Bonneville agrees and states that the Commission's concern is misplaced because the proposed Reliability Standard does not authorize an entity to interrupt firm load for contingency reserves during EOP–002–2.1 energy emergency alerts 1 and 2. If the Commission believes that the proposed Reliability Standard should further qualify the circumstances under which loads may be used for contingency reserves, WECC contends that the issue should be addressed in a manner and at a time that does not preclude approval of the proposed regional Reliability Standard. WECC adds that it is prepared to participate in any efforts intended to address the Commission's concerns in this regard.

47. NERC agrees with WECC that a reliability coordinator must declare a capacity or energy emergency before firm load could be considered to maintain contingency reserves but also agrees with the Commission that greater specificity of the appropriate Energy Emergency Alert (EEA) level that must be declared would be helpful. Puget Sound argues that the proposed language could be interpreted to allow the use of firm load in a manner that is inconsistent with EOP–002–2.1. CDWR comments that reliability planning should not consider shedding firm loads as a contingency reserve. CDWR contends that balancing authority should plan for load interruption only if a customer voluntarily agrees to that specific use of its loads, and only upon clear terms and conditions.

Commission Determination

48. We will accept WECC's proposal on this issue. The Commission finds that, similar to the current continent-wide Reliability Standard, the proposed regional Reliability Standard does not allow balancing authorities or reserve sharing groups to curtail firm load except in compliance with NERC's Reliability Standard EOP–002–2.1.

49. The continent-wide Reliability Standard, BAL–002 does not contemplate the use of firm load as contingency reserve. In fact, it would be a violation of EOP–002–2.1 if balancing authorities or reserve sharing groups outside of WECC planned to shed firm load before the reliability coordinator issued a level 3 energy emergency alert.[52] Similarly, although Requirement R3.6 of Reliability Standard BAL–002–WECC–1 would allow balancing authorities and reserve sharing groups to use "Load, other than Interruptible Load, once the Reliability Coordinator has declared a capacity or energy emergency,"[53] these entities would not be authorized to shed firm load unless the applicable reliability coordinator had issued a level 3 energy emergency alert pursuant to EOP–002–2.1. Thus, balancing authorities and reserve sharing groups within WECC are subject to the same restrictions regarding the use of firm load as contingency reserve as balancing authorities elsewhere

[47] NERC Petition at 18.

[48] BAL–002–WECC–1, Requirement R3.6.

[49] *Citing* Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 324 (identifying guidelines for what constitutes a just and reasonable Reliability Standard).

[50] BAL–002–WECC–1, Requirement R3.6.

[51] *See* NERC Glossary, *available at http://www.nerc.com/docs/standards/rs/Glossary_of_Terms_2010April20.pdf.*

[52] EOP–002–2.1, Requirement R7.

[53] BAL–002–WECC–1, Requirement R3.6.

operating under the continent-wide Reliability Standard. On remand, we direct WECC to develop revised language to clarify this point.

E. Demand-Side Management as a Resource

50. In Order No. 693, the Commission directed the ERO to submit a modification to continent-wide Reliability Standard BAL–002–0 that includes a Requirement that explicitly allows that demand-side management be used as a resource for contingency reserves, and clarifies that demand-side management should be treated on a comparable basis so long as it meets similar technical requirements as other resources providing this service.[54] The Commission directed the ERO to list the types of resources that can be used to meet contingency reserves to provide users, owners and operators of the Bulk-Power System a set of options to meet contingency reserves.[55] The Commission clarified that the purpose of this directive was to ensure comparable treatment of demand-side management with conventional generation or any other technology and to allow demand-side management to be considered as a resource for contingency reserves on this basis without requiring the use of any particular contingency reserve option.[56] The Commission further clarified that in order for demand-side management to participate, it must be technically capable of providing contingency reserve service, with the ERO determining the technical requirements.[57]

51. In its petition, NERC states that it raised this concern with WECC, and WECC responded that the drafting team wrote the regional Reliability Standard "to permit load, Demand-Side Management, generation, or another resource technology that qualifies as Spinning Reserve or Contingency Reserve to be used as such." WECC further explained that demand-side management that is deployable within ten minutes is a subset of interruptible load, which is an acceptable type of reserve set forth in proposed Requirement R3.2.[58] WECC previously commented that, in the proposed standard, "Loads and [demand-side management] were not allowed as Spinning Reserve because it is not permitted by the NERC Spinning Reserve definition."[59]

NOPR Proposal

52. In its NOPR, the Commission stated that the proposed regional Reliability Standard does not explicitly address the use of demand-side management as a resource for contingency reserves. Accordingly, the Commission proposed to direct WECC to develop a modification to BAL–002–WECC–1 that explicitly provides that demand-side management that is technically capable of providing this service may be used as a resource for contingency reserves. Consistent with the Commission's directive in Order No. 693, the Commission explained that the modification should list the types of resources, including demand-side management, which can be used to meet contingency reserves. The Commission also stated that the modification should ensure comparable treatment of demand-side management with conventional generation or any other technology and allow demand-side management to be considered as a resource for contingency reserves on this basis without requiring the use of any particular contingency reserve option.

53. In addition, the Commission noted a conflict related to the definition of Spinning Reserve as it is used in the proposed regional Reliability Standard. The Commission stated that Requirement R3.1 refers to the NERC Glossary definition of Spinning Reserve, which omits the use of demand-side management or other technologies that could be used as a resource because it limits acceptable Spinning Reserve resources to generation resources. The Commission proposed to direct WECC to develop a modification to the proposed regional Reliability Standard replacing the term Spinning Reserve with Operating Reserve-Spinning, which includes as part of the definition of Operating Reserve, "load fully removable from the system within the Disturbance Recovery Period following the contingency event." Since the term Spinning Reserve was not used in other Reliability Standards, the Commission proposed to direct the ERO to remove the term from the NERC Glossary upon approval of a modified Reliability Standard using Operating Reserve-Spinning.

Comments

54. WECC, supported by NERC, Bonneville, CAISO, Idaho Power, and SCE, contends that the proposed regional Reliability Standard is inclusive of demand-side management as a resource to be used in the calculation of contingency reserve because it provides for the use of Interruptible Load for contingency reserve. WECC points out that the NERC Glossary defines Interruptible Load as "demand that the end-use customer makes available to its load-serving entity via contract or agreement for curtailment."[60] Nevertheless, if the Commission issues a remand, CAISO urges the Commission to provide NERC an opportunity to resubmit BAL–002–WECC–1 to address any definitional concerns within 90 days.

55. Xcel comments that the Reliability Standard should not be more explicit about the inclusion of demand-side management as a resource because the term demand-side management encompasses many types of technologies and services, including reduction of energy consumption by use of high-efficiency light bulbs. If demand-side management is more explicitly included in the proposed regional Reliability Standard, Xcel contends that such a revision might cause entities that are working to provide value to the end-use customers to claim that a customer could get revenue by providing reserves.

56. By contrast, Puget Sound and CDWR comment that they agree with the Commission that technically qualified demand-based resources—as well as other qualified non-generation resources such as energy storage devices—should be allowed to provide ancillary services. CDWR suggests that, if Spinning Reserve is meant to connote two products—a contingency reserve and a frequency regulation reserve—then consideration should be given to better defining the services and the associated technical criteria. Nevertheless, CDWR comments that demand-based resources that agree to interruption for reliability purposes should receive reduced charges for lesser quality services, an exemption from charges associated with the same service that the demand-based resources are providing, and compensation for service they provide.

57. Concerning the Commission's proposal to direct the ERO to remove the term Spinning Reserve upon approval of a modified regional

[54] *Mandatory Reliability Standards for the Bulk-Power System,* Order No. 693, 72 FR 16416 (Apr. 4, 2007), FERC Stats. & Regs. ¶ 31,242, at P 330, order on reh'g, Order No. 693–A, 120 FERC ¶ 61,053 (2007).

[55] *Id.* P 331, 335.

[56] *Id.* P 333.

[57] *Id.* P 334.

[58] NERC Petition at 40.

[59] NERC Petition at Exhibit C (Record of Development of Proposed Reliability Standard) WECC's Written Response to NERC's Written Comments, August 13, 2008 at page 4.

[60] *See* NERC Glossary *available at http://www.nerc.com/docs/standards/rs/Glossary_of_Terms_2010April20.pdf.*

Reliability Standard, NERC points out that there are two definitions for Spinning Reserve; one from NERC, the other from WECC. NERC suggests that the Commission retain the NERC-defined term and retire the WECC term. NERC states that the proposed standard uses the NERC-defined term in Requirements R1, R2, and R3.

58. Several commenters oppose the removal of the term Spinning Reserve from the NERC Glossary.[61] Puget Sound states that retaining the term in the NERC Glossary is helpful to the development of a capacity/reserves market by facilitating the purchase and sale of spinning capacity that is not contingency-based. Similarly, NV Energy states that the term Spinning Reserve is useful because it describes a type of reserve that must be synchronized, unloaded generating capacity, as this is the only product that can provide the essential service of frequency and governor response under dynamic system conditions and disturbances. WSPP argues that the Commission's proposal is based upon a faulty understanding of the relationship between the terms Operating Reserve-Spinning and Spinning Reserve. WSPP and MISO agree that Spinning Reserve is used in the definition of Operating Reserve, which appears more than fifty times in the NERC Reliability Standards. WSPP further explains that Spinning Reserve can be used for the spinning component of Operating Reserve but also for other critical system requirements. In addition, MISO argues, generally, that it is not appropriate for the Commission to effect changes to the continent-wide NERC standards by proposing a modification to the NERC Glossary within the context of a proceeding addressing a regional Reliability Standard.

59. With respect to the Commission's proposed revisions of the definitions of the terms Operating Reserve—Spinning and Operating Reserve—Supplemental, NERC agrees that greater clarity is necessary regarding the meaning of "load fully removable from the system." NERC states, however, that these modifications must be made through NERC's Reliability Standard Development Process and are, in fact, currently being addressed in Project 2007–05 Balancing Authority Controls, which is currently revising Reliability Standard BAL–002–0, as well as other standards.[62]

Commission Determination

60. We find that the proposed regional Reliability Standard does not provide that demand-side management that is technically capable of providing this service may be used as a resource for contingency reserves. The WECC definition of Spinning Reserve, like the NERC definition of the same term, is limited to "unloaded generation which is synchronized and ready to serve additional demand." Thus, neither the WECC nor the NERC definitions of Spinning Reserve are inclusive of demand-side management as a resource.[63] Nevertheless, WECC argues that the proposed regional Reliability Standard is inclusive of demand-side management as a resource for contingency reserves because it lists interruptible load as an available resource for contingency reserve. The definition of interruptible load, however, is not inclusive of all forms of demand-side management.[64] NERC defines demand-side management as "all activities or programs undertaken by Load-Serving Entity or its customers to influence the amount or timing of electricity they use."[65] This could include interruptible load but, as Xcel points out, demand-side management may encompass the use of many types of technologies and services. For example, according to the NERC Glossary, demand-side management includes controllable load, termed Direct Control Load Management, which is defined as demand-side management that is under the direct control of the system operator but does not include interruptible load.[66] Thus, by simply listing interruptible load, the proposed regional Reliability Standard is not sufficiently inclusive of demand-side management as a resource.[67]

61. On remand, the Commission hereby adopts its NOPR proposal and directs the WECC to develop modifications to the proposed regional Reliability Standard that explicitly provide that demand-side management technically capable of providing this service may be used as a resource for both spinning and non-spinning contingency reserves.[68] Consistent with the Commission's directive in Order No. 693, the modification should list the types of resources, including demand-side management, which can be used to meet contingency reserves.[69] The modification also should ensure comparable treatment of demand-side management with conventional generation or any other technology and allow demand-side management to be considered as a resource for contingency reserves on this basis without requiring the use of any particular contingency reserve option. For example, consistent with our determinations in Order No. 693, the modification could replace the term Spinning Reserve with Operating Reserve—Spinning and Non-Spinning Reserve with Operating Reserve—Supplemental, since these glossary definitions are inclusive of demand-side management, including controllable load, in contrast to the current terms used in the proposed regional Reliability Standard.[70]

62. As commenters have pointed out, the term Spinning Reserve is used in the definition of Operating Reserve and in service agreements by and among certain WECC entities. Therefore, the Commission will not adopt its proposal to direct the ERO to remove the term from the NERC Glossary. However, as NERC points out WECC has maintained its own definition of the term Spinning Reserve. We find no substantial difference between the two terms. Both terms refer to "unloaded generation that is synchronized and ready to serve additional demand."[71] In its order approving WECC's current regional Reliability Standard, the Commission determined that regional definitions

[61] *E.g.,* MISO, Puget Sound, WSPP, and Xcel.

[62] As of July 28, 2010, this project has been merged with Project 2007–18—Reliability-based Controls and is now listed as new Project 2010–14—Balancing Authority Reliability-based Control. The new project page is available at *http://www.nerc.com/filez/standards/Project2010-14_Balancing_Authority_RBC.html.*

[63] In the transmittal letter of its compliance filing to Order No. 719, CAISO explained that demand-side management resources cannot currently provide regulation or spinning reserve services in its markets because of WECC's definitions of regulation and spinning reserve, which are limited to generation resources. CAISO, Compliance Filing, Docket No. ER09–1048–000, at 28–30 (April 28, 2009).

[64] NERC defines Interruptible Load as "Demand that the end-use customer makes available to its Load-Serving Entity via contract or agreement for curtailment." NERC Glossary *available at http://www.nerc.com/docs/standards/rs/Glossary_of_Terms_2010April20.pdf.*

[65] NERC Glossary *available at http://www.nerc.com/docs/standards/rs/Glossary_of_Terms_2010April20.pdf.*

[66] *Id.*

[67] We also note that WECC's explanation that demand-side management that is deployable within ten minutes is a subset of interruptible load is not reflected in the definition of Interruptible Load.

[68] In Order No. 693, the Commission clarified that, in order for demand-side management to participate as a resource for contingency reserves, it must be technically capable of providing contingency reserve service. For example, not every end-user who curbs electricity usage is technically capable of providing contingency reserve service. The Commission expects that the ERO would determine what technical requirements demand-side management would need to meet to provide contingency reserves. Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 334.

[69] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 333.

[70] *Id.* P 1896.

[71] NERC Glossary, *available at http://www.nerc.com/docs/standards/rs/Glossary_of_Terms_2010April20.pdf.*

should conform to the definitions set forth in the NERC Glossary, unless a specific deviation has been justified.[72] WECC has not justified the need for a separate, regional definition of Spinning Reserve. Accordingly, we direct WECC to remove this regional definition from the NERC Glossary.

F. Miscellaneous

Comments

63. In its petition, NERC contends that the industry will benefit from the improved clarity of the proposed regional Reliability Standard. Among its revisions, NERC presents a proposal from WECC for an interpretation of the term "Load Responsibility."[73] In the NOPR, the Commission stated its belief that any confusion regarding the term "Load Responsibility" has been addressed by WECC and therefore does not have a reliability impact. Xcel states that it agrees that WECC's interpretation is an improvement and that the standard is clearer without the term. Nevertheless, Xcel comments that more guidance on application is needed from both WECC and FERC before the western markets may operate efficiently.

64. If the Commission decides to remand the proposed regional Reliability Standard, the QF Parties ask the Commission to direct WECC to define the term "net generation." The QF Parties explain that the calculation of the amount of contingency reserves in the proposed standard is based, in part, on the amount of net generation, which is not defined. The QF Parties contend that, consistent with Commission precedent, the definition of net generation should not include generation used to serve load behind the meter.[74]

65. Regarding the applicability of the proposed regional Reliability Standard, NV Energy expresses concern that it does not assign any responsibility or obligations for generator owners and generator operators. NV Energy states that a balancing authority does not have ownership or operational control over significant shares of generating resources within its footprint. Thus, NV Energy contends, a balancing authority may be required to carry a disproportionate share of the contingency reserve obligation within the Western Interconnection. For this reason, NV Energy asks the Commission to direct WECC to address this issue on remand.

Commission Determination

66. The proposed regional Reliability Standard offers certain improvements over the current regional Reliability Standard as commenters point out. Nevertheless, for the reasons discussed above, we must remand the proposed regional Reliability Standard to the ERO. On remand, we direct WECC to consider the concerns raised by the QF Parties and NV Energy.

III. Information Collection Statement

67. The Office of Management and Budget (OMB) regulations require that OMB approve certain reporting and recordkeeping (collections of information) imposed by an agency.[75] The information contained here is also subject to review under section 3507(d) of the Paperwork Reduction Act of 1995.[76] By remanding the proposed Reliability Standard the Commission is maintaining the status quo until future revisions to the Reliability Standard are approved by the Commission. Thus, the Commission's action does not add to or increase entities' reporting burden.

IV. Environmental Analysis

68. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[77] The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. Included in the exclusion are rules that are clarifying, corrective, or procedural or that do not substantially change the effect of the regulations being amended.[78] The actions directed herein fall within this categorical exclusion in the Commission's regulations.

V. Regulatory Flexibility Act

69. The Regulatory Flexibility Act of 1980 (RFA)[79] generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The RFA mandates consideration of regulatory alternatives that accomplish the stated objectives of a final rule and that minimize any significant economic impact on a substantial number of small entities. The Small Business Administration's Office of Size Standards develops the numerical definition of a small business.[80] For electric utilities, a firm is small if, including affiliates, it is primarily engaged in the transmission, generation and/or distribution of electric energy for sale and its total electric output for the preceding twelve months did not exceed four million megawatt hours. The RFA is not implicated by this final rule because by remanding the proposed Reliability Standard the Commission is maintaining the status quo until future revisions to the Reliability Standard are approved by the Commission.

VI. Document Availability

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

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

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

VII. Effective Date and Congressional Notification

73. This final rule shall become effective November 26, 2010. The Commission has determined, with the concurrence of the Administrator of the

[72] *North American Electric Reliability Corp.,* 119 FERC ¶ 61,260 at P 54.

[73] WECC's interpretation of "Load Responsibility," which was approved by the WECC Board of Directors September 7, 2007, places the responsibility on the balancing authorities to determine the amount of and assure that adequate contingency reserves are provided. *See* WECC Interpretation of Load Responsibility (Sept. 7, 2007), *available at http://www.wecc.biz/Standards/Interpretations/Interpretation%20of%20Load%20Responsibility.pdf.* Likewise, the current regional Reliability Standard places the responsibility on the balancing authorities to determine the amount of contingency reserves and assure that adequate contingency reserves are provided.

[74] *Citing,* Opinion No. 464, Docket No. ER98–997–000, at P 11 *et seq.,* 38–40 (August 12, 2003).

[75] 5 CFR 1320.11.

[76] 44 U.S.C. 3507(d).

[77] *Regulations Implementing the National Environmental Policy Act of 1969,* Order No. 486, FERC Stats. & Regs. ¶ 30,783 (1987).

[78] 18 CFR 380.4(a)(2)(ii).

[79] 5 U.S.C. 601–612.

[80] *See* 13 CFR 121.201.

Office of Information and Regulatory Affairs of OMB, that this rule is not a "major rule" as defined in section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996.

List of Subjects in 18 CFR Part 40

Electric power, Electric utilities, Reporting and recordkeeping requirements.

By the Commission.

Kimberly D. Bose,

Secretary.

APPENDIX A

List of Commenters

Commenter name	Abbreviation
Western Electricity Coordinating Council	WECC
North American Electric Reliability Corp	NERC
Bonneville Power Administration	Bonneville
California Independent System Operator Corp	CAISO
California Dept of Water Resources, State Water Project	CDWR
Idaho Power Co.	Idaho Power
Midwest Independent System Operator, Inc	MISO
Powerex Corp	Powerex
Puget Sound Energy, Inc	Puget Sound
Cogeneration Association of California and the Energy Producers and Users Coalition	QF Parties
Sempra Generation	Sempra
Sierra Pacific Power Co. and Nevada Power Co	NV Energy
Southern California Edison Co	SCE
Western Interconnection Regional Advisory Body	WIRAB
WSPP Inc	WSPP
Xcel Energy Services Inc	Xcel

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DEPARTMENT OF STATE

22 CFR Part 62

[Public Notice: 7216]

RIN 1400–AC56

Exchange Visitor Program—Secondary School Students

AGENCY: United States Department of State.

ACTION: Final rule.

SUMMARY: The Department is revising existing Secondary School Student regulations regarding the screening, selection, school enrollment, orientation, and quality assurance monitoring of exchange students as well as the screening, selection, orientation, and quality assurance monitoring of host families and field staff. Further, the Department is adopting a new requirement regarding training for all organizational representatives who place and/or monitor students with host families. The proposed requirement to conduct FBI fingerprint-based criminal background checks will not be implemented at this time. Rather, it will continue to be examined and a subsequent Final Rule regarding this provision will be forthcoming. These regulations, as revised, govern the Department designated exchange visitor programs under which foreign secondary school students (ages 15–18½) are afforded the opportunity to study in the United States at accredited public or private secondary schools for an academic semester or year while living with American host families or residing at accredited U.S. boarding schools.

DATES: Effective November 26, 2010. Compliance with the new requirement for the State Department designed and mandated training module for local coordinator training, as set forth at § 62.25(d)(1), will not become effective until the development of an online training platform implementing this requirement is completed. The Department anticipates a January 2011 launch of this training platform. A subsequent **Federal Register** Notice will be published when development is completed.

FOR FURTHER INFORMATION CONTACT: Stanley S. Colvin, Deputy Assistant Secretary for Private Sector Exchange, U.S. Department of State, SA–5, 2200 C Street, NW., 5th Floor, Washington, DC 20522–0505; or *e-mail at JExchanges@state.gov*.

SUPPLEMENTARY INFORMATION: The U.S. Department of State has authorized Secondary School Student programs since 1949, following passage of the United States Information and Educational Exchange Act of 1948 and adoption of 22 CFR Part 62—Exchange Visitor Program, establishing a student exchange program (14 FR 4592, July 22, 1949). Over the last 60 years, more than 850,000 foreign exchange students have lived in and learned about the United States through these Secondary School Student programs.

While the vast majority of the Department's nearly 28,000 annual exchanges of Secondary School students conclude with positive experiences for both the exchange student and the American host families, a number of incidents have occurred recently with respect to student placement and oversight which demand the Department's immediate attention. The success of the Secondary School Student program is dependent on the generosity of the American families who support this program by welcoming foreign students into their homes. The number of qualified foreign students desiring to come to the United States for a year of high school continues to rise and student demand is now placing pressure on the ability of sponsors to identify available and appropriate host family homes. The Department desires to provide the means to permit as many exchange students into the United States as possible so long as we can ensure their safety and welfare, which is our highest priority.

A great majority of exchange students who come to the United States to attend high school enjoy positive life-changing experiences, grow in independence and maturity, improve their English language skills, and build relationships with U.S. citizens. As with other Exchange Visitor Program categories, the underlying purpose of the

Secondary School Student program is to further U.S. public diplomacy and foreign policy goals by encouraging this positive academic and social interaction. Experience has shown that foreign students who participate in this program share the knowledge and goodwill derived from their exchange experience with fellow citizens upon return to their home countries. The age and vulnerability of high school exchange students and the long-term importance of these programs necessitates increased quality of sponsor program administration through both the promulgation of clear and enhanced regulations and continued Department oversight of sponsor activities and compliance. The Department believes that the increased specificity in this Final Rule and the establishment of minimum industry standards will improve the quality of exchange student placements and promote the health, safety and well-being of this most vulnerable group of exchange visitors. The Department, the Congress, the American public, and members of the exchange community share a common goal of ensuring a safe and positive exchange experience for every foreign student participating in this exchange program.

As a first step in the rulemaking process to adopt enhanced program safeguards, the Department published in the **Federal Register** an Advance Notice of Proposed Rulemaking (ANPRM) soliciting comments from sponsors and the general public on current best practices in the industry (*see* 74 FR 45385, September 2, 2009). The ANPRM focused on six areas: (1) Utilization of standardized information on a sponsor-developed host family application form; (2) a requirement for photographs of all host family homes (to include the student's bedroom, living areas, kitchen, outside of house and grounds) as a part of the host family application process; (3) the appropriateness of host family references from family members or local coordinators, and the feasibility of obtaining one reference from the school in which the student is enrolled; (4) whether fingerprint-based criminal background checks should be required of all adult host family members and sponsor officers, employees, representatives, agents and volunteers who come, or may come, into direct contact with the student and whether guidelines regarding the interpretation of criminal background checks are needed; (5) the establishment of baseline financial resources for potential host families; and (6) the establishment of limitations on the composition of potential host families. In response to the ANPRM, 97 parties filed comments, and the Department, in turn, identified 16 discrete issues that it believed merited specific public comment. These issues and the proposed regulatory language addressing each matter were consolidated into a Notice of Proposed Rulemaking (NPRM) (*see* 75 FR 23197, May 3, 2010). The Department received a total of 1,698 comments in response to the NPRM. Of this number, 1,265 comments, or 74% of the total comments, were submitted by individuals self-identifying with three sponsor organizations: Rotary International (600 comments); American Field Services (451 comments); and Youth for Understanding (214 comments). Collectively, comments from persons associated with these three sponsor organizations opposed: Obtaining FBI fingerprint-based criminal background checks for adult members of potential host families; the prohibition of single adults hosting exchange students; the prohibition of removing exchange students' government issued documents, personal computers, and telephones from their possession; and the change of required maximum distance of local coordinators from exchange students from 120 miles to one hour's drive. Sponsor organizations, industry associations, state law enforcement agencies, and other interested members of the public submitted the remaining 433 comments. The Department also hosted a public meeting on June 17, 2010, to discuss the Notice of Proposed Rulemaking. The Executive Directors of the Alliance and Council on Standards for International Educational Travel (CSIET) and a representative of the National Center for Missing and Exploited Children provided statements on behalf of their respective organizations. Eleven (11) other individuals spoke at the public meeting, including directors of three organizations, two local Rotary leaders, four exchange program volunteers, and one current exchange student. The Department received twelve (12) written comments from attendees following the public meeting.

Analysis of Comments

1. Standard Host Family Application Form. The Department proposed that a new regulatory provision be added at § 62.25(j)(2) to require the use of standard information fields on sponsors' host family application forms. The information set forth at Appendix F to Part 62, "Information to be Collected on Secondary School Student Host Family Applications," includes all data fields that, at a minimum, must be collected. The Department received 93 comments, 85 of which supported this change indicating that it is important that all sponsors collect the same information on potential host families. The eight parties opposing this proposal argued that sponsor organizations are sufficiently able to determine information to be collected on the Host Family Application without guidance from the Department. The Department disagrees with these eight parties. Based on the Department's administration of this program, the collection of uniform information by all sponsors will establish a consistent, program-wide base for evaluating potential host families. Having considered all points of view on this issue, the Department hereby adopts, without change, this proposed language set forth at § 62.25(j)(2).

2. Requiring Photographs of the Host Family Home. The Department proposed that a new regulatory provision be added at § 62.25(j)(2) to require sponsors to photograph the exterior and grounds, kitchen, student's bedroom, bathroom, and family or living room of the potential host family's home as part of the host family application. The Department received 81 comments, 38 of which supported this change. Parties supporting this proposal explained that requiring photographs of the host family home would provide an objective visual means of evaluating the suitability of the home and is currently a standard practice of many sponsors. Many of the parties who did not support this requirement submitted comments that were general in nature, *i.e.,* merely voicing opposition to the proposal but without an explanation. A few comments stated that requiring photographs was an invasion of privacy. The Department disagrees with comments opposed to this proposed change and has determined that the safety of students outweighs any privacy issues that could be raised. The Department hereby adopts, without change, this proposed language set forth at § 62.25(j)(2).

3. Personal Character References for Host Family Applicants. As a procedural safeguard, the Department proposed that a new regulatory provision be added at § 62.25(j)(5) to eliminate host family members, and sponsor representatives from serving as character references for potential host families. The Department received 45 comments, 37 of which supported this change. Parties who did not support this requirement submitted comments that were general in nature, i.e., merely voicing opposition to the proposal but without an explanation. The

Department believes that the obtainment of personal character references from family members and persons affiliated with the sponsor organization does not provide a sufficiently impartial recommendation of a family's suitability to host. Having considered all points of view on this issue, the Department thereby adopts, without change, the proposed language set forth at § 62.25(j)(5).

4. Measuring Host Family Financial Resources. The Department proposed that a new regulatory provision be added at § 62.25(j)(6) to prohibit the placement of exchange students with host families receiving financial needs-based government subsidies for food or housing and to require that program sponsors collect the range of annual household income of potential host families on the host family application. The Department received 150 comments, 43 of which supported the collection of host family financial information. No comments were received opposing prohibiting a family that receives needs-based government subsidies for food or housing from hosting exchange students. Parties opposed to the proposed change regarding collection of information on host family income expressed the following concerns: Host families would not want to disclose their annual income levels; the requirement of such disclosure could discourage families from hosting; and income level is not a determinant of whether a family will be a good host family. The Department disagrees with those comments opposed to collecting household income information and has determined that the benefits of knowing a potential host family's range of income is an important factor in assessing a family's financial ability to care for an exchange student and outweighs any concerns that such information collection would discourage some families from hosting. Having considered all points of view on this issue, the Department hereby adopts, without change, the proposed language set forth at § 62.25(j)(6).

5. Criminal Background Checks. The Department proposed that a new regulatory provision be added at § 62.25(j)(7) to require that all potential host family adults (age 18 or older) complete an FBI fingerprint-based criminal background check before the family is able to host an exchange student. The Department received 882 comments, 160 of which supported this change. Opponents of the proposed FBI fingerprint-based criminal background check requirement suggested it would "criminalize" host families participating in the program and could potentially reduce by as much as 30% the number of families willing to host. This estimate was calculated by sponsors and industry trade associations involved in the program through surveys of current host families. Opponents also suggested that this proposal could not be executed in a timely, cost effective, or convenient manner as there is no existing mechanism for such checks to be performed directly by placement organizations. Supporters of this proposed requirement explained that the extra level of protection that FBI fingerprint-based criminal background checks of host family adults would provide exchange students far outweighs the inconveniences that such checks would impose on host families.

The Department notes that the proposal to require FBI fingerprint-based criminal history checks for all adult members of potential host families is responsive to public demands for the increased protections and reflects a trend at both the state and federal levels towards requiring FBI fingerprint-based criminal background checks for volunteers working with children. Specifically, the Congress created the Child Safety Pilot Program to be administered by the National Center for Missing and Exploited Children (*see* the National Child Protection Act/ Volunteers for Children Act) to provide a national means to complete FBI fingerprint-based criminal background checks on volunteers working with children, a category that includes adult members of potential host families.

Given the National Center for Missing and Exploited Children's limited authorization and resources to perform these checks, a number of cost, administrative, and statutory issues need to first be addressed before this proposal can be adopted. Accordingly, the Department will conduct further fact-finding and analysis on this matter and will not adopt at this time the proposed language set forth at § 62.25(j)(7). The existing requirements for criminal background checks remain. As a matter of clarification, sponsors must verify that each member of the host family household eighteen years of age and older, as well as any new adult member added to the household, or any member of the host family household who will turn eighteen years of age during the exchange student's stay in that household, has undergone a criminal background check (which must include a search of the Department of Justice's National Sex Offender Public Registry). *See http://www.nsopk.gov.*

6. Host Family Composition. The Department proposed that a new regulatory provision be added at § 62.25(j)(9) to prohibit single adults without a school-aged child living in the home or without a child who visits the home frequently from hosting exchange students. The Department received 1,190 comments, 77 of which supported this change. Supporters of this proposed change believe that the placement of an exchange student or students with a single adult without a school-aged child who lives in or frequently visits the home necessarily increases potential risk to the exchange student as there is no additional person in the home with whom the student can communicate, should the relationship with the host parent become strained or abusive. However, parties opposing this proposal argued that the exclusion of single adults without school-aged children in the home or who frequently visit is discriminatory and would unnecessarily eliminate approximately ten percent (10%) of current host families many of whom, sponsors reported, provide excellent experiences for their exchange students and who tend to repeatedly volunteer to participate in this exchange program. This potential reduction of host families was provided by trade associations involved in this program through a survey of current host families.

The Department notes that numerous public comments submitted by sponsor organizations outlined best practices regarding the placement of exchange students in single adult host homes, including additional screening measures for single adults. Having considered competing points of view, the Department finds that the language set forth at § 62.25(j)(9) should be amended to impose additional screening procedures for exchange student placements involving single adult parents with no school-aged children in the home, including a secondary level of review by an organizational representative other than the individual who recruited and selected the applicant. Such secondary review should include demonstrated evidence from the individual's friends or family who can provide an additional support network for the exchange student and evidence of the individual's ties to the community. Finally, both the exchange student and his or her natural parents must agree in writing to any placement with a single adult host parent without a school-aged child in the home. These additional screening procedures for single adult homes will be monitored by the Department over an experimental period of not more than three years, following which the success of this approach will be further reviewed and

any necessary adjustments will be considered for adoption.

7. Local Coordinator Training Course. The Department proposed that a new regulatory provision be added at § 62.25(d)(1) to require that all local coordinators complete a training program, to be developed and administered by the Department. The Department received 108 comments, 65 of which supported this proposal. The Department notes that local coordinators, who serve as representatives (as either employees or volunteers) of program sponsors and who have responsibility for obtaining school enrollment and locating and recruiting host families, are the critical component in a successful exchange program. Local coordinators exercise a degree of independent judgment when determining whether a potential host family is capable of providing a comfortable and nurturing home environment for an exchange student, whether that family is an appropriate match for the student, and whether it has adequate financial resources to undertake hosting obligations. Opponents of this proposed change explained that the local coordinator training programs currently offered by sponsors are sufficient and that a Department-administered training course is redundant. The Department disagrees with those comments and determines that a uniform and program-wide local coordinator training course will better ensure that all agents and employees placing exchange students on behalf of a sponsor are equally educated and informed of their responsibilities. Having considered all points of view on this issue, the Department hereby adopts, without change, the proposed language set forth at § 62.25(d)(1).

8. Number of Students and Host Families for Whom a Local Coordinator May Be Responsible. The Department sought public comment on whether limiting the number of student and host family placements that a local coordinator may oversee would enhance the quality of host family placements. The Department received 61 comments, 17 of which supported this proposal. Opponents of the proposal opined that such a ratio was a decision best left to, and most accurately set by, the sponsor organization. The Department agrees with the 44 parties opposing this proposal, and, having considered all points of view on this issue, does not adopt this requirement.

9. Athletic Participation in the United States. The Department proposed that a new regulatory provision be added at § 62.25(h)(2). This provision would prohibit exchange student selection and placement based on athletic ability. The Department received 37 comments, 35 of which supported this proposal. Comments in support of this requirement noted that this proposal is an existing CSIET provision and that the adoption of this standard would establish a uniform policy across the Secondary School Student program industry. The two parties opposed to this requirement provided no explicit reasons. Having has considered all points of view on this issue, the Department hereby adopts, without change, the proposed language set forth at § 62.25(h)(2).

10. Prohibition of Payments to Host Families. The Department proposed that a new regulatory provision be added at § 62.25(d)(6) to prohibit payments to host families for hosting exchange students. The Department received 141 comments, 122 of which supported this proposal. Parties who supported the proposal cited the established Secondary School Student program practice of not paying host families to ensure that host families are involving themselves in the program with the correct motives, i.e., for the experience, and not for compensation. The parties who opposed this requirement suggested that host families were providing a service for which the family should be compensated. The Department disagrees with the 19 parties opposing this proposal and maintains its position that hosting an exchange student must remain a volunteer activity. Having considered all points of view on this issue, the Department hereby adopts, without change, the proposed language set forth at § 62.25(d)(6).

11. Separate Orientation for Host Families. The Department proposed that a new regulatory provision be added at § 62.25(d)(9). This provision would clarify that sponsors must conduct the host family orientation at the end of the host family application process, i.e., after the host family has been fully vetted and accepted into the program. The Department received 519 comments, 75 of which supported this proposal. Parties opposed to this proposed change argued that the host family orientation is often used as the initial recruitment session. The Department disagrees with those comments opposed to requiring a separate host family orientation and has determined that a separate orientation, to be conducted following the recruitment, screening, and selection of host families, will better ensure that the host family fully understands and accepts the obligations it assumes when choosing to host an exchange student. Having considered all points of view on this issue, the Department hereby adopts, without change, the proposed language set forth at § 62.25(d)(9).

12. Additional Visit to Host Family Homes. The Department proposed that a new regulatory provision be added at § 62.25(d)(12) to require that a visit to the host family home be conducted, within two months of placement, by an organizational representative of the sponsor other than the local coordinator who screened and selected the host family and made the placement. The Department received 91 comments, 31 of which supported this proposal. Opponents focused on additional administration and cost burdens for sponsors required for a second organizational representative to make these visits. The Department disagrees with those comments opposed to this proposed change and has determined that the enhanced monitoring outweighs any possible administrative inconveniences. The Department also recognizes that some sponsors will need to adjust their current business models to satisfy this new requirement but has determined that this requirement is a minimal cost to sponsors. Having considered all points of view on this issue, the Department hereby adopts, without change, the proposed language set forth at § 62.25(d)(12).

13. Local Coordinator Distance from Exchange Students. The Department proposed that a new regulatory provision similar to that which has been successfully incorporated into the Au Pair category regulations be added at § 62.25(d)(5) to require that no secondary school student placement be made beyond one hour's drive of the home of the local organizational representative responsible for monitoring the student. The Department received 54 comments, 22 of which supported this proposal. Opponents of this change explained that such a requirement would serve only to the limit number of exchange student placements in rural locations, especially the Mountain West region. The Department agrees with those comments opposed to this proposed change. Having considered all points of view on this issue, the Department does not adopt this requirement.

14. Restrictions on Local Coordinators. The Department proposed that a new regulatory provision be added at § 62.25(d)(10) to limit the functions and responsibilities of a local coordinator. Such limitations would prohibit a local coordinator from performing the duties of both a host family and a local coordinator/area

supervisor for an exchange student; or performing the duties of both a host family for one sponsor and a local coordinator for another. A local coordinator would also be prohibited from performing the duties of a local coordinator for a student if the coordinator also holds a position of direct authority over the student that is not related to or arising from the coordinator's placement of a student with a host family. Many local coordinators are teachers and principals in the schools where a student is placed. The Department received 62 comments, 31 of which supported this proposal. Opponents specifically argued that school officials (both teachers and principals) best know the school and student environment in which exchange students will be immersed and to exclude such a cohort needlessly eliminates some of the most important volunteers in the Secondary School Student program. The Department adopts, without change, the proposed language set forth at § 62.25(d)(10)(i) and (ii) but finds that the language set forth at § 62.25(d)(10)(iii) should be amended so that principals and teachers are not excluded from serving as local coordinators. However, a teacher cannot serve as a local coordinator for a student in his/her class. A principal cannot serve as a local coordinator for a student in his/her school. The Department also notes that students are placed in U.S. boarding schools.

15. Removing Exchange Student Property. The Department proposed that a new regulatory provision be added at § 62.25(d)(8) to prohibit the removal of exchange students' government issued documents, personal computers, and telephones from their possession. The Department received 550 comments, 68 of which supported this proposal. Comments opposed to this proposed requirement argued both that students often do not understand the importance of safekeeping their government issued documents and that confiscating cell phones and computers is a time-tested and acceptable disciplinary action for host parents. Comments supporting this proposed requirement explained that exchange students should always have access to their telephones and computers to maintain contact with parents, authorities, or friends in case of a problem, thus viewing such access as a safeguard for the student. Federal law prohibits the removal of official governmental documents from foreign nationals. The Department agrees with the comments opposed to these proposed requirements regarding the removal of cell phones and computers and has determined that the language set forth at § 62.25(d)(8) should be amended to delete the prohibition against removing an exchange student's personal computer or cell phone. However, under no circumstance is a sponsor or a host family permitted to prohibit a student from communicating with his/her natural parents and families by telephone and e-mail.

16. Limits to Advertising. The Department proposed that new regulatory provisions be added at § 62.25(m)(3) and (4) to prohibit sponsors from including personal data, contact information, or photographs of potential exchange students on web sites or in other promotional materials and would require sponsors to ensure that access to student profiles be password protected and available only to potential host families who have been fully vetted and selected for program participation. The Department received 103 comments, 27 of which supported this proposal. Parties supporting this proposal stated that prohibiting the use of photographs and personal information of potential exchange students for recruiting un-vetted host families would better ensure the safety of exchange students as it makes such information more difficult for predators to access. Opponents stated that use of photographs in a restricted and limited manner is essential for host family recruiting. Opponents also described this type of "photo-listing," or using a photograph with a student's first name but no last name, address, or contact information to be a safe and responsible practice and one widely used in the U.S. adoption of children process. The Department disagrees with those comments opposing this proposed change and notes that the family selection process in the U.S. adoption system is much more lengthy and comprehensive than the selection of exchange student host families, and is therefore an inexact comparison. Having considered all points of view on this issue, the Department hereby adopts, without change, the proposed language set forth at § 62.25(m)(3) and § 62.25(m)(4).

Finally, in drafting the Proposed Rule, the language contained in section 62.25(n) Reporting Requirements, paragraph 3 was amended to clarify the information the report was to contain. The Department views this as a clarification and not a change in requirements. Currently, a sponsor cannot prepare a report on changes in student placement with more than one host family or school without having the data, requested in the proposed rule, readily available. Likewise, a sponsor cannot perform requisite monitoring of a student without having this information on each student in their exchange program. In addition, consistent with the current process required for completion of the Placement Reports, this report is being requested in electronic format to enable the data submitted from all sponsor organizations to be compared and analyzed. The Department received no comments on this section of the proposed requirement and hereby adopts the proposed language set forth at 62.25(n)(3) as stated. For additional clarification, a final sentence was added to reflect the date by which the report is required. The sentence reads: This report is due by July 31 for the previous academic school year.

Administrative Procedure Act

The Department of State is of the opinion that the Exchange Visitor Program is a foreign affairs function of the U.S. Government and that rules implementing this function are exempt from section 553 (Rulemaking) and section 554 (Adjudications) of the Administrative Procedure Act (APA). The U.S. Government policy and longstanding practice have supervised and overseen foreign nationals who come to the United States as participants in exchange visitor programs, either directly or through private sector program sponsors or grantees. When problems occur, the U.S. Government is often held accountable by foreign governments for the treatment of their nationals, regardless of who is responsible for the problems. The purpose of this rule is to protect the health and welfare of foreign nationals entering the United States (often on programs funded by the U.S. Government) for a finite period of time and with a view that they will return to their countries of nationality upon completion of their exchange programs. In support of its position that this Final Rule involves a foreign affairs function of the U.S. Government, the Department of State represents that failure to protect the health and welfare of these foreign nationals will have direct and substantial adverse effects on the foreign affairs of the United States. Given this foreign affairs function exemption, the Department of State considers that it is under no legal obligation to provide public notice and comment with respect to proposed regulations. Nonetheless, in this instance, the Department of State offered reasonable opportunity for public notice and comment.

Regulatory Flexibility Act/Executive Order 13272: Small Business

As discussed above, the Department believes that this rule is exempt from the provisions of 5 U.S.C. 553, and that no other law requires the Department to give notice of rulemaking. Accordingly, the Department believes that this rule is not subject to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) or Executive Order 13272, section 3(b).

However, the Department has examined the potential impact of this rule on small entities. Entities conducting student exchange programs are classified under code number 6117.10 of the North American Industry Classification System. Some 5,573 for-profit and tax-exempt entities are listed as falling within this classification. Of this total number of so-classified entities, 1,226 are designated by the Department of State as sponsors of an exchange visitor program, designated as such to further the public diplomacy mission of the Department and U.S. Government through the conduct of people to people exchange visitor programs. Of these 1,226 Department designated entities, 933 are accredited degree granting academic institutions, none of which we believe to be a small entity under the terms of the Regulatory Flexibility Act and the remaining 293 are for-profit or tax-exempt entities. Of the 293 for-profit or tax-exempt entities designated by the Department 131 have annual revenues of less than $7 million dollars, thereby falling within the purview of the Regulatory Flexibility Act. Of these 131 entities 61 conduct secondary school student activities. This Rule will involve additional costs for these 61 entities. These costs arise from the additional staff time needed to photograph host family homes, additional screening procedures for single adult family homes, ensuring that an orientation is conducted after a potential host family has been fully vetted and accepted and an additional home visit to the host family by an organizational representative within two months of placement of the student in the home. The Department estimates these additional requirements will involve approximately four additional hours of staff time, per student and at an estimated $20 per hour will cost $80 additional per student participant. These 61 small entities program some 3,750 students annually. Thus at an additional $80 per student these 61 entities will incur $300,000 in additional administrative costs.

Although, as stated above, the Department is of the opinion that the Exchange Visitor Program is a foreign affairs function of the United States Government and, as such, that this rule is exempt from the rulemaking provisions of section 553 of the APA, given the projected costs of this rule (discussed under the Executive Order 12866 heading below) and the number of entities conducting student exchange programs noted above, the Department has determined that this rule will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million in any 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.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

The Department has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not pre-empt tribal law. Accordingly, the requirements of Section 5 of Executive Order 13175 do not apply to this rulemaking.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by 5 U.S.C. 804 for the purposes of Congressional review of agency rulemaking under the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801–808). This 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 companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866

The Department is of the opinion that the Exchange Visitor Program is a foreign affairs function of the United States Government and that rules governing the conduct of this function are exempt from the requirements of Executive Order 12866. However, the Department has nevertheless reviewed this regulation to ensure its consistency with the regulatory philosophy and principles set forth in that Executive Order.

The Department has identified potential costs associated with this rule beginning with the requirement that sponsors collect photographs documenting the exterior and interior of a potential host family home. Although many sponsors currently collect such photographs as part of the host family application and vetting process, not all designated sponsors do so. Those sponsors that do collect this photographic documentation find that the cost of doing so is not substantial as the photographs are taken by the local coordinator with digital cameras, uploaded electronically, and attached to the host family application that is in turn sent to the sponsor for evaluation and further vetting. For program sponsors not currently following this practice, the cost of doing so will be associated with the purchase of a digital camera for those local coordinators that do not own or have access to one (or a telephone with camera capability). The Department does not believe this will be a substantial cost to sponsors. No comments received cited cost as an objection to photo use.

The Department also identifies the costs associated with the implementation of enhanced training for local coordinators, the individuals acting as agents of program sponsors in screening, selecting, and monitoring host family placements. The Department will develop a training program for all local coordinators at a projected one-time development cost to the Department of $100,000. An additional cost of this rule is the time required for these individuals to take this training. While some local coordinators receive payment for placing exchange students, others do not. In determining costs for required training, the Department places a value of $20 per hour on the time spent in taking this required training and thus finds that if all volunteers and agents (estimated at 4,000 individuals) spend three hours each taking the proposed training, then the aggregate cost would be approximately $240,000. Finally, the Department notes that there will be an increased cost arising from the requirement that each host family home be visited within the first or second month of the student's placement in the home by a representative of the sponsor other than the local coordinator who screened and selected the host family and arranged the placement. The Department recognizes that the sponsor will utilize its existing local coordinator network and that the identifiable cost of this proposal will be related to the

additional cost of travel for this sponsor representative, which the Department anticipates to not be substantial.

The Department has examined the costs and benefits associated with this rule and declares that educational and cultural exchanges are both the cornerstone of U.S. public diplomacy and an integral component of U.S. foreign policy. The Secondary School Student exchange programs conducted under the authorities of the Exchange Visitor Program promote mutual understanding by providing foreign students the opportunity to study in U.S. high schools while living with American host families. Not only are the students themselves transformed by these experiences, but so too are their families, friends, and teachers in their home countries. By studying and participating in daily student life in the United States, Secondary School Student program participants gain an understanding of and an appreciation for the similarities and differences between their culture and that of the United States. Upon their return home, these students enrich their schools and communities with different perspectives of U.S. culture and events, providing local communities with new and diverse perspectives. Secondary School Student exchanges also foster enduring relationships and lifelong friendships which help build longstanding ties between the people of the United States and other countries. In reciprocal fashion, American secondary school students are provided opportunities to increase their knowledge and understanding of the world through these friendships. Participating schools gain from the experience of having international students in the classroom, at after-school activities, and in their communities. Although the benefits of these exchanges to the United States and its people cannot be monetized, the Department is nonetheless of the opinion that these benefits outweigh the costs associated with this rule.

Executive Order 12988

The Department has reviewed this regulation in light of sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Executive Orders 12372 and 13132

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this regulation.

Paperwork Reduction Act

The information collection requirements contained in this rulemaking are pursuant to the Paperwork Reduction Act, 44 U.S.C. Chapter 35 and OMB Control Number 1405–0147, Form DS–7000.

List of Subjects in 22 CFR Part 62

Cultural exchange program.

■ Accordingly, 22 CFR part 62 is to be amended as follows:

PART 62—EXCHANGE VISITOR PROGRAM

■ 1. The Authority citation for part 62 is revised to read as follows:

Authority: 8 U.S.C. 1101(a)(15)(J), 1182, 1184, 1258; 22 U.S.C. 1431–1442, 2451 *et seq.;* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. 105–277, Div. G, 112 Stat. 2681 *et seq.;* Reorganization Plan No. 2 of 1977, 3 CFR, 1977 Comp. p. 200; E.O. 12048 of March 27, 1978; 3 CFR, 1978 Comp. p. 168; the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. 104–208, Div. C, 110 Stat. 3009–546, as amended; Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT) (Pub. L. 107–56), Section 416, 115 Stat. 354; and the Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. 107–173; 116 Stat. 543.

■ 2. Section 62.25 is revised to read as follows:

§ 62.25 Secondary school students.

(a) *Purpose.* This section governs Department of State designated exchange visitor programs under which foreign secondary school students are afforded the opportunity to study in the United States at accredited public or private secondary schools for an academic semester or an academic year, while living with American host families or residing at accredited U.S. boarding schools.

(b) *Program sponsor eligibility.* Eligibility for designation as a secondary school student exchange visitor program sponsor is limited to organizations:

(1) With tax-exempt status as conferred by the Internal Revenue Service pursuant to section 501(c)(3) of the Internal Revenue Code; and

(2) Which are United States citizens as such term is defined in § 62.2.

(c) *Program eligibility.* Secondary school student exchange visitor programs designated by the Department of State must:

(1) Require all exchange students to be enrolled and participating in a full course of study at an accredited academic institution;

(2) Allow entry of exchange students for not less than one academic semester (or quarter equivalency) and not more than two academic semesters (or quarter equivalency) duration; and

(3) Ensure that the program is conducted on a U.S. academic calendar year basis, except for students from countries whose academic year is opposite that of the United States. Exchange students may begin an exchange program in the second semester of a U.S. academic year only if specifically permitted to do so, in writing, by the school in which the exchange student is enrolled. In all cases, sponsors must notify both the host family and school prior to the exchange student's arrival in the United States whether the placement is for an academic semester, an academic year, or a calendar year.

(d) *Program administration.* Sponsors must ensure that all organizational officers, employees, representatives, agents, and volunteers acting on their behalf:

(1) Are adequately trained. Sponsors must administer training for local coordinators that specifically includes, at a minimum, instruction in: Conflict resolution; procedures for handling and reporting emergency situations; awareness or knowledge of child safety standards; information on sexual conduct codes; procedures for handling and reporting allegations of sexual misconduct or any other allegations of abuse or neglect; and the criteria to be used to screen potential host families and exercise good judgment when identifying what constitutes suitable host family placements. In addition to their own training, sponsors must ensure that all local coordinators complete the Department of State mandated training module prior to their appointment as a local coordinator or assumption of duties. The Department of State training module will include instruction designed to provide a comprehensive understanding of the Exchange Visitor Program; its public diplomacy objectives; and the Secondary School Student category rules and regulations. Sponsors must demonstrate the individual's successful completion of all initial training

requirements and that annual refresher training is also successfully completed.

(2) Are adequately supervised. Sponsors must create and implement organization-specific standard operating procedures for the supervision of local coordinators designed to prevent or deter fraud, abuse, or misconduct in the performance of the duties of these employees/agents/volunteers. They must also have sufficient internal controls to ensure that such employees/agents/volunteers comply with such standard operating procedures.

(3) Have been vetted annually through a criminal background check (which must include a search of the Department of Justice's National Sex Offender Public Registry);

(4) Place no exchange student with his or her relatives;

(5) Make no exchange student placement beyond 120 miles of the home of the local coordinator authorized to act on the sponsor's behalf in both routine and emergency matters arising from that exchange student's participation in the Exchange Visitor Program;

(6) Make no monetary payments or other incentives to host families;

(7) Provide exchange students with reasonable access to their natural parents and family by telephone and e-mail;

(8) Make certain that the exchange student's government issued documents (i.e., passports, Forms DS–2019) are not removed from his/her possession;

(9) Conduct the host family orientation after the host family has been fully vetted and accepted;

(10) Refrain, without exception, from acting as:

(i) Both a host family and a local coordinator or area supervisor for an exchange student;

(ii) A host family for one sponsor and a local coordinator for another sponsor; or

(iii) A local coordinator for any exchange student over whom he/she has a position of trust or authority such as the student's teacher or principal. This requirement is not applicable to a boarding school placement.

(11) Maintain, at minimum, a monthly schedule of personal contact with the exchange student. The first monthly contact between the local coordinator and the exchange student must be in person. All other contacts may take place in-person, on the phone, or via electronic mail and must be properly documented. The sponsor is responsible for ensuring that issues raised through such contacts are promptly and appropriately addressed.

(12) That a sponsor representative other than the local coordinator who recruited, screened and selected the host family visit the exchange student/host family home within the first or second month following the student's placement in the home.

(13) Maintain, at a minimum, a monthly schedule of personal contact with the host family. At least once during the fall semester and at least once during the spring semester, (i.e., twice during the academic year) the contact by the local coordinator with the host family must be in person. All other contacts may take place in person, on the phone, or via electronic mail and must be properly documented. The sponsor is responsible for ensuring the issues raised through such contacts are promptly and appropriately addressed.

(14) That host schools are provided contact information for the local organizational representative (including name, direct phone number, and e-mail address), the program sponsor, and the Department's Office of Designation; and

(15) Adhere to all regulatory provisions set forth in this Part and all additional terms and conditions governing program administration that the Department may impose.

(e) *Student selection.* In addition to satisfying the requirements of § 62.10(a), sponsors must ensure that all participants in a designated secondary school student exchange visitor program:

(1) Are secondary school students in their home countries who have not completed more than 11 years of primary and secondary study, exclusive of kindergarten; or are at least 15 years of age, but not more than 18 years and six months of age as of the program start date;

(2) Demonstrate maturity, good character, and scholastic aptitude; and

(3) Have not previously participated in an academic year or semester secondary school student exchange program in the United States or attended school in the United States in either F–1 or J–1 visa status.

(f) *Student enrollment.* (1) Sponsors must secure prior written acceptance for the enrollment of any exchange student in a United States public or private secondary school. Such prior acceptance must:

(i) Be secured from the school principal or other authorized school administrator of the school or school system that the exchange student will attend; and

(ii) Include written arrangements concerning the payment of tuition or waiver thereof if applicable.

(2) Under no circumstance may a sponsor facilitate the entry into the United States of an exchange student for whom a written school placement has not been secured.

(3) Under no circumstance may a sponsor charge a student private school tuition if such arrangements are not finalized in writing prior to the issuance of Form DS–2019.

(4) Sponsors must maintain copies of all written acceptances for a minimum of three years and make such documents available for Department of State inspection upon request.

(5) Sponsors must provide the school with a translated "written English language summary" of the exchange student's complete academic course work prior to commencement of school, in addition to any additional documents the school may require. Sponsors must inform the prospective host school of any student who has completed secondary school in his/her home country.

(6) Sponsors may not facilitate the enrollment of more than five exchange students in one school unless the school itself has requested, in writing, the placement of more than five students from the sponsor.

(7) Upon issuance of a Form DS–2019 to a prospective participant, the sponsor accepts full responsibility for securing a school and host family placement for the student, except in cases of voluntary student withdrawal or visa denial.

(g) *Student orientation.* In addition to the orientation requirements set forth at § 62.10, all sponsors must provide exchange students, prior to their departure from their home countries, with the following information:

(1) A summary of all operating procedures, rules, and regulations governing student participation in the exchange visitor program along with a detailed summary of travel arrangements;

(2) A copy of the Department's welcome letter to exchange students;

(3) Age and language appropriate information on how to identify and report sexual abuse or exploitation;

(4) A detailed profile of the host family with whom the exchange student will be placed. The profile must state whether the host family is either a permanent placement or a temporary-arrival family;

(5) A detailed profile of the school and community in which the exchange student will be placed. The profile must state whether the student will pay tuition; and

(6) An identification card, that lists the exchange student's name, United States host family placement address

and telephone numbers (landline and cellular), sponsor name and main office and emergency telephone numbers, name and telephone numbers (landline and cellular) of the local coordinator and area representative, the telephone number of Department's Office of Designation, and the Secondary School Student program toll free emergency telephone number. The identification card must also contain the name of the health insurance provider and policy number. Such cards must be corrected, reprinted, and reissued to the student if changes in contact information occur due to a change in the student's placement.

(h) *Student extra-curricular activities.* Exchange students may participate in school sanctioned and sponsored extra-curricular activities, including athletics, if such participation is:

(1) Authorized by the local school district in which the student is enrolled; and

(2) Authorized by the state authority responsible for determination of athletic eligibility, if applicable. Sponsors shall not knowingly be party to a placement (inclusive of direct placements) based on athletic abilities, whether initiated by a student, a natural or host family, a school, or any other interested party.

(3) Any placement in which either the student or the sending organization in the foreign country is party to an arrangement with any other party, including receiving school personnel, whereby the student will attend a particular school or live with a particular host family must be reported to the particular school and the National Federation of State High School Associations prior to the first day of classes.

(i) *Student employment.* Exchange students may not be employed on either a full or part-time basis but may accept sporadic or intermittent employment such as babysitting or yard work.

(j) *Host family application and selection.* Sponsors must adequately screen and select all potential host families and at a minimum must:

(1) Provide potential host families with a detailed summary of the Exchange Visitor Program and of their requirements, obligations and commitment to host;

(2) Utilize a standard application form developed by the sponsor that includes, at a minimum, all data fields provided in Appendix F, "Information to be Collected on Secondary School Student Host Family Applications". The form must include a statement stating that: "The income data collected will be used solely for the purposes of determining that the basic needs of the exchange student can be met, including three quality meals and transportation to and from school activities." Such application form must be signed and dated at the time of application by all potential host family applicants. The host family application must be designed to provide a detailed summary and profile of the host family, the physical home environment (to include photographs of the host family home's exterior and grounds, kitchen, student's bedroom, bathroom, and family or living room), family composition, and community environment. Exchange students are not permitted to reside with their relatives.

(3) Conduct an in-person interview with all family members residing in the home where the student will be living;

(4) Ensure that the host family is capable of providing a comfortable and nurturing home environment and that the home is clean and sanitary; that the exchange student's bedroom contains a separate bed for the student that is neither convertible nor inflatable in nature; and that the student has adequate storage space for clothes and personal belongings, reasonable access to bathroom facilities, study space if not otherwise available in the house and reasonable, unimpeded access to the outside of the house in the event of a fire or similar emergency. An exchange student may share a bedroom, but with no more than one other individual of the same sex.

(5) Ensure that the host family has a good reputation and character by securing two personal references from within the community from individuals who are not relatives of the potential host family or representatives of the sponsor (i.e., field staff or volunteers), attesting to the host family's good reputation and character;

(6) Ensure that the host family has adequate financial resources to undertake hosting obligations and is not receiving needs-based government subsidies for food or housing;

(7) Verify that each member of the host family household 18 years of age and older, as well as any new adult member added to the household, or any member of the host family household who will turn eighteen years of age during the exchange student's stay in that household, has undergone a criminal background check (which must include a search of the Department of Justice's National Sex Offender Public Registry);

(8) Maintain a record of all documentation on a student's exchange program, including but not limited to application forms, background checks, evaluations, and interviews, for all selected host families for a period of three years following program completion; and

(9) Ensure that a potential single adult host parent without a child in the home undergoes a secondary level review by an organizational representative other than the individual who recruited and selected the applicant. Such secondary review should include demonstrated evidence of the individual's friends or family who can provide an additional support network for the exchange student and evidence of the individual's ties to his/her community. Both the exchange student and his or her natural parents must agree in writing in advance of the student's placement with a single adult host parent without a child in the home.

(k) *Host family orientation.* In addition to the orientation requirements set forth in § 62.10, sponsors must:

(1) Inform all host families of the philosophy, rules, and regulations governing the sponsor's exchange visitor program, including examples of "best practices" developed by the exchange community;

(2) Provide all selected host families with a copy of the Department's letter of appreciation to host families;

(3) Provide all selected host families with a copy of Department of State-promulgated Exchange Visitor Program regulations;

(4) Advise all selected host families of strategies for cross-cultural interaction and conduct workshops to familiarize host families with cultural differences and practices; and

(5) Advise host families of their responsibility to inform the sponsor of any and all material changes in the status of the host family or student, including, but not limited to, changes in address, finances, employment and criminal arrests.

(l) *Host family placement.* (1) Sponsors must secure, prior to the student's departure from his or her home country, a permanent or arrival host family placement for each exchange student participant. Sponsors may not:

(i) Facilitate the entry into the United States of an exchange student for whom a host family placement has not been secured;

(ii) Place more than one exchange student with a host family without the express prior written consent of the host family, the natural parents, and the students being placed. Under no circumstance may more than two exchange students be placed with a host family, or in the home of a local coordinator, regional coordinator, or volunteer. Sponsors may not place students from the same countries or

with the same native languages in a single home.

(2) Prior to the student's departure from his or her home country, sponsors must advise both the exchange student and host family, in writing, of the respective family compositions and backgrounds of each, whether the host family placement is a permanent or arrival placement, and facilitate and encourage the exchange of correspondence between the two.

(3) In the event of unforeseen circumstances that necessitate a change of host family placement, the sponsor must document the reason(s) necessitating such change and provide the Department of State with an annual statistical summary reflecting the number and reason(s) for such change in host family placement in the program's annual report.

(m) *Advertising and Marketing for the recruitment of host families.* In addition to the requirements set forth in § 62.9 in advertising and promoting for host family recruiting, sponsors must:

(1) Utilize only promotional materials that professionally, ethically, and accurately reflect the sponsor's purposes, activities, and sponsorship;

(2) Not publicize the need for host families via any public media with announcements, notices, advertisements, etc. that are not sufficiently in advance of the exchange student's arrival, appeal to public pity or guilt, imply in any way that an exchange student will be denied participation if a host family is not found immediately, or identify photos of individual exchange students and include an appeal for an immediate family;

(3) Not promote or recruit for their programs in any way that compromises the privacy, safety or security of participants, families, or schools. Specifically, sponsors shall not include personal student data or contact information (including addresses, phone numbers or email addresses) or photographs of the student on Web sites or in other promotional materials; and

(4) Ensure that access to exchange student photographs and personally identifying information, either online or in print form, is only made available to potential host families who have been fully vetted and selected for program participation. Such information, if available online, must also be password protected.

(n) *Reporting requirements.* Along with the annual report required by regulations set forth at § 62.15, sponsors must file with the Department of State the following information:

(1) Sponsors must immediately report to the Department any incident or allegation involving the actual or alleged sexual exploitation or any other allegations of abuse or neglect of an exchange student. Sponsors must also report such allegations as required by local or state statute or regulation. Failure to report such incidents to the Department and, as required by state law or regulation, to local law enforcement authorities shall be grounds for the suspension and revocation of the sponsor's Exchange Visitor Program designation;

(2) A report of all final academic year and semester program participant placements by August 31 for the upcoming academic year or January 15 for the Spring semester and calendar year. The report must be in the format directed by the Department and must include at a minimum, the exchange student's full name, Form DS–2019 number (SEVIS ID #), host family placement (current U.S. address), school (site of activity) address, the local coordinator's name and zip code, and other information the Department may request; and

(3) A report of all situations which resulted in the placement of an exchange student with more than one host family or in more than one school. The report must be in a format directed by the Department and include, at a minimum, the exchange student's full name, Form DS–019 number (SEVIS ID #), host family placements (current U.S. address), schools (site of activity address), the reason for the change in placement, and the date of the move. This report is due by July 31 for the previous academic school year.

A new Appendix F is added to Part 62, as follows:

Appendix F to Part 62—Information To Be Collected on Secondary School Student Host Family Applications

Basic Family Information:

a. Host Family Member—Full name and relationship (children and adults) either living full-time or part-time in the home or who frequently stay at the home)

b. Date of Birth (DOB) of all family members

c. Street Address

d. Contact information (telephone; e-mail address) of host parents

e. Employment—employer name, job title, and point of contact for each working resident of the home

f. Is the residence the site of a functioning business? (e.g., daycare, farm)

g. Description of each household member (e.g., level of education, profession, interests, community involvement, and relevant behavioral or other characteristics of such household members that could affect the successful integration of the exchange visitor into the household)

h. Has any member of your household ever been charged with any crime?

Household Pets:

a. Number of Pets

b. Type of Pets

Financial Resources:

a. Average Annual Income Range: Less than $25,000; $25,000–$35,000; $35,000–$45,000; $45,000–$55,000; $55,000–$65,000; $65,000–$75,000; and $75,000 and above. Note: The form must include a statement stating that: "The income data collected will be used solely for the purposes of ensuring that the basic needs of the exchange students can be met, including three quality meals and transportation to and from school activities"

b. Describe if anyone residing in the home receives any kind of public assistance (financial needs-based government subsidies for food or housing)

c. Identify those personal expenses expected to be covered by the student

Diet:

a. Does anyone in the family follow any dietary restrictions? (Y/N)

If yes, describe:

b. Do you expect the student to follow any dietary restrictions? (Y/N)

If yes, describe:

c. Would you feel comfortable hosting a student who follows a particular dietary restriction (ex. Vegetarian, Vegan, etc.)? (Y/N)

d. Would the family provide three (3) square meals daily?

High School Information:

a. Name and address of school (private or public school)

b. Name, address, e-mail and telephone number of school official

c. Approximate size of the school student body

d. Approximate distance between the school and your home

e. Approximate start date of the school year

f. How will the exchange student get to the school (e.g. bus, carpool, walk)?

g. Would the family provide special transportation for extracurricular activities after school or in the evenings, if required?

h. Which, if any, of your family's children, presently attend the school in which the exchange visitor is enrolled?

If applicable list sports/clubs/activities, if any, your child(ren) participate(s) in at the school

i. Does any member of your household work for the high school in a coaching/teaching/or administrative capacity?

j. Has any member of your household had contact with a coach regarding the hosting of an exchange student with particular athletic ability?

If yes, please describe the contact and sport.

Community Information:

a. In what type of community do you live (e.g.: Urban, Suburban, Rural, Farm)

b. Population of community

c. Nearest Major City (Distance and population)

d. Nearest Airport (Distance)

e. City or town website

f. Briefly describe your neighborhood and community

g. What points of interest are near your area (parks, museums, historical sites)?

h. Areas in or near neighborhood to be avoided?

Home Description:

a. Describe your type of home (e.g. single family home, condominium, duplex, apartment, mobile home) and include photographs of the host family home's exterior and grounds, kitchen, student's bedroom, student's bathroom, and family and living areas.

b. Describe Primary Rooms and Bedrooms

c. Number of Bathrooms

d. Will the exchange student share a bedroom? (Y/N)

If yes, with which household resident?

e. Describe the student's bedroom

f. Describe amenities to which the student has access

g. Utilities

Family Activities:

a. Language spoken in home

b. Please describe activities and/or sports each family member participates in: (e.g., camping, hiking, dance, crafts, debate, drama, art, music, reading, soccer, baseball, horseback riding)

c. Describe your expectations regarding the responsibilities and behavior of the student while in your home (e.g., homework, household chores, curfew (school night and weekend), access to refrigerator and food, drinking of alcoholic beverages, driving, smoking, computer/Internet/E-Mail)

Would you be willing voluntarily to inform the exchange visitor in advance of any religious affiliations of household members? (Y/N)

Would any member of the household have difficulty hosting a student whose religious beliefs were different from their own? (Y/N)

Note: A host family may want the exchange visitor to attend one or more religious services or programs with the family. The exchange visitor cannot be required to do so, but may decide to experience this facet of U.S. culture at his or her discretion.

How did you learn about being a host family?

References:

Dated: October 21, 2010.

Sally J. Lawrence,

Director, Office of Designation, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2010–27200 Filed 10–26–10; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2010–0901]

RIN 1625–AA00

Safety Zone: Epic Roasthouse Private Party Firework Display, San Francisco, CA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone in the navigable waters of San Francisco Bay 1,000 yards off Epic Roasthouse Restaurant, San Francisco, CA during a fireworks display in support of the Epic Roasthouse Private Party. This safety zone is established to ensure the safety of participants and spectators from the dangers associated with the pyrotechnics. Unauthorized persons and vessels are prohibited from entering into, transiting through, or remaining in the safety zone without permission from the Captain of the Port or her designated representative.

DATES: This rule is effective from 10:45 a.m. through 9:30 p.m. on November 5, 2010.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2010–0901 and are available online by going to *http://www.regulations.gov,* inserting USCG–2010–0901 in the "Keyword" box, and then clicking "Search." They are also 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.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or e-mail Ensign Liz Ellerson, U.S. Coast Guard Sector San Francisco; telephone 415–399–7436, e-mail *D11-PF-MarineEvents@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that it would be impracticable to publish a notice of proposed rulemaking (NPRM) with respect to this rule because the event would occur before the rulemaking process would be completed. Because of the dangers posed by the pyrotechnics used in this fireworks display, the safety zone is necessary to provide for the safety of event participants, spectators, spectator craft, and other vessels transiting the event area. For the safety concerns noted, it is in the public interest to have these regulations in effect during the event.

Basis and Purpose

The Epic Roasthouse Private Party is scheduled to take place on November 5, 2010, on the navigable waters of San Francisco Bay, 1,000 yards off Epic Roasthouse Restaurant, San Francisco, CA. The fireworks display is meant for entertainment purposes. This safety zone is issued to establish a temporary restricted area on the waters surrounding the fireworks launch site during loading of the pyrotechnics, and during the fireworks display. This restricted area around the launch site is necessary to protect spectators, vessels, and other property from the hazards associated with the pyrotechnics on the fireworks barges. The Coast Guard has granted the event sponsor a marine event permit for the fireworks display.

Discussion of Rule

During the set up of the fireworks and until the start of the fireworks display, the temporary safety zone applies to the navigable waters around the fireworks site within a radius of 100 feet. From 8:45 p.m. until 9:30 p.m., the area to which the temporary safety zone applies will increase in size to encompass the navigable waters around the fireworks site within a radius of 1,000 feet.

The effect of the temporary safety zone will be to restrict navigation in the vicinity of the fireworks site while the fireworks are set up, and until the conclusion of the scheduled display. Except for persons or vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the restricted area. These regulations are needed to keep spectators and vessels away from the immediate vicinity of the fireworks barge to ensure

the safety of participants, spectators, and transiting vessels.

Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes and executive orders.

Regulatory Planning and Review

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 potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

Although this rule restricts access to the waters encompassed by the safety zone, the effect of this rule will not be significant because the local waterway users will be notified via public Broadcast Notice to Mariners to ensure the safety zone will result in minimum impact. The entities most likely to be affected are pleasure craft engaged in recreational activities.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this 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.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This rule may affect owners and operators of pleasure craft engaged in recreational activities and sightseeing. This rule will not have a significant economic impact on a substantial number of small entities for several reasons: (i) Vessel traffic can pass safely around the area, (ii) vessels engaged in recreational activities and sightseeing have ample space outside of the effected portion of the areas off San Francisco, CA to engage in these activities, (iii) this rule will encompass only a small portion of the waterway for a limited period of time, and (iv) the maritime public will be advised in advance of this safety zone via Broadcast Notice to Mariners.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offer to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking process.

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.

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).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

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.

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.

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.

Protection of Children

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

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.

Energy Effects

We have analyzed this rule under Executive Order 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 order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, 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 rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction. This rule involves establishing, disestablishing, or changing Regulated Navigation Areas and security or safety zones. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES.**

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add temporary § 165.T11–367 to read as follows:

§ 165.T11–367 Safety zone; Epic Roasthouse Private Party, San Francisco, CA.

(a) *Location.* This temporary safety zone is established for the waters of San Francisco Bay 1,000 yards off Epic Roasthouse Restaurant, San Francisco, CA. The fireworks launch site will be located in position 37° 46′35.30″ N, 122° 23′13.33″ W (NAD 83).

From 10:45 a.m. until 8:45 p.m. on November 5, 2010, the temporary safety zone applies to the navigable waters around the fireworks site within a radius of 100 feet. From 8:45 p.m. until 9:30 p.m. on November 5, 2010, the area to which the temporary safety zone applies will increase in size to encompass the navigable waters around the fireworks site within a radius of 1,000 feet.

(b) *Definitions.* As used in this section, "designated representative" means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer on a Coast Guard vessel or a Federal, State, or local officer designated by or assisting the Captain of the Port San Francisco (COTP) in the enforcement of the safety zone.

(c) *Regulations.*

(1) Under the general regulations in § 165.23 of this title, entry into, transiting, or anchoring within this safety zone is prohibited unless authorized by the COTP or the COTP's designated representative.

(2) The safety zone is closed to all vessel traffic, except as may be permitted by the COTP or a designated representative.

(3) Vessel operators desiring to enter or operate within the safety zone must contact the COTP or a designated representative to obtain permission to do so. Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the COTP or the designated representative. Persons and vessels may request permission to enter the safety zone on VHF–16 or through the 24-hour Command Center at telephone 415–399–3547.

(d) *Effective period.* This section is effective from 10:45 a.m. through 9:30 p.m. on November 5, 2010.

Dated: October 15, 2010.

C.L. Stowe,

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

[FR Doc. 2010–27114 Filed 10–26–10; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 9 and 721

[EPA–HQ–OPPT–2008–0918; FRL–8846–8]

RIN 2070–AB27

1-Propene, 2,3,3,3-tetrafluoro-; Significant New Use Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is issuing a significant new use rule (SNUR) under section 5(a)(2) of the Toxic Substances Control Act (TSCA) for the chemical substance identified as 1-Propene, 2,3,3,3-tetrafluoro- (CAS No. 754–12–1) which was the subject of premanufacture notice (PMN) P–07–601. This action requires persons who intend to manufacture, import, or process the chemical substance for a use that is designated as a significant new use by this final rule to notify EPA at least 90 days before commencing that activity. EPA believes that this action is necessary because the chemical substance may be hazardous to human health. The required notification would provide EPA with the opportunity to evaluate the intended use and, if necessary, to prohibit or limit that activity before it occurs.

DATES: This final rule is effective November 26, 2010.

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPPT–2008–0918. All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

FOR FURTHER INFORMATION CONTACT: *For technical information contact:* Kenneth Moss, Chemical Control Division (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 564–9232; e-mail address: *moss.kenneth@epa.gov.*

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South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; e-mail address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Does this action apply to me?

You may be potentially affected by this action if you manufacture, import, process, or use the chemical substance contained in this final rule: 1-Propene, 2,3,3,3-tetrafluoro- (PMN P–07–601; CAS No. 754–12–1). Potentially affected entities may include, but are not limited to:

Manufacturers, importers, or processors of the subject chemical substance (NAICS codes 325 and 324110), *e.g.,* chemical manufacturing and petroleum refineries.

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. To determine whether you or your business may be affected by this action, you should carefully examine the applicability provisions in § 721.5. If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

This action may also affect certain entities through pre-existing import certification and export notification rules under TSCA. Chemical importers are subject to the TSCA section 13 (15 U.S.C. 2612) import certification requirements promulgated at 19 CFR 12.118 through 12.127; see also 19 CFR 127.28. Chemical importers must certify that the shipment of the chemical substance complies with all applicable rules and orders under TSCA. For importers of the chemical substance subject to this SNUR those requirements include the SNUR. The EPA policy in support of import certification appears at 40 CFR part 707, subpart B. In addition, any persons who export or intend to export the chemical substance that is the subject of this final rule on or after November 26, 2010 are subject to the export notification provisions of TSCA section 12(b) (15 U.S.C. 2611(b)) (see § 721.20) and must comply with the export notification requirements in 40 CFR part 707, subpart D.

II. Background

A. What action is the agency taking?

EPA is finalizing a SNUR under TSCA section 5(a)(2) for the chemical substance identified as 1-Propene, 2,3,3,3-tetrafluoro- (PMN P–07–601; CAS No. 754–12–1; aka HFO–1234yf). This action requires persons who intend to manufacture, import, or process the chemical substance for an activity that is designated as a significant new use by this final rule to notify EPA at least 90 days before commencing that activity.

Previously, in the **Federal Register** of February 1, 2010 (75 FR 4983) (FRL–8438–4), EPA issued a direct final SNUR for the chemical substance. However, EPA received notices of intent to submit adverse comments on this SNUR. Therefore, as required by § 721.170(d)(4)(i), in the **Federal Register** of April 2, 2010 (75 FR 16670) (FRL–8816–9), EPA withdrew the direct final SNUR on this chemical substance and subsequently proposed a SNUR using notice and comment procedures in the **Federal Register** of April 2, 2010 (75 FR 16706) (FRL–8818–2). More information on the chemical substance subject to this final rule can be found in the direct final or proposed SNUR. The record for the direct final and proposed SNUR on this chemical substance was established in the docket under docket ID number EPA–HQ–OPPT–2008–0918. That docket includes information considered by the Agency in developing the direct final rule and this final rule, including comments on the proposed rule. The chemical substance addressed under this final SNUR is also being reviewed under the Clean Air Act (CAA) to determine whether it may be listed as an acceptable substitute for CFC–12 in motor vehicle air conditioning systems. See "Protection of Stratospheric Ozone: New Substitute in the Motor Vehicle Air Conditioning Sector under the Significant New Alternatives Policy (SNAP) Program" (74 FR 53445, October 19, 2009) (FRL–8969–7).

EPA received six comments on the proposed SNUR and two comments on the original direct final SNUR. A full discussion of EPA's response to these comments is included in Unit V. of this document. After consideration of these comments, EPA is issuing a modified final rule on the chemical substance that:

1. Clarifies the significant new use provisions by organizing them under the following paragraphs of § 721.80:

- Section 721.80(j) (use other than as a refrigerant in motor vehicle air conditioning systems in new passenger cars and vehicles).
- Section 721.80(m) (commercial use other than in new passenger cars and vehicles in which the charging of motor vehicle air conditioning systems with the PMN substance was done by the motor vehicle original equipment manufacturer (OEM)).
- Section 721.80(o) (distribution in commerce of products intended for use by a consumer for the purpose of servicing, maintenance, and disposal involving the PMN substance).

2. Removes the following significant new use provisions:

- All servicing, maintenance, and disposal involving the PMN substance will be done only by CAA section 609 certified technicians using CAA section 609 certified refrigerant handling equipment.
- Uses in which the chemical substance will be sold or distributed in other than 20-pound (net weight) containers or larger (this significant new use is now encompassed by § 721.80(o)).

Furthermore, EPA has provided in the docket to this rule additional human health information to supplement EPA's findings under § 721.170(d)(3)(i) and EPA's findings in the proposed rule. See Unit IV. of the proposed rule in the **Federal Register** of April 2, 2010 (75 FR 16706) for a discussion of EPA's findings.

B. What is the agency's authority for taking this action?

Section 5(a)(2) of TSCA (15 U.S.C. 2604(a)(2)) authorizes EPA to determine that a use of a chemical substance is a "significant new use." EPA must make this determination by rule after considering all relevant factors, including those listed in TSCA section 5(a)(2). Once EPA determines that a use of a chemical substance is a significant new use, TSCA section 5(a)(1)(B) requires persons to submit a significant new use notice (SNUN) to EPA at least 90 days before they manufacture, import, or process the chemical substance for that use. Persons who must report are described in § 721.5.

C. Applicability of General Provisions

General provisions for SNURs appear in 40 CFR part 721, subpart A. These provisions describe persons subject to the rule, recordkeeping requirements, exemptions to reporting requirements, and applicability of the rule to uses occurring before the effective date of the final rule. Provisions relating to user fees appear at 40 CFR part 700. According to § 721.1(c), persons subject to this SNUR must comply with the same notice requirements and EPA regulatory procedures as submitters of PMNs under TSCA section 5(a)(1)(A). In

particular, these requirements include the information submission requirements of TSCA section 5(b) and 5(d)(1), the exemptions authorized by TSCA section 5(h)(1), (h)(2), (h)(3), and (h)(5), and the regulations at 40 CFR part 720. Once EPA receives a SNUN, EPA may take regulatory action under TSCA section 5(e), 5(f), 6, or 7 to control the activities for which it has received the SNUN. If EPA does not take action, EPA is required under TSCA section 5(g) to explain in the **Federal Register** its reasons for not taking action.

Chemical importers are subject to the TSCA section 13 (15 U.S.C. 2612) import certification requirements promulgated in Customs and Border Patrol regulations at 19 CFR 12.118 through 12.127; see also 19 CFR 127.28. Chemical importers must certify that the shipment of the chemical substance complies with all applicable rules and orders under TSCA. For importers of the chemical substance subject to this final SNUR those requirements include the SNUR. The EPA policy in support of import certification appears at 40 CFR part 707, subpart B. In addition, any persons who export or intend to export the chemical substance identified in this final SNUR are subject to the export notification provisions of TSCA section 12(b) (15 U.S.C. 2611 (b)) (*see* § 721.20) and must comply with the export notification requirements in 40 CFR part 707, subpart D.

III. Rationale and Objectives of the Rule

A. Rationale

During the review of the chemical substance PMN P–07–601—as discussed in the proposed rule—based on test data on the PMN substance, EPA identified health concerns for developmental toxicity and lethality to workers and consumers if they were exposed to a significant amount of the PMN substance via inhalation. EPA determined that one or more of the criteria of concern established at § 721.170 were met. EPA did not find that the use scenarios described in the PMN triggered the determination set forth under section 5(e) of TSCA. EPA did, however, determine that certain changes from the use scenario described in the PMN could result in increased exposures, thereby constituting a "significant new use." EPA has determined that activities proposed as a "significant new use" satisfy the two requirements stipulated in § 721.170(c)(2), i.e., these significant new use activities: "(i) Are different from those described in the premanufacture notice for the substance, including any amendments, deletions, and additions of activities to the premanufacture notice, and (ii) may be accompanied by changes in exposure or release levels that are significant in relation to the health or environmental concerns identified" for the PMN substance.

B. Objectives

EPA is issuing this final SNUR for a chemical substance that has undergone premanufacture review because the Agency wants to achieve the following objectives with regard to the significant new uses designated in this final rule:

- EPA will receive notice of any person's intent to manufacture, import, or process a listed chemical substance for the described significant new use before that activity begins.
- EPA will have an opportunity to review and evaluate data submitted in a SNUN before the notice submitter begins manufacturing, importing, or processing a listed chemical substance for the described significant new use.
- EPA will be able to regulate prospective manufacturers, importers, or processors of a listed chemical substance before the described significant new use of that chemical substance occurs, provided that regulation is warranted pursuant to TSCA sections 5(e), 5(f), 6, or 7.

Issuance of a SNUR for a chemical substance does not signify that the chemical substance is listed on the TSCA Inventory. Guidance on how to determine if a chemical substance is on the TSCA Inventory is available on the Internet at *http://www.epa.gov/opptintr/newchems/pubs/invntory.htm.*

IV. Significant New Use Determination

Section 5(a)(2) of TSCA states that EPA's determination that a use of a chemical substance is a significant new use must be made after consideration of all relevant factors, including:

- The projected volume of manufacturing and processing of a chemical substance.
- The extent to which a use changes the type or form of exposure of human beings or the environment to a chemical substance.
- The extent to which a use increases the magnitude and duration of exposure of human beings or the environment to a chemical substance.
- The reasonably anticipated manner and methods of manufacturing, processing, distribution in commerce, and disposal of a chemical substance.

In addition to these factors enumerated in TSCA section 5(a)(2), the statute authorizes EPA to consider any other relevant factors.

To determine what would constitute a significant new use for HFO–1234yf, EPA considered relevant information—in the docket and discussed further in Unit V. of this document—about the toxicity of the chemical substance, likely human exposures and environmental releases associated with possible uses, taking into consideration the four bulleted TSCA section 5(a)(2) factors listed in this unit, and the regulations at § 721.170 for issuing a SNUR after receipt of a PMN.

V. Response to Comments on Proposed SNUR on 1-Propene, 2,3,3,3-tetrafluoro-

EPA received comments from a number of submitters on the proposed rule for the chemical substance identified as 1-Propene, 2,3,3,3-tetrafluoro- (PMN P–07–601; CAS No. 754–12–1; aka HFO–1234yf). These comments, many of which covered similar issues, have been grouped under general headings. Many of the comments stated that EPA's risk assessment for the PMN substance overstates both the potential hazards of the chemical substance and the potential exposures from "do-it-yourself" (DIY) consumer use, and uses a health effects endpoint from a toxicity study that is inappropriate given the duration of exposure that could result from DIY consumer use. These commenters evaluated EPA's risk assessment and conducted their own quantitative risk assessments for single, short-term exposure scenarios, using where possible the same information and approach used in EPA's Risk Assessment for the PMN Substance (Ref. 4). A discussion of the comments received and the Agency's responses follows.

A. Risk Assessment: Toxicity

Commenters stated that adverse health impacts from use of HFO–1234yf under the conditions specified would not be expected for car occupants, servicing personnel, or DIY consumers. The comments relate to the choice of the point of departure (POD) for the Agency's risk assessment of single-exposure (DIY consumers) use scenarios and to the Agency's use of a Margin of Exposure (MOE), as opposed to Hazard Index (HI), approach to evaluate the chemical substance.

Comment: Why didn't the Agency use the 200,000 parts per million (ppm) effect level from a 4-hour rat study on HFO–1234yf to select the POD for the risk assessment?

Response: This acute 4-hour exposure study in rats showed some lung effects at approximately 200,000 ppm, the lowest exposure level in the study.

Thus, EPA considers 200,000 ppm to be a LOAEL (low observed adverse effect level). If a LOAEL were used in the risk assessment instead of a NOAEL (no observed adverse effect level), EPA would use an uncertainty factor to estimate a NOAEL, which would result in a lower POD than what was used. Instead, EPA used the NOAEL for a subacute 14-day study on the chemical substance as the endpoint, because the LOAEL from the acute 4-hour study is an effect endpoint which is inappropriate for developing safe exposure levels for humans. Some of the animals in the 4-hour acute study had grey, discolored lungs at both exposure levels in the study, and EPA considered this an adverse effect. Therefore, EPA could not determine a NOAEL from the acute 4-hour study. It is Agency policy to use the NOAEL where available, because of greater assurance of a "safe" level. Where only the LOAEL is available, that will be used along with any necessary additional uncertainty factors. For example, if EPA had started with the LOAEL of 200,000 ppm, it would have required an additional MOE of 10 to estimate a NOAEL from a LOAEL, for a total MOE of 300 instead of 30. This would have resulted in a more conservative risk assessment than using the NOAEL from the 14-day subacute study.

Comment: Why didn't the Agency use the cardiac sensitization study in dogs as the POD?

Response: Cardiac sensitization studies are for very short durations—on the order of 10 minutes—and they only address cardiac sensitization. The PMN chemical does not induce cardiac sensitization. EPA selected the acute POD from a multiple-exposure, two-week rat inhalation study on the PMN substance, reasoning that if no effects were seen in the duration of the study, then no effects would be seen from a single exposure.

Comment: Why did EPA use the MOE rather than HI approach for risk assessment of HFO–1234yf?

Response: Where available, it is EPA policy to use a NOAEL for the POD. This is the highest exposure level that did not cause an adverse health effect in a study. In this case, EPA selected the POD from an animal (rat 2-week inhalation) study. Because animals may respond to different exposure levels than humans, there is some uncertainty when extrapolating from animals to humans. For this reason, an Uncertainty Factor (UF) is applied when extrapolating from animals to humans—typically a factor of 10 is used but, in this case, since there was a reasonable estimate of the pharmacokinetic component of the uncertainty, this UF was reduced to 3. An additional UF is applied to account for variation in the human population response to a chemical exposure—in this case, a UF of 10 was used. The two UFs give a resultant UF of 30 to yield an acceptable level of health risk. EPA's policy for review of new chemicals under TSCA is to divide the POD by the exposure level to obtain the MOE. For this PMN substance, the "acceptable level of health risk" would be an MOE of 30 or greater.

One commenter proposed dividing the estimated exposure to the PMN chemical by the POD levels to obtain a HI. If the exposure is less than the POD, the HI is <1 and this would be considered an "acceptable level of health risk." This HI approach, however, does not factor in uncertainties about extrapolating from animal to human responses, nor does it address variability within the human population with regard to thresholds of response to chemical exposures. EPA has consistently applied the MOE approach to PMN evaluations (and for other risk assessments) in order to account for these uncertainties. This is the rationale for EPA continuing to use the MOE approach for this chemical substance.

Perhaps most important to EPA's position on this final SNUR is that EPA has uncertainties about using available single-exposure studies on HFO–1234yf to determine the MOEs for different exposure scenarios. As a result of concerns with these studies, EPA calculated single exposure MOEs from the NOAEL in the 2-week inhalation toxicity study of the PMN chemical in rats. There are some additional uncertainties in the single exposure (acute) assessments because of the observation of lethality in rabbit dams after multiple exposures in a developmental study to the PMN substance. For these reasons, as mentioned in Unit IV. of the proposed SNUR, EPA recommends a rabbit acute inhalation toxicity study to address the question of whether pregnant rabbits would die from a single exposure. Rabbits should be exposed for one hour, using the Organisation for Economic Co-operation and Development (OECD) 403 test guideline. Pregnant rabbits should be exposed on gestational day 12 (this is within the time-frame that pregnant rabbits started dieing in the developmental study).

B. Risk Assessment: Exposure

Comment: Commenter stated that EPA's assessment, using the Gradient Report (Ref. 6), overstates the potential exposures from consumer DIY use of HFO–1234yf to refill MVAC systems. The commenter asserted that EPA's methodology to estimate the exposure levels associated with the DIY use greatly exaggerates the exposure that could be experienced in actual use conditions. The specific exposure parameters that the commenters questioned were assumptions regarding:

- Garage volume.
- Time the user spent under the hood during recharging operations.
- The size of the space where any leaking gas would disperse.
- The air exchange rate in a service area that should be well-ventilated when the engine is running.
- Use of the refrigerant in a closed garage with no ventilation.
- The amount of refrigerant used during recharge operations.

During the comment period for the proposed SNUR, the PMN submitter conducted a simulated vehicle service leak testing, using HFC–134a as a surrogate, indicating that exposures from use of a 12-oz can during consumer DIY use are below the Agency's level of concern for HFO–1234yf (Ref. 7).

Response: After reviewing the submitted consumer DIY use exposure study, EPA responded with a list of clarifying questions (Ref. 5), to which the PMN submitter subsequently responded (Ref. 8). Although the PMN submitter's responses were helpful, EPA still has concerns about potential exposures to consumers during DIY use and the inherent toxicity of HFO–1234yf. Therefore, the Agency has decided to retain requirements in the final rule for notification to the Agency prior to distribution in commerce of products intended for use by DIY consumers, while waiting for data from the acute inhalation toxicity study in rabbits described in Unit V.A. With regards to exposure, the peak concentration values from the submitted study are as high as 3% by volume, equivalent to 30,000 ppm. These peaks appeared to occur in the first one or two minutes of each emission. Accordingly, EPA would need exposure data presented and averaged out over shorter Time Weighted Averages (TWAs) than the 30 minutes currently in the study, because it would appear that a number of these early exposure peaks could result in TWA values that would result in MOEs less than the acceptable Agency level of 30 (see Unit V.A.). This is important because the data on HFO–1234yf are insufficient to differentiate whether the toxicity is due to blood level alone from an acute exposure, is due to accumulated exposure over time (area under the curve), or is due to some

combination of both. Since blood equilibrium levels are reached within minutes, a high level of exposure in a short duration could result in blood levels exceeding a threshold if the mode of action is due to blood levels. Additional TWAs of 3, 5, and 10 minutes are recommended.

The Agency's chief concern during its analysis of the submitted exposure study, and generally when estimating potential consumer exposure to HFO–1234yf, is that even if there is a low likelihood of the types of exposure scenarios assessed in this study occurring, there are estimates of 11 million DIY consumer recharging events per year in the United States (Ref. 1) (this is not necessarily 11 million people as some individuals recharge more than once). The Clodic survey commissioned by the California Air Resources Board (Ref. 3) indicated that 10% of DIY consumers released 100 g or more of refrigerant during servicing, including 2% releasing more than 500 g, and another 15% of DIY consumers released 50 to 100 g during servicing, due to faulty recharging equipment and poor technique. Both these percentages and the overall number of DIY consumer recharging events indicate that a substantial number of events could have significant leaks. The Agency recognizes that commenters have suggested, as an alternative to the container size limitation contained in the proposed SNUR, that the reductions in emissions and exposures can be accomplished by restricting sales and use of all refrigerants to qualified technicians, or by using DIY consumer containers and charging equipment that minimize the potential for releases (e.g., having a resealable/leak control device on all containers and using charging connection equipment that has a quick coupler with a moving rod to open the low pressure refrigerant valve on the vehicle). For example, CARB's "Certification Procedures for Small Containers of Automotive Refrigerant," effective March 10, 2010 (Ref. 2), mandates a self-sealing valve with leakage rate in storage of ≤3.0 g/yr, container labeling requirements, and education materials requirements. However, commenters provided insufficient information on these approaches for EPA to assess whether, for HFO–1234yf, they would reduce exposures during DIY consumer use and thus eliminate the potential toxicity risk. Consequently, the Agency has removed the specific container size limitation proposed as a significant new use, and replaced it with a description that directly addresses the issue of potential exposure to DIY consumers by clarifying that significant new use, found at 40 CFR 721.80(o) ("use in a consumer product"), as "distribution in commerce of products intended for use by a consumer for the purpose of servicing, maintenance, and disposal involving the PMN substance."

Information on such techniques or equipment to minimize potential exposures to DIY consumers should accompany any SNUN submitted in response to this final SNUR that requests use of HFO–1234yf in DIY consumer products. Other information submitted with such a SNUN should include data that quantifies exposures for durations shorter than the 30-minute TWA presented in the exposure study submitted by the PMN submitter, in particular, TWAs for 3 minutes, 5 minutes, and 10 minutes, in addition to 30 minutes.

C. CAA Section 609 Certification

Comment: One commenter stated that the training and equipment requirements currently in CAA section 609 relative to other refrigerants would not be necessary for environmentally safe usage of HFO–1234yf during initial charging in an automobile assembly plant. The commenter stated that a CAA section 609 certification is not currently required for automobile assembly plants workers or equipment; manufacturers perform their own training programs; and Occupational Safety and Health Administration (OSHA) requirements for handling flammable substances already fully address the flammability-related HFO–1234yf worker safety issues in automobile assembly facilities.

Response: EPA recognizes that the requirements for certification contained in CAA section 609 are reserved only for the MVAC servicing sector, *i.e.,* "service for consideration," which includes technicians or mechanics being paid either with cash, credit, goods, or services when they perform a service in a vehicle involving a refrigerant in an air conditioning system (40 CFR 82.32 (g)).

The following scenarios are not covered under CAA section 609:

- Initial charge of an MVAC by OEMs.
- The action of disposing or disassembling an MVAC in a disposal facility in accordance with 40 CFR 82.152 and 40 CFR 82.156 (f). The action of extracting or recovering refrigerant from an MVAC at a disposal facility does not require CAA section 608 or 609 certification (40 CFR 82.34 (d)); however, such processing does require the use of an approved refrigerant handling equipment meeting the requirements of 40 CFR 82.36 (*i.e.,* CAA section 609 equipment).
- Servicing on gratitude (service done for free). For example, a DIY individual if not being paid with cash, credits, goods, or service would not be covered under CAA section 609 requirements.

Furthermore, intentionally venting any refrigerant is prohibited under section 608 of the CAA and under 40 CFR 82.154 (a)(1).

EPA expects, in accordance with 40 CFR 82.34, that all servicing and maintenance of the MVAC involving the PMN substance will be done only by CAA section 609-certified technicians using CAA section 609-certified refrigerant handling equipment, and that extraction or recovery of the PMN substance from MVAC bound for disposal and located at a motor vehicle disposal facility will be done with CAA section 609-approved refrigerant recovery equipment. In 2011, EPA expects to propose regulations under CAA section 609 that specifically address requirements for servicing using HFO–1234yf (*e.g.,* certification of refrigerant handling equipment). EPA also expects that during initial charging by OEM, general industry requirements under OSHA 29 CFR 1910 for personal protective equipment, training and other measures for working with chemicals that may pose risks to their health and safety, are already applicable and any further restrictions under this final SNUR would be redundant and unnecessary.

Therefore, EPA agrees with the commenter and has modified the relevant language in the regulatory text of the proposed rule to remove specific references to the CAA section 609 certification.

D. Use of HFO–1234yf as a Delivery Agent

Comment: One commenter expressed concern that HFC–134a refrigerant has been used to deliver chemicals into MVAC systems for the advertised purpose of increasing system-cooling performance and/or injecting oil, trace dyes, sealants to stop refrigerant system leakage, etc. The commenter requests that EPA not allow use of HFO–1234yf as transfer/delivery agent for such purposes. Another commenter requested that HFO–1234yf not be allowed for this use due to health concerns.

Response: Prior to marketing HFO–1234yf as a delivery agent, a person would need to submit notices to EPA under both the CAA SNAP program and under TSCA. If a person plans to market HFO–1234yf as a "delivery agent" in cans, rather than as a refrigerant for MVAC, then they must submit a SNAP

information notice to EPA for use of HFO–1234yf as an aerosol propellant. Under the SNAP program, the person would be allowed to market HFO–1234yf as an aerosol propellant 90 days after submission of a complete notice. Similarly, under the SNUR, that person would also need to submit a SNUN 90 days before engaging in a use other than as a refrigerant in MVAC, such as a delivery agent. In many cases, EPA responds to a SNUN by amending the SNUR to allow companies other than the SNUN submitter (such as the submitter's processor customers) to engage in the newly approved use(s).

VI. Applicability of Rule to Uses Occurring Before Effective Date of the Final Rule

As discussed in the **Federal Register** of April 24, 1990 (55 FR 17376), EPA has decided that the intent of TSCA section 5(a)(1)(B) is best served by designating a use as a significant new use as of the date of publication of the proposed SNUR rather than as of the effective date of the final rule. If uses begun after publication were considered ongoing, rather than new, it would be difficult for EPA to establish SNUR notice requirements because a person could defeat the SNUR by initiating the proposed significant new use before the rule became effective, and then argue that the use was ongoing as of the effective date of the final rule.

Any person who began commercial manufacture, import, or processing of 1–Propene, 2,3,3,3-tetrafluoro- (PMN P–07–601; CAS No. 754–12–1; aka HFO–1234yf) for any of the significant new uses designated in the proposed SNUR after the date of publication of the proposed SNUR must stop that activity before the effective date of this final rule. Persons who ceased those activities will have to meet all SNUR notice requirements and wait until the end of the notification review period, including all extensions, before engaging in any activities designated as significant new uses. If, however, persons who began manufacture, import, or processing of the chemical substance between the date of publication of the proposed SNUR and the effective date of this final SNUR meet the conditions of advance compliance as codified at § 721.45(h), those persons would be considered to have met the final SNUR requirements for those activities.

VII. Test Data and Other Information

EPA recognizes that TSCA section 5 does not require the development of any particular test data before submission of a SNUN. There are two exceptions:

1. Development of test data is required where the chemical substance subject to the SNUR is also subject to a test rule under TSCA section 4 (*see* TSCA section 5(b)(1)).

2. Development of test data may be necessary where the chemical substance has been listed under TSCA section 5(b)(4) (*see* TSCA section 5(b)(2)).

In the absence of a section 4 test rule or a section 5(b)(4) listing covering the chemical substance, persons are required only to submit test data in their possession or control and to describe any other data known to or reasonably ascertainable by them (*see* 40 CFR 720.50). However, upon review of PMNs and SNUNs, the Agency has the authority to require appropriate testing. In this case, EPA recommends a rabbit acute inhalation toxicity study to address human health concerns. EPA strongly encourages persons, before performing any testing, to consult with the Agency pertaining to protocol selection. The OECD test guidelines are available from the OECD Bookshop at *http://www.oecdbookshop.org* or SourceOECD at *http://www.sourceoecd.org.*

The recommended tests may not be the only means of addressing the potential risks of the chemical substance. However, SNUNs submitted without any test data may increase the likelihood that EPA will respond by taking action under TSCA section 5(e), particularly if satisfactory test results have not been obtained from a prior PMN or SNUN submitter. EPA recommends that potential SNUN submitters contact EPA early enough so that they will be able to conduct the appropriate tests.

SNUN submitters should be aware that EPA will be better able to evaluate SNUNs which provide detailed information on the following:

- Human exposure and environmental release that may result from the significant new use of the chemical substance.
- Potential benefits of the chemical substance.
- Information on risks posed by the chemical substance compared to risks posed by potential substitutes.

VIII. SNUN Submissions

As stated in Unit II.C. of this document, according to § 721.1(c), persons submitting a SNUN must comply with the same notice requirements and EPA regulatory procedures as persons submitting a PMN, including submission of test data on health and environmental effects as described in 40 CFR 720.50. SNUNs must be submitted to EPA on EPA Form No. 7710–25 in accordance with the procedures set forth in § 721.25 and § 720.40. This form is available from the Environmental Assistance Division (7408M), 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. Forms and information are also available on-line at *http://www.epa.gov/opptintr/newchems.*

IX. Economic Analysis

EPA evaluated the potential costs of establishing SNUN requirements for potential manufacturers, importers, and processors of the chemical substance during the development of the direct final rule. The Agency's complete Economic Analysis is available in the docket under docket ID number EPA–HQ–OPPT–2008–0918.

X. References

The following is a listing of those documents used to prepare the preamble to this final rule. Additional information for this final rule can be located under docket ID number EPA–HQ–OPPT–2008–0918, which is available for inspection as specified under **ADDRESSES**.

1. CARB 2008. Technical Support Document Staff Analysis on Emissions and Economic Impact of Proposed Regulation for Small Containers of Automotive Refrigerant. Appendix G to CARB, 2010 (Ref. 2).

2. CARB 2010. Certification Procedures for Small Containers of Automotive Refrigerant. *California Air Resources Board,* effective March 10, 2010. Document incorporated by reference in California Code of Regulations (CCR), title 17, sections 95360 through 9537. Available on-line at *http://www.arb.ca.gov/regact/2009/hfc09/hfc09.htm.*

3. Clodic *et al.* 2008. Clodic, D, Tremoulet, A, Riachi, Y, et al. Evaluation of the Potential Impact of Emissions of HFC–134a from Non Professional Servicing of Motor Vehicle Air Conditioning Systems. *Prepared under CARB Agreement No. 06–341.* December 2008.

4. EPA 2009. Risk Assessment: PMN 07–0601; Reflecting Deliberations and Decisions From the 03/04/09 RAD Dispo. Docket ID number: EPA–HQ–OPPT–2008–0918–0034.

5. EPA 2010. EPA Questions to Honeywell on Submitted Exposure Study. Docket ID number: EPA–HQ–OPPT–2008–0918.

6. Gradient 2009. Risk Assessment for Alternative Refrigerant HFO–1234yf. Gradient Corporation, Seattle, Washington. April 3, 2009. Prepared for SAE International, Cooperative Research Program 1234.

7. Honeywell 2010a. Comment on EPA Proposed Rule. *Simulated Vehicle Service Leak Testing and Exposure Study.* Docket ID number: EPA–HQ–OPPT–2008–0918–0088.

8. Honeywell 2010b. Honeywell Response to EPA Questions on Submitted Exposure Study. Docket ID number: EPA–HQ–OPPT–2008–0918.

XI. Statutory and Executive Order Reviews

A. Executive Order 12866

This final rule establishes a SNUR for a chemical substance that was the subject of a PMN. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993).

B. Paperwork Reduction Act

According to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* an Agency may not conduct or sponsor, and a person is not required to respond to a collection of information that requires OMB approval under the PRA, unless it has been approved by OMB and displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register**, are listed in 40 CFR part 9, and included on the related collection instrument or form, if applicable. EPA is amending the table in 40 CFR part 9 to list the OMB approval number for the information collection requirements contained in this final rule. This listing of the OMB control numbers and their subsequent codification in the CFR satisfies the display requirements of PRA and OMB's implementing regulations at 5 CFR part 1320. This Information Collection Request (ICR) was previously subject to public notice and comment prior to OMB approval, and given the technical nature of the table, EPA finds that further notice and comment to amend it is unnecessary. As a result, EPA finds that there is "good cause" under section 553(b)(3)(B) of the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(B), to amend this table without further notice and comment.

The information collection requirements related to this action have already been approved by OMB pursuant to PRA under OMB control number 2070–0012 (EPA ICR No. 574). This action does not impose any burden requiring additional OMB approval. If an entity were to submit a SNUN to the Agency, the annual burden is estimated to average between 30 and 170 hours per response. This burden estimate includes the time needed to review instructions, search existing data sources, gather and maintain the data needed, and complete, review, and submit the required SNUN.

Send any comments about the accuracy of the burden estimate, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques, to the Director, Collection Strategies Division, Office of Environmental Information (2822T), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. Please remember to include the OMB control number in any correspondence, but do not submit any completed forms to this address.

C. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the Agency hereby certifies that promulgation of this SNUR will not have a significant adverse economic impact on a substantial number of small entities. The rationale supporting this conclusion is discussed in this unit. The requirement to submit a SNUN applies to any person (including small or large entities) who intends to engage in any activity described in the final rule as a "significant new use." Because these uses are "new," based on all information currently available to EPA, it appears that no small or large entities presently engage in such activities. A SNUR requires that any person who intends to engage in such activity in the future must first notify EPA by submitting a SNUN. Although some small entities may decide to pursue a significant new use in the future, EPA cannot presently determine how many, if any, there may be. However, EPA's experience to date is that, in response to the promulgation of over 1,400 SNURs, the Agency receives on average only 5 notices per year. Of those SNUNs submitted from 2006–2008, only one appears to be from a small entity. In addition, the estimated reporting cost for submission of a SNUN (see Unit IX.) is minimal regardless of the size of the firm. Therefore, EPA believes that the potential economic impacts of complying with these SNURs are not expected to be significant or adversely impact a substantial number of small entities. In a SNUR that published in the **Federal Register** of June 2, 1997 (62 FR 29684) (FRL–5597–1), the Agency presented its general determination that final SNURs are not expected to have a significant economic impact on a substantial number of small entities, which was provided to the Chief Counsel for Advocacy of the Small Business Administration.

D. Unfunded Mandates Reform Act

Based on EPA's experience with proposing and finalizing SNURs, State, local, and Tribal governments have not been impacted by these rulemakings, and EPA does not have any reasons to believe that any State, local, or Tribal government will be impacted by this final rule. As such, EPA has determined that this rule does not impose any enforceable duty, contain any unfunded mandate, or otherwise have any affect on small governments subject to the requirements of sections 202, 203, 204, or 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4).

E. Executive Order 13132

This action will not have a substantial direct effect on 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, entitled *Federalism* (64 FR 43255, August 10, 1999).

F. Executive Order 13175

This final rule does not have Tribal implications because it is not expected to have substantial direct effects on Indian Tribes. This does not significantly or uniquely affect the communities of Indian Tribal governments, nor does it involve or impose any requirements that affect Indian Tribes. Accordingly, the requirements of Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000), do not apply to this final rule.

G. Executive Order 13045

This action is not subject to Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997), because this is not an economically significant regulatory action as defined by Executive Order 12866, and this action does not address environmental health or safety risks disproportionately affecting children.

H. Executive Order 13211

This action is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001), because this action is not expected to affect energy supply,

distribution, or use and because this action is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

In addition, since this action does not involve any technical standards, section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note), does not apply to this action.

J. Executive Order 12898

This action does not entail special considerations of environmental justice related issues as delineated by Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

XII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects

40 CFR Part 9

Environmental protection, Reporting and recordkeeping requirements.

40 CFR Part 721

Environmental protection, Chemicals, Hazardous substances, Reporting and recordkeeping requirements.

Dated: October 14, 2010.

Wendy C. Hamnett,

Director, Office of Pollution Prevention and Toxics.

■ Therefore, 40 CFR parts 9 and 721 are amended as follows:

PART 9—[AMENDED]

■ 1. The authority citation for part 9 continues to read as follows:

Authority: 7 U.S.C. 135 *et seq.,* 136–136y; 15 U.S.C. 2001, 2003, 2005, 2006, 2601–2671; 21 U.S.C. 331j, 346a, 348; 31 U.S.C. 9701; 33 U.S.C. 1251 *et seq.,* 1311, 1313d, 1314, 1318, 1321, 1326, 1330, 1342, 1344, 1345 (d) and (e), 1361; E.O. 11735, 38 FR 21243, 3 CFR, 1971–1975 Comp. p. 973; 42 U.S.C. 241, 242b, 243, 246, 300f, 300g, 300g–1, 300g–2, 300g–3, 300g–4, 300g–5, 300g–6, 300j–1, 300j–2, 300j–3, 300j–4, 300j–9, 1857 *et seq.,* 6901–6992k, 7401–7671q, 7542, 9601–9657, 11023, 11048.

■ 2. The table in § 9.1 is amended by adding the following section in numerical order under the undesignated center heading "Significant New Uses of Chemical Substances" to read as follows:

§ 9.1 OMB approvals under the Paperwork Reduction Act.

* * * * *

40 CFR Citation	OMB Control No.
* * * * *	
Significant New Uses of Chemical Substances	
* * * * *	
721.10182	2070–0012
* * * * *	

* * * * *

PART 721—[AMENDED]

■ 3. The authority citation for part 721 continues to read as follows:

Authority: 15 U.S.C. 2604, 2607, and 2625(c).

■ 4. Add § 721.10182 to subpart E to read as follows:

§ 721.10182 1-Propene, 2,3,3,3-tetrafluoro-.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as 1-propene, 2,3,3,3-tetrafluoro- (PMN P–07–601; CAS No. 754–12–1; also known as HFO–1234yf) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(j) (use other than as a refrigerant in motor vehicle air conditioning systems in new passenger cars and vehicles (*i.e.,* as defined in 40 CFR 82.32 (c) and (d)); § 721.80 (m) (commercial use other than in new passenger cars and vehicles in which the charging of motor vehicle air conditioning systems with the PMN substance was done by the motor vehicle original equipment manufacturer (OEM)); and § 721.80(o) (distribution in commerce of products intended for use by a consumer for the purpose of servicing, maintenance, and disposal involving the PMN substance).

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125 (a), (b), (c), and (i) are applicable to manufacturers, importers, and processors of this chemical substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

[FR Doc. 2010–27166 Filed 10–26–10; 8:45 am]

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Proposed Rules

Federal Register
Vol. 75, No. 207
Wednesday, October 27, 2010

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 AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1450

Biomass Crop Assistance Program

AGENCY: Commodity Credit Corporation and Farm Service Agency, USDA.

ACTION: Record of Decision.

SUMMARY: This document presents the Record of Decision (ROD) regarding FSA implementation of the Biomass Crop Assistance Program (BCAP) as provided for in the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill). The U.S. Department of Agriculture (USDA), Farm Service Agency (FSA) prepared a Final Programmatic Environmental Impact Statement (PEIS) for BCAP. A Notice of Availability (NOA) of that PEIS was published in the **Federal Register** on June 25, 2010. This decision record summarizes the reasons FSA has selected the Proposed Action Alternatives taking into account the program's expected environmental and socioeconomic impacts and benefits as documented in the PEIS, all of which were considered in this decision.

SUPPLEMENTARY INFORMATION:

The Decision

Having undertaken a thorough evaluation of the resource areas affected by BCAP, a detailed analysis of the alternatives, a comprehensive review of public comments on the Draft PEIS, comments received on the Notice of Fund Availability (NOFA) to the Matching Payment component of BCAP, experience from administering the Matching Payments component of BCAP, and public comments received on the proposed rule, FSA has decided to implement Alternative 2, the Selected Alternative, identified for BCAP. This decision was made after comparing overall environmental impacts and other relevant information with regard to the reasonable alternatives considered in the BCAP PEIS and through the additional public input on the BCAP following the guidance of the Administrative Procedures Act (Pub. L. 79–404) and agency rules, opinions, orders, records, and proceedings. Alternative 2 was selected as the alternative that was most consistent with the intent and language of the 2008 Farm Bill (Pub. L. 110–246), while being environmentally responsible and reasonable to implement, and that would not have significant negative impacts. The following briefly describes the purpose and need for the proposed action and the alternatives considered.

Purpose and Need for the Proposed Action

The purpose of the Proposed Action is to establish and administer BCAP, as specified the 2008 Farm Bill. The need for the Proposed Action is to implement BCAP for the purposes specified in the 2008 Farm Bill, specifically to promote the establishment and production of eligible dedicated energy crops.

The purpose of the PEIS was to identify and assess the broad implications to the human and natural environments of the national implementation of those components of the BCAP that were discretionary in nature as provided by the 2008 Farm Bill. It was determined that BCAP provided incentives and assistance in the production of dedicated energy crops similar to the incentives for production of traditional agricultural row crops, which was the reasoning behind limiting the analysis to establishment and production of dedicated energy crops. Dedicated energy crops currently under consideration as economically viable were determined to use similar cultivation techniques, grown in areas with current traditional crop production, and have similar transportation methods and mechanisms, and as such, would have similar off-farm effects for delivery to markets, with these effects being site specific. The range of final products that could be produced from dedicated energy crops grown as part of BCAP is wide and changing with new technology on a rapid basis. Cumulatively, the conversion of dedicated energy crops into a final product was qualitatively analyzed since the location, type, and technology to reach a final product from a dedicated energy crop could not be quantifiably determined as part of this program.

Overview of BCAP

BCAP is a new program provided for in Title IX of the 2008 Farm Bill. BCAP is intended to assist agricultural and forest land owners and operators with the collection, harvest, storage, and transportation of eligible materials for use in a biomass conversion facility (BCF) and to support the establishment and production of eligible crops for conversion to bioenergy in selected project areas. BCAP will be administered by the Deputy Administrator for Farm Programs of the FSA on behalf of the Commodity Credit Corporation (CCC) with the support of other Federal and local agencies. BCAP is composed of two components: (1) The Matching Payments component for the collection harvest, storage, and transportation (CHST) of eligible materials, and (2) the Establishment and Annual Payments component associated with BCAP project areas.

BCAP Matching Payments Component

CCC and FSA published a NOFA for the Matching Payments component of BCAP for eligible renewable biomass material on June 11, 2009 (74 FR 27767–27772). The NOFA announced the availability of funds beginning in 2009 for matching payments to eligible material owners for CHST of eligible material delivered to qualified BCFs in advance of full implementation of BCAP. FSA invited comments on the NOFA from all interested individuals and organizations over a 60-day comment period. On February 8, 2010, the proposed rule for full implementation of BCAP was published (75 FR 6264–6288) which terminated the NOFA effective February 3, 2010. With the publication of the proposed rule, the CCC and FSA requested comments on the proposed rule, which included both components of the BCAP.

The NOFA was published in response to the Presidential Directive issued to the Secretary of Agriculture directing an aggressive acceleration of investment in and production of biofuels. The Presidential directive requested that the Secretary of Agriculture take steps to the extent permitted by law to expedite and increase production of and investment in biofuel development by making the renewable energy financing available in the 2008 Farm Bill available within 30

days. The NOFA was the first step in a multi-step process to provide guidance and funding for CHST in response to the Presidential Directive consistent with the 2008 Farm Bill. The NOFA provided a general summary of the provisions that would be used to administer payments for CHST in advance of the rule on BCAP. Specifically, the NOFA (1) provided policies and processes for providing matching payments for the CHST of eligible material, to qualified BCFs, and (2) described the process for qualifying CHST BCFs. The Matching Payments component was implemented under the guidance of the Deputy Administrator for Farm Programs, FSA (Deputy Administrator), who is also the Executive Vice President of CCC. The USDA determined that making these funds available as soon as possible was in the public interest, and that withholding funds for CHST to provide for public notice and comment would unduly delay the provisions of the benefits associated with the program.

The Matching Payments component was determined not to be a major Federal action per the NEPA definition since (1) the program was understood to be a mandatory program subject to a final construction and implementation of the statutory terms and the interim allocation of funds while the final determinations were being made and (2) the materials collected during the Matching Payments component were currently being utilized in the marketplace for a similar, if not the same, purpose. The Matching Payments component incentivized an existing activity, which was fully seen from the data collected during the NOFA authority, to continue production during current economic conditions. The data from the NOFA indicated that approximately 80 percent of the BCFs qualified were collecting renewable biomass materials prior to the NOFA, indicating only a small number of qualified BCFs either were new facilities, facilities newly brought on-line, but were in the construction phases prior to the NOFA, or were facilities that restarted production from an off-line state due to the incentive created by the Matching Payments component encouraging delivery of the energy feedstock. There is an indication from the data that there was a redirection of some existing materials from pulp and paper manufacturers to wood pellet mills.

The Matching Payments component of BCAP was analyzed in the PEIS as a mandatory implementation of the 2008 Farm Bill for either alternative in the economic modeling as a payment to producers within project areas; it was not analyzed as a payment to others outside the contract acreage producers. It was assumed for both alternatives that producers would receive the $45 per ton as the maximum matching payment for delivery of biomass to a qualified facility for two years from the first delivery. Using this assumption would anticipate, per the model limitations, the potential for maximum adoption of dedicated energy crops by producers within project areas and therefore, estimated land use conversion given the highest potential value, in total (annual payment, delivery payment, and matching payment combination), for delivered biomass. The maximum payment scenario was used to depict a maximum adoption under limited funding and a scenario with unlimited funding that would assist in meeting the goals of other legislation (such as the Renewable Fuel Standard (RFS2)), which would indicate the broad potential impacts to the human and natural environments from the establishment and growth of dedicated bioenergy crops. The timing within the model was estimated as five years from acreage contracted during the last authorized fiscal year for herbaceous perennial crops with a delivery estimate of two to three years from establishment. For woody species, the contract period is 15 years with at least one delivery; therefore, the model results were assumed for a period 15 years from acreage contracted during the last authorized fiscal year with at least one delivery for some woody species and two deliveries for other woody species.

BCAP Establishment and Annual Payments Component

BCAP is intended to support the establishment and production of eligible crops on eligible land for conversion at a biomass conversion facility (BCF) in selected BCAP project areas and to provide financial assistance to producers of eligible crops in BCAP project areas. Under the Establishment and Annual Payments component, the CCC would accept BCAP project area proposals on a continuous basis. To be considered for selection as a BCAP project area, a project sponsor consisting of a group of producers or a BCF must submit to the Secretary a proposal that includes (at a minimum): (1) A description of the eligible land and eligible crops to be enrolled in the proposed BCAP project area; (2) a letter of commitment from a BCF that the BCF would use eligible crops intended to be produced in the BCAP project area; (3) evidence that the BCF has sufficient equity available if the BCF is not operational at the time the project area proposal is submitted; and (4) other information that gives the Secretary a reasonable assurance that the BCF would be in operation by the time that the eligible crops are ready for harvest. BCAP project area proposals would be evaluated on selection criteria that take into account:

- The dry tons of eligible crops and the probability those crops would be used for BCAP purposes;
- The dry tons of renewable biomass potentially available from other sources;
- The anticipated economic impact within the project area;
- The opportunity for producers and local investors to participate in ownership of BCF;
- The participation by beginning or socially disadvantaged farmers or ranchers;
- The impact on soil, water, and related resources;
- The variety in biomass production approaches within a project area;
- The range of eligible crops among the project areas;
- The ability to promote cultivation of perennial bioenergy crops and annual bioenergy crops that show exceptional promise, and not primarily grown for food or animal feed; and
- Any additional criteria, as determined by the Secretary.

BCAP project areas would be subject to approval based on the above selection criteria and the successful completion of a finding of no significant impact (FONSI) for a NEPA Environmental Assessment (EA), which would determine that there would be no significant effects to the natural or human environment within the proposed project area. This project area level NEPA document would identify regionally and locally significant features and/or resources and the potential for effects to those resources from the proposed project area implementation. If certain mitigation measures could be undertaken to avoid significant effects, those measures would be detailed in the project area EA.

Additional requirements at the producer level include conservation planning in the form of a BCAP conservation plan or forest stewardship plan (or an equivalent plan). In addition to an approved conservation plan or forest stewardship plan (or the equivalent), a site-specific BCAP environmental screening form would be completed to determine the appropriate level of further environmental review necessary prior to completion of the BCAP contract with the producer. That environmental review and conservation

planning would provide site-specific mitigation measures, as necessary, to conserve physical and biological resources at the contract level. Those mitigation measures and practices approved through conservation planning would be periodically monitored by USDA to determine the success and compliance with those measures.

A producer within the project area may enter into a contract with CCC to commit eligible land, which would then be called contract acreage, to establish and/or produce eligible crops. Contract durations may be up to five years for annual and non-woody perennial crops and up to 15 years for woody perennial crops. The 2008 Farm Bill defined eligible land for project areas as agricultural land and non-industrial private forest land (NIPF), subject to certain exclusions. Eligible agricultural land for BCAP includes cropland, grassland, pastureland, rangeland, hayland, and other lands on which food, fiber, or other agricultural products are produced or are capable of being produced for which a valid conservation plan exists or is implemented. Eligible NIPF land for BCAP includes rural lands with existing tree cover, or that are suitable for growing trees, which are owned by any private individual, group, association, corporation, Indian tribe, or other private legal entity as provided by section 5(c) of the Cooperative Forestry Assistance Act of 1978, as amended (16 U.S.C. 2103a). Agricultural and NIPF lands with already established energy crops or already contracted for energy crops or planned energy crops would be eligible lands for contract acreage. USDA FSA may consider waste lands, brownfields, abandoned mine land, and environmental clean-up sites as eligible land, if they meet the definition of agricultural land or NIPF, as described above and in the 2008 Farm Bill.

Producers in project areas may be eligible for both BCAP establishment payments and annual payments. Producers would be eligible for establishment payments for not more than 75 percent of the cost of establishing a perennial crop, which could include woody perennial crops. Establishment payments were not authorized for annual crops and would only be made for new perennial, eligible crops with a projected initial harvest time occurring within the length of the contract period. Existing eligible crops on agricultural lands and NIPF would not be eligible for establishment payments; however, they could be eligible for annual payments. Annual payments would be calculated on: (1) A weighted average soil rental rate for cropland; (2) the applicable marginal pastureland rental rate for all other land except for NIPF; (3) for NIPF, the average county rental rate for cropland as adjusted for forestland productivity; and (4) any incentive as determined by the Deputy Administrator. The payments are intended to support production of eligible crops.

Alternatives Analyzed

The following list contains action alternatives determined to be reasonable, which were evaluated in detail in the BCAP PEIS as developed during internal and public scoping processes, as described in the following section. These alternatives were developed to provide overall flexibility in the program with one alternative being restrictive and with limited funding, while the other was broader and could provide a greater level of funding. The No Action Alternative, used as a baseline for comparison of the Proposed Action, assumed no Federal program for the Establishment and Annual Payments Program component of BCAP. Alternative 1 was determined to be the Preferred Alternative in the Final PEIS.

ALTERNATIVES CONSIDERED

Alternative 1: Targeted implementation of BCAP	Alternative 2: Broad implementation of BCAP
BCFs supported by BCAP project areas are limited to producing energy.	All bio-based products produced by a BCF in BCAP project areas can be supported.
No new non-agricultural lands allowed for BCAP project area crop production.	New non-agricultural lands allowed for BCAP project area crop production.
Cropland acres enrolled in the program would be capped at 25 percent of cropland acres within a given county.	Cropland acres enrolled in the program would not be capped.
Advanced biofuels produced by BCAP project area BCFs must meet the greenhouse gas test.	Advanced biofuels produced by BCAP project area BCFs do not need to meet the greenhouse gas test.
Only new BCFs are allowed to be part of BCAP project areas and only newly established crops on BCAP contract acres are eligible crops.	Existing BCFs that meet BCAP eligibility requirements are supported.
Only large commercial BCFs would be allowed in BCAP project areas.	Small and Pilot BCFs would qualify for BCAP project areas.
Payments would be limited to provide some risk mitigation.	Payments would completely replace lost potential income from non-BCAP crops.

Public Involvement

Responses to the Final SEIS public comments and FSA's analyses supporting this Record of Decision are presented in the following discussion.

Public Scoping

CCC first provided notice of its intent (NOI) to prepare the proposed BCAP PEIS in the **Federal Register** on October 1, 2008 (73 FR 57047–57048). CCC provided an amended NOI to prepare the proposed BCAP PEIS on May 13, 2009 (74 FR 22510–22511), and solicited public comment on the proposed PEIS for BCAP. Six public scoping meetings were held in May and June 2009 to solicit comments for the development of alternatives and to identify environmental concerns. FSA performed a density analysis of likely BCAP participation to determine those areas that would utilize the program and meetings were planned for these six locations. Public meetings were held in Washington, Texas, Iowa, Louisiana, Georgia, and New York in the cities and dates as presented in the table below. The PEIS has taken into consideration comments gathered in the scoping process initiated with the October 1, 2008, NOI to develop the alternatives proposed for the administration and implementation of BCAP. Announcements of the scoping meetings were posted in the FR (74 FR 22510–22511), State and county FSA offices, and the FSA Web site prior to the meetings. A public website was created that provided program information, scoping meeting locations and times, and an electronic form for submitting comments via the internet. A presentation was given at each meeting followed by a comment period for attendees. Printed program information and comment forms were made available at the meetings, along with

cards providing the public comment Web site address. Meetings were attended by the FSA National Environmental Compliance Manager or FSA Federal Preservation Officer, and were recorded by a court reporter.

LIST OF PUBLIC SCOPING MEETINGS

Date of meeting	City, state	Meeting location
May 28, 2009	Olympia WA	Red Lion Hotel, 2300 Evergreen Park Drive, Olympia, WA 98502.
June 2, 2009	Amarillo, TX	Hilton Garden Inn, 9000 I–40 West, Amarillo, TX 79124.
June 4, 2009	Alexandria, LA	Alexander Fulton Hotel, 701 4th Street, Alexandria, LA 71301.
June 8, 2009	Des Moines, IA	Renaissance Savery Hotel, 401 Locust Street, Des Moines, IA 50309.
June 10, 2009	Albany, GA	Hilton Garden Inn, 101 S. Front Street, Albany, GA 31701.
June 11, 2009	Syracuse, NY	Hilton Garden Inn, 6004 Fair Lakes, East Syracuse, NY 13057.

All comments received during the scoping process were recorded and categorized, as applicable, to the stated purpose and need for the Proposed Action, the Proposed Action itself, preliminary alternatives, and environmental resource areas. The comments were evaluated by FSA to determine the scope and significance of each issue and the depth at which it would be analyzed in the PEIS.

Draft PEIS

The availability of the Draft PEIS was announced on August 10, 2009 (74 FR 39915). This Notice of Availability (NOA) marked the beginning of a 45-day public comment period soliciting comments from interested persons and agencies. Comments were received through October 9, 2009. Copies of the Draft PEIS were provided to the headquarters and all the regional offices of the U.S. Environmental Protection Agency (EPA) and U.S. Fish and Wildlife Service (USFWS). Comments were received from State and Federal agencies, non-government organizations, and individuals. FSA responded to all substantive comments received and either expanded the PEIS to address the comment or explained why the PEIS was not expanded or clarified in accordance with the comment.

The Draft PEIS received comments from five Federal agencies, three private individuals, 25 organizations or corporations, and the Government of Canada. These 35 commenters generated 191 comments. The individual comments addressed Air Quality (22), Biological Resources (41), Cumulative Effects (9), Mitigation (4), Additional Language or Further Clarification (14), Other (39), Proposed Action and Alternatives (24), Purpose and Need (10), Recreation (1), Resources Eliminated from Detailed Study (3), Socioeconomics and Land Use (21), Soil Resources and Quality (11), and Water Quantity and Quality (10).

Comments concerning Air Quality included greenhouse gas (GHG) emissions from biomass burning, carbon sequestration, soil carbon, carbon sinks, primary/criteria air pollutants, and wind erosion. Biological resources comments included effects to protected species, primary nesting season (PNS) considerations, conversion of forest lands, conversion of grasslands, genetically engineered (GE) organisms, cumulative effects to vegetation and wildlife, types of crops planted, grassland birds, and invasive and noxious species. Cumulative effects comments included effects to higher-value product feedstocks, effects from forest land conversion, and associated and related programs at the state level. Mitigation comments included new tools to assess the values of biomass production at the site-specific level to generate the BCAP conservation plan and a request for greater details. Other comments received included mechanisms associated with CHST, monitoring programs, conversion of Conservation Reserve Program (CRP) acres, the inclusion of crop residues, greater description of forestry resources, agricultural plastics, more precise definitions of eligible crops and lands, and the use of only one crop type as an example of eligible crops. Several comments were received on the number of alternatives presented and analyzed. Comments on Socioeconomics and Land Use included the effects on existing BCF, the use of residues, and the inclusion of short rotation woody crops (SRWC) into the models. Soil-related comments included increased erosion potential, soil carbon sequestration, and the role of agricultural residues in soil formation. Water-related comments included water quantity for BCF use, erosion and pesticide transport, irrigation use, and Gulf of Mexico hypoxia.

Final PEIS

Public notices announcing the availability of the Final PEIS were published on June 25, 2010 (75 FR 36386). The Final PEIS was available for public review and comment for 30 days, and to ensure that all potential comments from interested stakeholders were received and reviewed, an extra 30 days was provided for FSA receipt of comments. FSA received comments from two Federal agencies, 38 organizations or corporations, one local government representative, and seven private citizens. Approximately 54 percent of the commenters specifically favored one alternative over the others, with 15 commenters favoring Alternative 1, 10 commenters favoring Alternative 2, and one commentor favoring the No Action Alternative.

Final PEIS commenters supported Alternative 2, the Selected Alternative, for many of the following reasons: Provides the greatest incentive for forest landowners to continue managing NIPF to produce valuable ecosystem goods and services; discourages NIPF owners from converting forest land to other land uses; provides more renewable biomass than Alternative 1 or the No Action Alternative; creates the greatest reduction in fossil fuel consumption; increases energy security by increasing domestic energy production; socioeconomic benefits; environmental benefits; allows the all qualified BCF to participate regardless of size; Alternative 1 is too restrictive; more closely supports State renewable portfolio standards (RPS) goals; creates green jobs; and provides greater incentives to high potential bioenergy crops.

Impacts Summary

The Final PEIS outlines and compares all of the alternatives' potential impacts. Based upon the analyses and conclusions presented in the Draft PEIS, FSA identified the Preferred Alternative as Alternative 1; however, with comments received on the NOFA, experience with the Matching Payments component of BCAP, comments received on the proposed rule, and from

the Final PEIS comment period, FSA has chosen Alternative 2 to be the selected and implemented alternative. Within the context of the Proposed Action's purpose and need, this alternative is both environmentally responsible and reasonable to implement, would not have significant negative impacts, and more closely matches the intent and guidance of the 2008 Farm Bill. Both beneficial and potential adverse effects of the alternatives analyzed for implementing BCAP are identified and discussed below.

Alternative 1 (Preferred Alternative)

Under Alternative 1, the BCAP Establishment and Annual Payments component would be implemented on a more restrictive or targeted basis. Project areas would be authorized for those that support only large, new commercial BCFs that are limited to producing energy in part from only newly established crops on BCAP contract acres. No new non-agricultural lands (for example, NIPF converted to herbaceous crop lands) would be allowed to enroll for BCAP crop production.

Socioeconomics and Land Use Effects

Modeling indicates that at the national level, direct impacts to realized Net Farm Income are expected to remain unchanged from that of the No Action Alternative due to limited funding. However, net returns are likely to improve for those producers selected to participate in a BCAP project area. Total net returns for most potential project locations are positive, ranging between $2.7 and 7.3 million in Year 1 of the program. Modeling shows that positive Net Returns would still be expected over the long term (Year 3), indicating that the BCAP project areas remain capable of supplying a BCF with required feedstock.

Alternative 1 would cause land use changes only at the local level (that is, county or multi-county region). Land use changes range between 22,000 to 44,000 acres of crop (for example, corn, wheat, soy, etc.) and hay land being converted to dedicated energy crops (switchgrass) from that of the No Action Alternative.

Overall, scientific literature and the modeling for the BCAP PEIS indicated that the vast majority of cropland for dedicated energy crops would come from cropland currently in production for traditional row crops and from pastureland. Additionally, recent literature indicates that potentially nine million to 15 million expiring CRP acres could return to crop production by 2025, with an estimated one million acres potentially being planted in dedicated energy crops. This was based on the probable higher value of traditional row crops without the incentives provided by BCAP for dedicated energy crop production. The impact of expiring CRP acres on total CRP enrollment would be offset through re-enrollments into CRP and new acres being enrolled in CRP to reach the 32 million acre CRP cap as specified in the 2008 Farm Bill.

The PEIS found that Alternative 1 would cause only minor conversion of natural landscapes, including native habitats and forests, due to (1) the economic costs associated with supplying infrastructure (for example, roads, temporary irrigation for establishment) to those lands and (2) the restrictions inherent in the 2008 Farm Bill that limit and protect unique native habitats such as native sod, which would include rangelands that have never been in crop production. Economic indirect impacts under this alternative vary by project location.

The analysis method used in the PEIS did not address international indirect land-use change. This can be done, for example, by coupling output from the Policy Analysis System (POLYSYS) economic simulation model to an international economic sector model, such as the Global Change Assessment Model (GCAM) at the Joint Global Change Research Institute. Associating carbon coefficients to the economic sectors (for example, forest, croplands, fossil fuels, *etc*), allow for estimates of indirect land-use change associated with the changes in land-use occurring nationally. However, it is important to recognize that the ratio of land-use change (for example, one acre of soybeans taken out of production in the United States equals one acre of tropical deforestation) has not been adequately established through scientific literature. The social drivers of indirect land-use change are not clear, not substantiated, and cannot be modeled in a fact-based analysis at this time.

Growing dedicated energy crops, and subsequent land use changes for those crops in a region, would impact the agricultural sector by the creation of a new market. The exact amount of land that may be converted is limited to 25 percent of the acreage within each county being eligible for BCAP payments. This equates to a relatively small amount of vegetation being converted from traditional crops or pastureland to approved dedicated energy crop species. It is estimated that producing a dedicated energy crop would require $60 per dry ton (approximately $10 million) to establish the crop. To receive payments to establish a dedicated energy crop, producers must first convert their land from traditional crops. This would result in negative impacts within the community as inputs from the traditional crops are not purchased. Costs vary based on the community and the amount of land use changes required and range between $1.5 million to $5 million.

Total economic impacts range between $19 million and $28 million. Net positive impacts for the top five projects are between $21 million and $25 million for their region. However, land use changes would create negative impacts, through reduced purchases of inputs for traditional farming, within a region ranging from $2.5 million to $10 million depending on location.

Biological Resources

Due to the small scope of this alternative, and provided established provisions, standards, and guidelines are followed, and provided the BCAP conservation plan, forest stewardship plan (or the equivalent) are adapted to resource conditions, Alternative 1 would have no significant negative impacts on vegetation or wildlife.

It is unlikely there would be significant negative impacts to wildlife populations from the conversion to dedicated energy crops at a regional scale. However, the potential always exists for site-specific fluctuations in wildlife populations without the proper adaptive management techniques being applied during the establishment and harvesting stages of crop production. The proper use of adaptive management and appropriate mitigation techniques related to agricultural processes can help minimize any potential negative direct effects. There are not expected to be large scale impacts to regional wildlife populations because of the limited scope of land use change under this alternative. Indirect impacts to wildlife are related to habitat change. Some degree of wildlife mortality from collisions or nest destruction from farm equipment is unavoidable. Provided establishment and harvest of feedstock does not occur during the primary nesting season (PNS), these impacts should be minimized.

Reptiles and amphibians could experience negative and positive responses to the conversion to dedicated energy crops. The increase of native vegetation may increase the abundance of invertebrates, a source of food for many reptiles and amphibians. There may be short-term reductions in population sizes the year that

conversion occurs from agricultural activity to biomass establishment from collisions or crushing by farm equipment. The techniques described above, if properly planned and applied, are designed to minimize the impacts to wildlife of these activities. Likewise, because of the limited implementation under this alternative, these impacts would not be regional nor are they anticipated to affect regional wildlife population levels.

Impacts to invertebrates are related to habitat, and would vary based on specific lifestyle and habitat preference. Direct impacts to invertebrates are dependent on the degree of exposure and the mobility of a given species. Impacts from the establishment include destruction of nest sites, crushing, and the removal of food sources. These impacts can be reduced if activities are not conducted during periods of highest florescence or when flowers are in bloom.

Impacts to aquatic wildlife are associated with the dangers of sedimentation, and nutrient and agricultural chemical deposition into water bodies. However, provided established procedures for erosion and runoff control are followed, these potential impacts are not expected to be significant.

Air Quality

The analysis of potential air quality impacts was intended to estimate changes in land management associated with the adoption of dedicated biomass energy cropping practices and to estimate changes in greenhouse gases (GHG) and carbon stocks associated with those changes in land management. The analysis considered the range of potential effects associated with the establishment of the dedicated energy crop including crop production inputs through the harvesting of the dedicated energy crop to the farm gate.

The air quality analysis was developed through the output from the economic forecasting model associated with predicted changes in land management. This model (POLYSYS) is based on over 3,500 unique cropping practices that capture greater than 90 percent of all cropland production in the United States, using an annual time step and at a county level. When considering changes in land-use and soil carbon stocks, the model works at a sub-county level. The annual time step allows for near-term estimates of dedicated energy crop adoption and potential changes in GHG emissions. Changes in GHG emissions included upstream emissions from the production of agricultural inputs (for example, fertilizers, pesticides, energy for irrigation), on-site fossil fuel emissions, on-site soil carbon dioxide (CO_2) emissions from organic carbon (soil organic matter and plant residue) and inorganic carbon (agricultural lime), and soil nitrous oxide (N_2O) emissions.

This method was chosen, because the economic modeling components within the POLYSYS model are of a spatial resolution (county) and temporal resolution (annual) needed to address dedicated energy crop adoption rates both locally and nationally. This information was used to assess the impact of annual adoption rates on GHG emissions. Fossil-fuel offsets from the use of cellulosic ethanol occur outside the farm gate; therefore, they were not included in this analysis. Inclusion of fossil-fuel offsets would likely contribute to larger carbon savings and less net CO_2 emissions to the atmosphere, than is accounted for in the current analysis.

Positive changes to air quality are expected under Alternative 1. However, since the scope of this alternative is limited, these changes would not be significant. Direct impacts relate to the energy and/or emissions from agricultural production activities. Under this alternative, energy consumption within the top five regions would be reduced by 3,664 gigajoules (GJ) through the conversion to switchgrass when compared to the No Action Alternative. This energy change is minor, in most cases less than 0.1 percent. Carbon emissions were less than those of the No Action Alternative, yet small, usually less than 0.1 percent reduction. Due to the limited scale of conversion under this alternative, the amount of fugitive dust emissions would be minor, temporary, local, and nearly equal to that of the No Action Alternative. Yet, over the long term, given the conversion to perennial dedicated energy crops and reduction tillage, there would be a reduction in fugitive dust emissions. These effects would be positive, but minor.

Limited indirect impacts would occur from emissions from equipment exhaust or other mobile sources necessary for the establishment of dedicated energy crops. However, since machinery is already utilized on these fields, these impacts are similar to those of the No Action Alternative.

Site-specific mitigation measures would be determined based on the local or regional Air Quality Control Region, as prescribed in the conservation plan or through local or State regulations concerning air emissions of criteria pollutants. Best Management Practices (BMPs) to reduce mobile sources include proper maintenance of equipment and dust suppression activities.

Soil Resources

Under Alternative 1, a reduction in erosion from all sources is expected. Conversion of croplands from traditional crops to switchgrass is estimated to reduce topsoil loss from these acres by 0.4 inches per year; which equates to four inches over a ten year period. Soil carbon would increase between 0.2 and 10.1 percent over that of the No Action Alternative. Indirect impacts under Alternative 1 would be increased biodiversity of soil biota as a result of increased soil organic matter and the presence of perennial vegetation. The use of BMPs would further reduce the potential for soil loss. Provided established conservation standards, provisions and guidelines are implemented, Alternative 1 would have no significant negative impact on soil resources.

Water Quality and Quantity

Under Alternative 1, direct impacts to water quality are expected from the changes to the use of nutrients and agricultural chemicals for the establishment and production of switchgrass in the potential BCAP project locations. Decreases in the use of potassium (3.1 percent), lime (4.0 percent), herbicides (5.5 percent), insecticides (11.2 percent), and other agricultural chemicals (3.6 percent) are expected; while the use of nitrogen (2.1 percent) and phosphorus (2.9 percent) within the top five project areas are expected to increase over that of the No Action Alternative. The overall reduction in nutrients and agricultural chemical, erosion, total suspended solids (TSS), and sedimentation would provide positive impacts on water quality from implementation of this alternative. However, due to the limited amount of acreage under this alternative, these benefits would be local.

The change in the quantity of water required under this alternative would be minimal. The amount of water used for irrigation in the top five regions would only decrease approximately 0.25 percent over that of the No Action Alternative, saving an estimated 1.2 million gallons of water per day. When compared across all project area States, 23.6 million gallons of water per day would be conserved. Switchgrass has a higher water use efficiency (WUE) than other traditional crops, and is highly tolerant of various water regimes and is more drought tolerant than traditional crops.

Indirect impacts under Alternative 1 result from the reduction in sedimentation and nutrient and agricultural chemical deposition into surface water bodies that move downstream, benefiting larger water stream courses and regional water quality.

To further reduce impacts to water quality, buffer strips comprised of mixed native species between biofuel crop fields and surface water bodies should be established for sediment and nutrient retention. Adherence to established conservation standards, provisions, and guidelines ensures Alternative 1 would have no significant negative impact on water quality.

Recreation

Under Alternative 1 there could be localized positive or negative impacts on wildlife habitat, but they are expected to be small due to the relatively small amount of land converted to energy crops. The impacts to recreation involving wildlife are expected to be small locally and also not significant at the regional or national level.

Alternative 2 (Selected Alternative)

Alternative 2 expands the BCAP Establishment and Annual Payments component, allowing anyone who meets basic eligibility requirements of the BCAP provisions in the 2008 Farm Bill to participate. In addition, existing BCFs and crops would be supported, including small and pilot BCFs, and all bio-based products derived from eligible materials would qualify under this alternative. New non-agricultural lands (for example, NIPF converted into herbaceous cropland) would be allowed to enroll and the number of cropland acres would not be capped.

Socioeconomics and Land Use Effects

Significant changes are expected in net revenues as total revenue values increase more than the feedstock production costs and as feedstock production reduces the supply of other crops and subsequently increases their prices. Price increases are most significant for wheat, corn, and soybeans, with price changes expected to increase by 15 to 20 percent during the period 2009 to 2023. The addition of more forestry resources as feedstock would reduce pressures on crop prices somewhat, as would any future increase in crop yields. It is expected that government commodity payments would increase due to the price impacts triggered by the increased demand for cropland.

Overall, scientific literature and the modeling for the BCAP PEIS indicated that the vast majority of cropland for dedicated energy crops would come from cropland currently in production for traditional row crops and from pastureland. Additionally, recent literature indicates that potentially nine to 15 million expiring acres of CRP could return to crop production by 2025, with an estimated one million acres potentially being planted in dedicated energy crops. This was based on the probable higher value of traditional row crops without the incentives provided by BCAP for dedicated energy crop production. The impact of expiring CRP acres on total CRP enrollment would be offset through re-enrollments into CRP and new acres being enrolled in CRP to reach the 32 million acre cap as specified in the 2008 Farm Bill.

Land use shifts, especially among the major crops, are expected under this alternative. The amount and type of land, both traditional cropland and non-cropland, converted to dedicated energy crop production would depend on which areas are designated as project areas. Modeling indicates that by 2023, planting of dedicated energy crops would increase production cropland by over 50 million acres, while resulting in a reduction in traditional cropland acreage by approximately 17 million acres, with corn acreage estimate to increase by less than one million acres. Of the estimated 350 million acres in current use as pastureland, approximately 34 million acres would shift to the production of dedicated energy crops while 15 million acres would shift to hay production. Overall, scientific literature and the modeling for the BCAP PEIS indicated that the vast majority of cropland for dedicated energy crops would come from cropland currently in production for traditional row crops and from cropland pastureland. Natural landscapes and native habitats and forests would be anticipated to have only minor conversion due to (1) the economic costs associated with supplying infrastructure (for example, roads, temporary irrigation for establishment) to those lands and (2) the restrictions inherent in the 2008 Farm Bill that limit and protect unique native habitats such as native sod, which would include rangelands that have never been in crop production.

There would be both positive and negative indirect impacts from the establishment of dedicated energy crops which would flow through the rest of the economy. While payments for the establishment of dedicated crops is estimated to be $11 billion and the matching payments component of BCAP is expected to create an estimated 280,000 jobs, the costs associated with land use changes required to meet the demand for dedicated energy crops and crop residues may bring a decline of $3.2 billion and a loss of 41,000 jobs. Overall, the total economic impact from implementation of Alternative 2 is anticipated to be positive with an estimated $88.5 billion in economic activity throughout and the creation of nearly 700,000 jobs.

Biological Resources

As with Alternative 1, provided established provisions, standards, and guidelines (that is, BMPs similar to those used in CRP conservation plan) are followed and the BCAP conservation plans, forest stewardship plans, or equivalent plans, are adapted to resource conditions, Alternative 2 would have no significant negative impacts on vegetation or wildlife. Conversion may have both negative and positive impacts. The loss of forest land (for example, NIPF converted to herbaceous cropland) or native grasslands, not native sod (for example, CRP acres planted to native grass that have expired and gone back into production) would decrease the habitat quality for several wildlife species; however the effects would be limited given the minor amount of conversion anticipated from these land types. Yet, as described in Alternative 1, many of the dedicated energy crop options have a higher habitat quality than traditional crops. The types of impacts to wildlife during the establishment of dedicated energy crops would be similar to those described in Alternative 1; yet, with the potential to occur at a much broader scale. Again, the scale of this impact is dependent on the types and amount of land converted to dedicated energy crops. Negative impacts to large mammals, small mammals, reptiles and amphibians, and invertebrates are not expected to be significant. Similarly, impacts to birds are not expected to impact population densities. However, the largest potential negative impact to grassland birds would occur during conversion or harvesting activities. Provided these activities do not occur during the PNS, and the small portion of grasslands in potential BCAP project area locations, impacts to grassland birds are minimal.

Air Quality

Implementing Alternative 2 on a broader scale would reduce overall direct carbon equivalent emissions during perennial dedicated energy crop

growth. Total energy use was approximately one to two percent higher in most years due to the indirect energy requirement for increased equipment manufacturing. Direct energy usage was either neutral or decreased over time. The effects of fugitive dust emissions during the establishment phase would be similar to those of Alternative 1. After establishment, fugitive dust emissions would decrease due to the alteration of cropping systems to perennial species. In the long term, these effects would be on a regional scale and would be positive. Indirect impacts are similar to those of Alternative 1. Site-specific mitigation measures and BMPs as described in Alternative 1 would reduce potential impacts to Air Quality under Alternative 2.

Soil Resources

Alternative 2 would result in reductions at both the local and regional level of soil erosion due to the transition from traditional crops to perennial vegetation used for dedicated energy crops. As indicated in the modeling results, dedicated energy crop production would increase production cropland by approximately 50 million acres under Alternative 2, with that acreage being shift from traditional row crops and cropland pasture, rather than natural landscapes, native habitats and forests. Overall, the shift toward more perennial vegetation on production croplands from traditional annual row crops would provide benefits to soil quality and soil carbon sequestration. Perennial crops, and the use of corn stover and wheat straw, would shift away from conventional tillage to no tillage practices. This shifting of tillage practices on an estimated 11 million acres would conserve approximately 40 million tons of soil each year over that of the No Action Alternative. As with Alternative 1, the biological diversity of the soil would also increase. As with Alternative 1, the use of BMPs would further reduce the potential for soil loss. Provided established conservation standards, provisions and guidelines are implemented, Alternative 2 would have no significant negative impact on soil resources.

Water Quality and Quantity

The direct and indirect impacts to water quality under Alternative 2 would be similar to those described in Alternative 1. However, as the amount of acreage converted from traditional crops to perennial crops increases, the benefits to both water quality and quantity increase. The same mitigation methods described in Alternative 1 would reduce potential impacts to water quality. Adherence to established conservation standards, provisions, and guidelines ensures Alternative 2 would have no significant negative impact on water quality.

Recreation

Under Alternative 2 there could be localized positive or negative impacts on wildlife habitat, but they are expected to be small due to the relatively small amount of land converted to energy crops. The impacts to recreation involving wildlife are expected to be small locally and also not significant at the regional or national level.

Mitigation Measures and Best Management Practices

In addition to the required BCAP conservation and/or forest stewardship plan (or the equivalent), all project sponsors and producers must follow all environmental rules and regulations as required through participation in other USDA programs. Each project proposal will be subject to NEPA analysis prior to approval. A BCAP Environmental Screening worksheet must be completed for each contract offer. This worksheet would provide the necessary environmental information to FSA so they can accurately and expeditiously complete an environmental evaluation, consistent with FSA's regulations on environmental quality found at 7 CFR part 799, for enrollment of a particular site in BCAP. This worksheet can also be used in conjunction with the BCAP conservation and/or forest stewardship plan (or the equivalent) to develop methods/activities that could mitigate any potential minor site specific environmental effects for individual producers applying to the program while still meeting the overarching goal of BCAP and NEPA. Prior to execution of the BCAP Project Area contract, NRCS or an authorized technical service provider (TSP) would complete a site-specific environmental evaluation that would reveal any protected resources on or adjacent to the proposed program lands. When sensitive resources, such as nesting birds, wetlands or cultural resources are present or in the vicinity of the proposed lands, consultation with the appropriate regulatory agency would occur. Specific mitigation measures necessary to reduce or eliminate the potential localized negative impacts to those sensitive resources would be identified. If the environmental evaluation concludes that species or critical habitat protected under ESA are potentially present, and the proposed conservation activity on the land is determined to have negative impacts and no alternatives exist, it is not likely the land would be eligible for that activity. Any mitigation measures and practices approved through conservation planning would be periodically monitored by USDA to determine the success and compliance with those measures.

If through completion of the environmental evaluation, it is determined that there is no potential for the proposed BCAP activity to significantly impact the quality of the human environment, the environmental evaluation serves as FSA's documented compliance with NEPA as well as the requirements of other environmental laws, regulations, and Executive Orders (EOs).

However, if after completion of the environmental evaluation it is determined that protected resources could potentially be adversely impacted, consistent with FSA's internal guidance, then no further action can occur until the BCAP applicant completes an EA. EAs would be required when the results of the environmental evaluation are unclear as to whether the proposed activities would significantly impact the quality of the human environment.

If the EA determines that there could be a significant effect on the quality of the human environment then a proposed BCAP project area or site specific EIS could be necessary. These EISs and all EAs would be tiered to this PEIS consistent with 40 CFR 1508.28.

Socioeconomics and Land Use Effects

To mitigate the socioeconomic effects of BCAP, the final rule provides that the eligibility for payment of vegetative wastes, such as wood wastes and wood residues, collected or harvested from both public and private lands will be limited to only those that would not otherwise be used for a higher-value product. This specifically excludes wood wastes and residues derived from mill residues or other production processes that create residual by-products that are typically used as inputs for higher value-added production. Additionally, industrial or other process wastes or by-products, such as black liquor or pulp liquor that is a waste by-product of the pulp and kraft paper manufacturing process, would not be included in the definition of biobased products because they are not significantly composed of organic or biological products collected or harvested from land. The final rule also continues the exclusion of commercially-produced timber, lumber, wood, or other finished products that

otherwise would be used for higher value products. Also, urban wood wastes have been excluded as specified in the 2008 Farm Bill.

Biological Resources

As specified in the 2008 Farm Bill, a conservation plan or forestry stewardship plan (or equivalent plan) is a fundamental component for ensuring appropriate and sustainable agricultural practices for specific programs. Consistent with accepted BMPs (for example, for CRP and associated programs), a BCAP conservation plan or forest stewardship plan (or the equivalent) that includes appropriate conservation practice standards and sustainable agriculture practices must be developed before implementation to reduce the negative impacts to biological resources. Dedicated energy crops should be chosen based on local ecosystem characteristics to minimize potential disturbance to native wildlife species and vegetation by providing habitats comparable to those found in natural habitats. Sustainable agricultural techniques should be used, if possible, to reduce negative impacts to biological resources. Specific county Natural Resources Conservation Service (NRCS) conservation practice standards, as well as State or county specific technical notes and specific guidance on mitigation measures, should be incorporated in the conservation plan and forest stewardship plan or equivalent. Applicable NRCS conservation practice standards should be followed on lands where conserving wildlife species is an objective of the landowner or forest stewardship plan. Site-specific environmental evaluation on the project site in conjunction with either informal or formal consultation with the appropriate USFWS office would protect species included on the endangered species list. Use of BMPs such as washing vehicles upon leaving and entering a work area would minimize the potential to spread invasive or noxious plant species.

Other eligible crops, such as animal wastes, food and yard wastes, and algae, have site-specific requirements in regards to potential for environmental effects. To lessen potential effects associated with animal wastes, appropriate guidance from State and Federal regulatory agencies concerning confined animal feeding operation practices and standard industry practices associated with animal production should be followed to ensure that collection of materials does not adversely impact localized vegetation and wildlife resources through secondary effects associated with water and air quality.

Air Quality

BMPs associated with dedicated energy crop production include the use of limited and no tillage components, which decrease the potential for fugitive dust emissions associated with exposed ground cover. Also, all producers would follow local air quality regulations, which may define other BMPs associated with agricultural activities, including transportation and chemical usage.

Soil Resources

BMPs associated with dedicated energy crop production include the use of limited and no tillage components which decreases exposed ground cover and allows for greater retention of topsoil through perennial root systems. Other eligible crops, such as animal wastes, food and yard wastes, and algae, have site specific requirements in regards to potential for environmental effects. To lessen potential effects associated with animal wastes, appropriate guidance from State and Federal regulatory agencies concerning confined animal feeding operation practices and standard industry practices associated with animal production should be followed to ensure that collection of materials does not adversely impact soil resources through secondary effects associated with water and air quality.

Water Quality and Quantity

Algae production, due to the specialized nature of the demonstration practices currently in effect, should move to minimize the use of potable water supplies, where feasible, to reduce effects on water consumption. BMPs for dedicated energy crop production that reduce the amount of agricultural chemicals used for production would benefit water quality through reduced transport in runoff. Also, the use of limited or no tillage cropping systems reduces the potential transported sediments by leaving ground cover on site and through the stability associated with perennial root systems. Agricultural irrigation systems are generally becoming more efficient, allowing for an overall reduction in irrigated water uses, and the inclusion of more dedicated energy crops with lower water demands and higher water use efficiencies would benefit water quantity by reducing the levels necessary for production.

Recreation

Given the site specific nature of the BCAP project areas and the practices best suited to those conditions, effects to the abundance of wildlife for both consumptive and non-consumptive uses would vary. Practices that encourage more foraging habitat for game species could induce changes in relation to decreased traditional row crop fields; however, changes to pasture of hayland could indicate small adverse effects. As such, operators should be encouraged to comply with the goals for wildlife habitat enhancements associated with the conservation plans and forest stewardship plans, at the recommendation of the technical advisors (that is, NRCS and U.S. Forest Service).

Cumulative Effects—Socioeconomics and Land Use Effects

Cumulative effects to socioeconomic conditions and land use would be highly dependent upon the location of the BCAP project areas and level of funding; however, overall the benefits associated with the establishment and production of dedicated energy crops should outweigh the losses associated with the land use shifts from traditional row crops. With limited funding, BCAP projects areas would be few and would be anticipated to provide local positive effects to the socioeconomic conditions from the conversion to dedicated energy crops; however, the effects would be balanced through the losses associated with input suppliers for traditional crops under Alternative 1. The limited funding assumption and the county acreage limitation would not induce national level changes in agricultural prices.

Under Alternative 2, the greater funding for BCAP could create numerous BCAP project areas with the potential to affect national crop prices. Alternative 2 would encourage greater regionalization, which could encourage more land use changes to dedicated energy crops, where traditional row crops only produced marginally positive income streams.

Also, the Matching Payments component has encouraged the use of woody biomass as a feedstock for many of the BCFs qualified during the NOFA period. More than 3.1 million tons of biomass was from woody resources during the NOFA period (85.6 percent of total biomass collected). Only 4.3 percent of woody resources were derived from Federal lands, with the remainder from non-Federal lands. During the short term, these resources could be an important source of

feedstock, until the sustainable harvest of dedicated energy crops would be available.

Biological Resources

Changes to vegetation structure and type could cause potential negative cumulative effects on native fish and wildlife through fragmented, degraded, or destroyed habitats. Cumulative effects to wildlife would be localized and site-specific as not all species are harmed by conversion of land to more intensive uses. While the footprints of the areas considered under conversion are relatively small (less than one percent of the area inside the 50-mile buffer), potential impacts may occur if land configuration and relative location of converted areas combined with existing habitat fragmentation patterns has a multiplicative effect on the overall regional habitat fragmentation values. The establishment of new crops in areas previously fallow or cropped with a different style of agriculture may cause direct mortality and range shifting at the local scale of wildlife. The use of BMPs and environmental assessments would prevent and minimize significant impacts; however, fragmentation is unavoidable. Cumulative impacts to vegetation would occur from the conversion of native pastureland or native vegetation to dedicated energy crops. The cap on the amount of acreage that may be used for dedicated energy crops under Alternative 1 (that is 25 percent in any single county within the 50-mile radius) also is designed to reduce these impacts. Similarly, because of the limited funding that would only provide for a limited number of BCFs, the amount of land that potentially would be converted is negligible.

Direct impacts to wildlife would occur by conflicts with haying machinery that may result in mortality. Under Alternative 1, direct impacts are expected to occur during the establishment and harvest stages of BCAP crops; yet, these impacts are expected to be short-term and localized. These habitat changes would impact such aspects as food availability, type and quantity of cover for escape and breeding, and the availability of adequate nesting sites. Wildlife in lands adjacent to the dedicated energy cropland may either be positively or negatively impacted depending on the habitat quality provided by the biofuel crops.

Cumulative effects through implementation of Alternative 2 would lead to direct and indirect impacts to vegetation and wildlife at a regional scale. As with Alternative 1, direct impacts are not expected to impact wildlife at a population level; however, the significance of indirect impacts are dependent on potential land use changes. The quantity and habitat quality of any land converted from native grasses, forest land or pastureland for dedicated energy crops would determine the level of cumulative impacts. Under Alternative 2, depending upon the level of land use changes, the cumulative impacts to vegetation and wildlife could be significant.

No cumulative impacts under the No Action Alternative would occur as the program would not convert land from one use to a dedicated energy crop.

Air Quality

In general, the maturation of the biofuels and bioenergy industries should result in significantly positive energy balance in relation to first generation biofuels and bioenergy supported by grain feedstocks and fossil fuels. With a limited level of BCAP funding that would only provide for two commercial-scale facilities, the range of potential cumulative effects would be broad depending upon the location of the facilities. However, it was estimated that the BCAP program would generate net energy savings and greater soil carbon sequestration as lands are converted to dedicated energy crops. The effects were estimated to only be locally or regionally significant and not nationally significant.

Cumulatively, under Alternative 2, the unlimited funding of the BCAP to support all scales of BCFs could lead to national level effects, such as a decline in soil carbon sequestration due to an increased use of crop residues to meet the Energy Independence and Security Act of 2007 (EISA) volume requirements. It could be surmised that under Alternative 1, to meet EISA requirements there would be a greater use of first generation biomass (that is, corn) and second generation biomass (that is, agricultural crop residues) than from Alternative 2, given the potential funding difference between the two alternatives. This would indicate that the greater use of crop residues for biofuels feedstock could reduce soil carbon levels below currently seen in traditional row crops where the crop residues remain. However, in the analysis it was assumed that EISA targets could not be met under Alternative 1 as indicated by the anticipated waivers for production under the base scenario.

Overall, it was indicated that soil carbon would increase under Alternative 2, as traditional row crops were replaced with perennial dedicated energy crops; however, in combination with EISA requirements for advanced biofuels percentages, traditional sources (for example, corn and crop residues) would be required in combination with BCAP project areas to meet the overall demand. It was estimated that there would be benefits from the conversion of lands associated with total carbon flux and overall energy use, but there would also be negative effects from the greater use of residues, which would generate additional GHG emissions and reduce soil carbon sequestration. In the longer term, as more acreage is planted to dedicated energy crops and regionally competitive crops (that is, SRWC), there would be some off-set from the anticipated soil carbon losses associated with residue removal and use.

Overall, the discussion of the EISA RFS2 program within the BCAP PEIS, including the characterization of indirect land-use impacts and GHG emissions, is appropriate given the limited overlap between the two programs. While both programs generally support the Administration's goals to expand domestic bioenergy production and consumption and decrease reliance on fossil fuels, BCAP supports a broader range of bioenergy conversion technologies as well as biobased products, which the RFS2 does not incentivize.

Soil Resources

The implementation of BCAP would generate positive effects from a reduction in soil erosion and increased soil carbon sequestration from the conversion of Title I crops to perennial dedicated energy crops. The conversion to a perennial dedicated energy crop provide greater soil retention due to anticipated cropping practices and the plant structure holding soil in place.

Under Alternative 1, with the limited BCAP funding, the benefits associated with reduced soil erosion would be only locally significant and would provide for positive changes to water quality, soil organisms biodiversity and overall biological diversity.

Under Alternative 2, depending upon the level of agricultural crop residue use to meet EISA requirements, the effects could be either insignificant or significant, cumulatively. When combined with the U.S. Forest Service measures to increase woody biomass utilization for bioenergy, there may be short term increases in soil erosion from forest lands in some regions; however, these should be minimal if harvest and management BMPs are implemented per the forest stewardship plan or the equivalent, and all applicable Federal, State, and local harvest regulations.

Also, in some regions, soil erosion on forest lands would be insignificant due to the species and understory cover provided. The increased use of crop residues is anticipated to lead to changes in cropping practices, which should provide greater soil cover by standing crop residues and reduced tillage practices to promote residues use.

Water Quality and Quantity

The conversion to a perennial dedicated energy crop provides greater water use efficiency than traditional row crops such as corn. This conversion would be anticipated to limit runoff from agricultural fields and potential need for irrigation past the initial establishment period. Under Alternative 1, with the limited BCAP funding, the benefits associated with increased water quality and decreased water quantity would be only locally significant and would provide for positive changes. Under Alternative 2, depending upon the level of crop residue use, the effects could be either insignificant or significant, cumulatively. The implementation of BCAP would generate positive effects from (1) a potential reduction of irrigated cropland acres, (2) greater water use efficiency on non-irrigated and irrigated acreage, and (3) a general reduction in agricultural chemical use from the conversion of Title I crops to perennial dedicated energy crops.

The majority of water consumption associated with corn-based ethanol is from irrigation to grow the crop. A potential reduction in the amount of irrigated acres would reduce the total water consumption to produce ethanol. Also, studies have indicated that conversion of biomass at co-generation or combined heat and power (CHP) power plants for electricity is more efficient in the reduction than conversion into transportation fuels. However, water consumption for this use should also be considered. Other studies indicate that traditional liquid biofuels used as a fuel source for power generation are the most water inefficient when compared to traditional fuels, such as natural gas, which was the most water efficient.

Recreation

Impacts to recreation could be positive or negative based on the locality for BCAP project regions. However, they would be small regionally and nationally under either alternative and would not substantively or cumulatively change the recreational aspects of participation in wildlife activities.

Basis for the Decision

Proposed Action

Alternative 2 is selected as the alternative to implement the Proposed Action. Alternative 2, the Selected Alternative, complies with the 2008 Farm Bill, provides FSA flexibility in terms of program implementation and development of a sustainable industry, and is the most balanced approach to achieving long-term program goals, while being consistent with the intent and language of the 2008 Farm Bill. The No Action Alternative was used as an analytical baseline. Alternative 1 provided for a targeted application of the BCAP; however, this alternative was restrictive in the types of potential sized facilities that could participate in the program, thus limiting the overall scope.

The broader scope of implementation, as analyzed under Alternative 2, would have the potential to open new non-agricultural lands (that is, NIPF) into dedicated energy crop production, which, if the effects were unmitigated could create losses of biodiversity at a regional scale. However, conversion from non-agricultural lands should be minor, since modeling results indicated that the majority of the cropland for dedicated energy crops would be converted from traditional row crops and pastureland. Also, the use of the BCAP conversation plan and forest stewardship plan (or the equivalent) would avoid and mitigate those effects through appropriate BMPs and sustainable practice approaches. No significant impacts would occur from implementation of the Proposed Action and no adverse cumulative impacts are expected. Potential negative impacts would be minimized by employment of site-specific environmental evaluations prior to contract approval, BMPs, incorporation of practical mitigation measures in the BCAP conservation plan or forest stewardship plan (or the equivalent), and, if indicated, EAs would be tiered to the Final PEIS for those areas requiring further NEPA analysis prior to contract approvals, consistent with 40 CFR 1508.28.

BCAP Components

BCAP is divided into two distinct components as specified in the 2008 Farm Bill. The Matching Payment component was determined to be largely mandatory and non-discretionary in nature. Implementation of the Establishment and Annual Payment component required an exercise of discretion by the Secretary of Agriculture. The separation of the two components in the 2008 Farm Bill and the mandatory nature of the Matching Payments allowed for the NOFA to be used to initiate that component before final rule-making on the entire BCAP. An appropriate comment period and inclusion of the reference to the BCAP Establishment and Annual Payments components PEIS, which included the Matching Payments component in the cumulative effects analysis, made inclusion of the Matching Payments component as part of the alternatives analysis for BCAP PEIS unnecessary per standard, as such with the publication of the Final BCAP PEIS, this analysis including the cumulative effects would be complete. The range of reasonable alternatives, given the geographic scope of the analysis, provided valid consideration of the scale of the program with unlimited funding authorized for both the Matching Payments component and the Establishment and Annual Payments component of BCAP in the 2008 Farm Bill.

Geographic Scale and Approach to the Analysis

The geographic scale of potential BCAP project area sites encompasses the entire United States and its territories and as a result land use changes, farming practices, weather conditions, soil types, water resources, natural ecosystems, and economies vary widely at the site-specific level. Therefore, the PEIS assessed the potential impacts of implementing the Establishment and Annual Payments component of BCAP on a broad scale that required that certain assumptions be made to assess the impacts of the program.

Since the BCAP supports the production of dedicated energy crops, the analysis focused only on the potential impacts associated with crop production and not the impacts associated with conversion of biomass into various types of energy (that is ethanol, electricity, burning for combined power and heat, *etc.*) since the intent of the program was for the successful establishment of dedicated energy crop production throughout the United States, which could be used in a myriad of end product components based on the facilities available to the producers. The PEIS evaluated the impacts of establishing a bioenergy crop (on BCAP eligible lands) and managing, and transporting to a BCF a specific crop from each of the three broad classes of cellulosic energy crops (woody crops, perennial herbaceous, and annual herbaceous). Hybrid poplar and willow (woody species), switchgrass (perennial herbaceous species), and forage sorghum (annual herbaceous species) were chosen

because they have the most widely available data; it is feasible that they can be established within the time frame of the program, and represent likely energy crops that would be grown for biofuels/bioenergy across varied regions of the United States. These representative dedicated energy crops in no way represent the entire range of possible bioenergy crops that could qualify as an eligible crop under the BCAP. The production of switchgrass, forage sorghum, hybrid poplar, and willow utilize agricultural practices that are similar to those used in traditional crop agriculture with some variations in equipment and techniques. Production operations and multi-year characteristics for each selected bioenergy crop would vary.

Although algae is an eligible crop under the Establishment and Annual Payments Program component of BCAP, it currently is not considered likely to be commercially feasible and suitable for inclusion in a BCAP project area by the end of fiscal year (FY) 2012, the expiration of the authority for BCAP. As such, algae as an eligible crop is briefly discussed, but is not included in the detailed analysis within this document.

Additionally, existing forestry resources on NIPF would be eligible for the Annual Payments. These resources are identified by approximate locations throughout the United States through association with private forest lands as detailed within the Forest Inventory and Analysis data publicly provided by the U.S. Forest Service.

Model Development and Approach

To determine the potential locations for BCAP projects based on prevailing economics of dedicated energy crop production, a model-based approach was used, which contained information on prevailing cropland uses, factors of production for an herbaceous energy crop (that is, switchgrass), factors for the use of crop residues as a bioenergy feedstock, and transportation costs. The model currently incorporates switchgrass and residues (crop and forestry) as feedstock for BCF. However, it is important to note that switchgrass can be seen as a generic dedicated energy crop which would represent the land use requirements implicit in the use of other energy crops for which data is not readily available. The use of switchgrass as a model crop representing other dedicated energy crops, could underestimate the production potential of feedstock that has a yield that could be significantly larger than switchgrass, and consequently underestimate the potential of specific regions of the country as candidate locations for potential BCAP projects locations. In an effort to address those shortcomings, the model was complemented with preliminary data in an effort to include poplars, willows, and forage sorghum as eligible crops.

The analysis included prices for switchgrass ranging from $35 to $80 per dry ton. The $60 per dry ton analysis provided a good regional coverage of feedstock potential supply for herbaceous perennial and annual crops, and consequently was selected to perform the GIS analysis to locate the potential BCAP projects; while $70 per ton was needed for poplars and $90 per ton for willows. The analysis assumed that farmers or land owners would receive $45 per ton in payment through BCAP plus a match from the plant demanding the cellulosic feedstock. This assumption was made based on the information provided in the 2008 Farm Bill and the Matching Payments component of the BCAP NOFA. It was assumed that producers would receive this matching payment for two years from the first date of delivery of feedstock to a BCF.

The model was developed to first determine approximate project locations based on the regional availability of feedstock and price levels. Then through the use of Geographic Information System (GIS) program and land use data at the county level, areas were identified that had the potential for higher feedstock concentrations. The analysis incorporated projected land use and proprietor income changes, government payment changes, along with an increase in transportation and the development of a dedicated energy crop. The approximate predicated project locations were developed for each of the proxy feedstocks analyzed. These predicted project locations were then used for each of the resource areas to determine potential impacts, both positive and negative, from the alternatives.

Under Alternative 2, funding for BCAP was assumed to be unlimited and a driving factor was to produce enough biomass feedstock to meet the demands of EISA (that is, approximately 15 billion gallons of advanced biofuels). The analysis for Alternative 2 was conducted at both a regional and the national level. The analysis focused on the impacts to net farm income; farm prices; government payments; land use shifts; and direct, indirect, and induced economic impacts as a result of changes in the aforementioned variables. To model this, POLYSYS was used to estimate the quantity and price of feedstock necessary to achieve the EISA targets through 2023. To meet the Department of Energy (DOE) goals of $1.76 per gallon of ethanol and $51 per dry ton of herbaceous feedstock by 2012, the role, size, and funding of a potential expanded BCAP was estimated, based on the estimated prices of feedstock. The analysis assumed that farmers or land owners would receive $45 per ton in matching payments through BCAP in addition to payment from the plant demanding the cellulosic feedstock. This assumption was made based on the initial matching payments distribution as described in the 2008 Farm Bill and implemented in the NOFA. This analysis for Alternative 2, built on the models developed for Alternative 1, which analyzed a suite of specific potential project areas.

Resource Specific Attributes

Based on the model results, assuming unlimited funding for the Establishment and Annual Payments component, the Proposed Action would create a balance of the objectives and goals of the program (that is, create the framework for a dedicated energy crop production industry in the United States) with overall natural and human-built environmental benefits, while minimizing potential negative effects through a comprehensive project area proposal process and site-specific environmental evaluation of each contract holding.

Overall, air quality; soil resources; and water quality and quantity; would have benefits from either alternative with Alternative 2 providing for greater effects given the overall potential size of the program. It was estimated that there would initially be greater adverse effects, though not significant, during the establishment phases; however, after initial establishment there would be greater amassed benefits from a greater reduction in soil erosion, more soil carbon sequestration, and reduced irrigation demand for perennial dedicated energy crops, including SRWC over more land areas.

Socioeconomic effects and land use changes would initially have a decline in economic activity within certain sectors (that is, services for traditional row crops) as a shift occurs into dedicated energy crops; however, a new equilibrium would be reached as those traditional row crop sectors convert into supporting dedicated energy crops. Through the analyzed period (2009 to 2023) the overall balance for socioeconomics and land use would be positive economic activity in excess of $88 billion with the potential for an increase in crop prices over the period by greater than 15 percent. There would

be the potential for regional effects to biological resources, however, it would be limited by the anticipated minor amount of conversion of non-agricultural lands (for example, NIPF converted to herbaceous cropland) and native grasslands, not native sod (for example, expired CRP acres that had been planted to native grass) to dedicated energy crops; however, those effects could be avoided and minimized through the use of accepted BMPs and BCAP environmental screening. On balance the Proposed Action, with the BMPs and practical mitigation measures associated in the BCAP conservation plan or forest stewardship plan (or the equivalent) in conjunction with project level NEPA analysis and the site-specific environmental evaluations prior to accepting contact holdings, would create a beneficial environment for the establishment of long-term dedicated energy crop industry in local and regional areas based on their unique dynamics, while growing those crops in a diverse and environmentally sustainable manner.

The Decision

FSA would implement the Selected Alternative as described in this ROD. This alternative provides overall benefits to the environment, allows for flexibility in implementation, and follows the intent and language of the statute when compared to the other alternatives analyzed. FSA would ensure impacts are minimized by employment of appropriate practice standards in conservation plans and forest stewardship plans (or equivalent), site-specific environmental evaluations prior to each approved contract, and supplemental EAs or EISs for those areas requiring further NEPA analyses.

After the publication of the Final PEIS on June 25, 2010, the later enactment of the 2010 Supplemental Appropriations Act (Pub. L. 111–212) on July 29, 2010, provided a limitation of funding for BCAP of $552,000,000 in fiscal year 2010 and $432,000,000 in fiscal year 2011. FSA does not have the authority to limit the scope of BCAP to a smaller or more restrictive program than the 2008 Farm Bill authorizes, except as may be needed to confine the program within these newly provided spending limits. Consistent with 40 CFR 1502.9, FSA has determined that a Supplemental PEIS may be required for changes to BCAP.

Signed in Washington, DC, on October 19, 2010.

Carolyn B. Cooksie,

Executive Vice President, Commodity Credit Corporation and Administrator, Farm Service Agency.

[FR Doc. 2010–26872 Filed 10–22–10; 11:15 am]

BILLING CODE 3410–05–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

[Docket Nos. PRM–50–93 and PRM–50–95; NRC–2009–0554]

Mark Edward Leyse; Mark Edward Leyse and Raymond Shadis, on Behalf of the New England Coalition; Petitions for Rulemaking

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of consolidation of petitions for rulemaking and re-opening of comment period.

SUMMARY: The Nuclear Regulatory Commission (NRC) is publishing for public comment a notice of consolidation of petitions for rulemaking (PRM). The PRMs to be consolidated are PRM–50–93 filed by Mark Edward Leyse on November 17, 2009, and PRM–50–95 filed on June 7, 2010, by Mark Edward Leyse and Raymond Shadis, on behalf of the New England Coalition (the Petitioners). PRM–50–95 was docketed by the NRC on September 30, 2010. In PRM–50–95, the Petitioners request that the NRC order Vermont Yankee Nuclear Power Station (Vermont Yankee) to lower the licensing basis peak cladding temperature in order to provide a necessary margin of safety in the event of a loss-of-coolant accident (LOCA). The NRC is considering PRM–50–95 in conjunction with existing PRM–50–93 that the NRC is reviewing on the same issues, and is re-opening the public comment period to consider the matters raised by PRM–50–95.

DATES: Submit comments by November 26, 2010. Comments received after this date will be considered if it is practical to do so, but the NRC is able to assure consideration only for comments received on or before this date.

ADDRESSES: Please include Docket ID NRC–2009–0554 in the subject line of your comments. For instructions on submitting comments and accessing documents related to this action, see "Submitting Comments and Accessing Information" in the **SUPPLEMENTARY INFORMATION** section of this document. You may submit comments by any one of the following methods.

Federal Rulemaking Web Site: Go to *http://www.regulations.gov* and search for documents filed under Docket ID NRC–2009–0554. Address questions about NRC dockets to Carol Gallagher, 301–492–3668, e-mail *Carol.Gallagher@nrc.gov.*

Mail comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Rulemakings and Adjudications Staff.

E-mail comments to: Rulemaking.Comments@nrc.gov. If you do not receive a reply e-mail confirming that we have received your comments, contact us directly at 301–415–1677.

Hand-deliver comments to: 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. Federal workdays (telephone 301–415–1677).

Fax comments to: Secretary, U.S. Nuclear Regulatory Commission at 301–415–1101.

FOR FURTHER INFORMATION CONTACT: Cindy Bladey, Chief, Rules, Announcements, and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Telephone: 301–492–3667 or Toll Free: 800–368–5642.

SUPPLEMENTARY INFORMATION:

Submitting Comments and Requesting Information

Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal Rulemaking Web site, *http://www.regulations.gov.* 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. The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed.

You can access publicly available documents related to this action using the following methods:

NRC's Public Document Room (PDR): The public may examine and have copied for a fee publicly available documents by the NRC's PDR, Room O–1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

NRC's Agencywide Documents Access and Management System (ADAMS):

Publicly available documents created or received at the NRC, including petitions for rulemaking PRM–50–93 (ADAMS Accession No. ML093290250) and PRM–50–95 (ADAMS Accession No. ML101610121), are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR Reference staff at 800–397–4209, 301–415–4737 or by e-mail to *pdr.resource@nrc.gov.*

Federal Rulemaking Web Site: Public comments and supporting materials related to this action, including the petitions for rulemaking, can be found at *http://www.regulations.gov* by searching on Docket ID NRC–2009–0554.

Summary of PRM–50–93

Mark Edward Leyse submitted a petition for rulemaking dated November 17, 2009. Mr. Leyse states that he is aware that data from multi-rod (assembly) severe fuel damage experiments indicates that the current regulations in 10 CFR Part 50 are non-conservative in their peak cladding temperature limit of 2200 °F, and that the Baker-Just and Cathcart-Pawel equations are also non-conservative for calculating the metal-water reaction rates that would occur in the event of a LOCA. As a result, Mr. Leyse requests that the NRC revise its regulations in 10 CFR 50.46(b)(1) and Appendix K to 10 CFR Part 50 based on this data. Mr. Leyse also requests that the NRC promulgate a regulation that will stipulate minimum allowable core reflood rates in the event of a LOCA. The NRC determined that the petition met the threshold sufficiency requirements for a petition for rulemaking under 10 CFR 2.802, and the petition was docketed as PRM–50–93. The NRC published a notice of receipt on January 25, 2010 (75 FR 3876), and requested public comment on PRM–50–93. The comment period closed on April 12, 2010.

Summary of PRM–50–95

On June 7, 2010, Mark Edward Leyse and Raymond Shadis, on behalf of the New England Coalition, submitted a petition requesting consideration under the NRC's requirements for a petition for an enforcement action, which are in 10 CFR 2.206. The Petitioners request that enforcement action be taken against Vermont Yankee, and that the NRC order the licensee of Vermont Yankee to lower the licensing basis peak cladding temperature in order to provide a necessary margin of safety (to help prevent a meltdown) in the event of a LOCA. The Petitioners represent the New England Coalition, a non-profit educational organization based in Brattleboro, Vermont.

The Petitioners offer the following as the basis for their request:

(1) The emergency core cooling system evaluation calculations that helped qualify the 20 percent uprate for Vermont Yankee are non-conservative;

(2) The peak cladding temperature limit of 2200 °F used in the NRC's regulations in § 50.46(b)(1) is non-conservative; and

(3) Experiments indicate that Vermont Yankee's licensing basis peak cladding temperature of 1960 °F for GE14 fuel would not provide a necessary margin of safety to help prevent a partial or complete meltdown in the event of a LOCA.

The petition discusses at length a number of experiments, including several multi-rod severe fuel damage experiments and a multi-rod thermal hydraulic experiment, and states that the data indicates that the licensing basis peak cladding temperature for Vermont Yankee should be decreased to a temperature lower than 1832 °F in order to provide a necessary margin of safety. The petition attachments include additional data in support of the discussion on these experiments.

The NRC's Consideration and Conclusion

The petition request was referred to the NRC's Office of Nuclear Reactor Regulation's enforcement Petition Review Board (PRB) and on June 23, 2010, the Petitioners participated in a teleconference with the PRB to provide information in support of the petition. A transcript of this teleconference is available at ADAMS Accession No. ML101890014. The PRB's initial recommendation was that the petition did not meet the criteria for reviewing petitions under 10 CFR 2.206, because there is another NRC proceeding in which the Petitioners could be a party and through which the NRC could address their concerns.

On July 26, 2010, the Petitioners participated in another teleconference with the PRB during which the initial recommendation was discussed and the Petitioners provided additional information. The transcript of this teleconference is available at ADAMS Accession No. ML102140405. The PRB's final recommendation was that the petition did not meet the criteria for review under 10 CFR 2.206 because the petition submitted generic concerns that would require revisions to existing NRC regulations. Such concerns are handled through the petition for rulemaking process in accordance with 10 CFR 2.802. The PRB noted that Mr. Leyse had previously submitted a petition for rulemaking on this topic, dated November 17, 2009, and docketed as PRM–50–93. Therefore, the PRB forwarded the 10 CFR 2.206 petition so that any additional information contained in the petition could be included in the review of PRM–50–93. The NRC has determined that the petition filed by Mr. Leyse and Mr. Shadis on behalf of the New England Coalition meets the threshold sufficiency requirements for a petition for rulemaking under 10 CFR 2.802, and the petition has been docketed as PRM–50–95. The NRC is requesting public comments on the petition for rulemaking, and has decided to consider any comments received on PRM–50–95 in conjunction with comments received on the related petition, PRM–50–93. In order that both petitions for rulemaking can be considered and resolved in a timely manner, the NRC is limiting the public comment period for PRM–50–95 to 30 days, and will only be accepting comments on matters raised in PRM–50–95 during this time.

Dated at Rockville, Maryland, this 21st day of October 2010.

For the Nuclear Regulatory Commission.

Annette Vietti-Cook,

Secretary of the Commission.

[FR Doc. 2010–27164 Filed 10–26–10; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF ENERGY

10 CFR Parts 433 and 435

[Docket No. EERE–2010–BT–STD–0031]

RIN 1904–AB96

Fossil Fuel-Generated Energy Consumption Reduction for New Federal Buildings and Major Renovations of Federal Buildings; Correction

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Proposed rule; correction.

SUMMARY: This document corrects the number assigned to the Environmental Assessment (EA) referenced in the October 15, 2010, notice of proposed rulemaking (NOPR) regarding the fossil fuel-generated energy consumption

requirements for new Federal buildings and Federal buildings undergoing major renovations. The correction is necessary because the proposed rulemaking referenced the EA number as (DOE–EA–1463). The correct EA number in the NOPR should be (DOE/EA–1778).

FOR FURTHER INFORMATION CONTACT: Margo Appel, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 586–9495, e-mail: *margo.appel@hq.doe.gov*, or Ami Grace-Tardy, U.S. Department of Energy, Office of the General Counsel, Forrestal Building, GC–71, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–5709, e-mail: *Ami.Grace-Tardy@hq.doe.gov*.

SUPPLEMENTARY INFORMATION: The U.S. Department of Energy (DOE) published a notice of proposed rulemaking in the **Federal Register** on October 15, 2010 (75 FR 63404), announcing a public meeting and seeking comments regarding the fossil fuel-generated energy consumption requirements for new Federal buildings and major renovations of Federal buildings.

DOE prepared a draft EA for this rulemaking. The draft EA has been added to the docket for this rulemaking. The NOPR incorrectly referenced the EA Number as (DOE–EA–1463) on page 63413, third column, fourth paragraph, third line. The correct EA number in the NOPR should be (DOE/EA–1778).

For additional information regarding the NOPR and the public meeting, including detailed instructions for the submission of comments and access to the docket to read background documents or comments received, please refer to the October 15, 2010, notice (75 FR 63404).

Issued in Washington, DC, on October 20, 2010.

Joseph Hagerman,

Acting Program Manager, Building Technologies Program, Energy Efficiency and Renewable Energy.

[FR Doc. 2010–27152 Filed 10–26–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–1186; Directorate Identifier 2009–CE–065–AD]

RIN 2120–AA64

Airworthiness Directives; Cessna Aircraft Company (Type Certificate Previously Held by Columbia Aircraft Manufacturing (Previously the Lancair Company)) Models LC40–550FG, LC41–550FG, and LC42–550FG 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 the products listed above. That NPRM proposed to retain the inspection requirements of AD 2009–09–09 and add a terminating action for the repetitive inspection requirements. That NPRM resulted from the manufacturer developing a modification that, when incorporated, would terminate the repetitive inspections required by AD 2009–09–09. Since we issued the earlier NPRM, the manufacturer revised the service information to include additional airplane serial numbers into the Effectivity section and revised the modification kit instructions. This action revises that NPRM by adding airplanes to the Applicability section and incorporating new service information. We are proposing this supplemental NPRM to retain the inspection requirements of AD 2009–09–09 and add a terminating action for the repetitive inspection requirements using the revised service information. Since these actions impose an additional burden over that proposed in the NPRM, 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 supplemental NPRM by December 13, 2010.

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

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

For service information identified in this AD, contact Cessna Aircraft Company, Product Support, P.O. Box 7706; Wichita, Kansas 67277; telephone: (316) 517–5800; fax: (316) 942–9006; Internet: *http://www.cessna.com.* You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call 816–329–4148.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Gary Park, Aerospace Engineer, Wichita Aircraft Certification Office, FAA, 1801 Airport Road, Room 100, Wichita, Kansas 67209; telephone: (316) 946–4123; fax: (316) 946–4107; e-mail: *gary.park@faa.gov.*

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–2009–1186; Directorate Identifier 2009–CE–065–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

We issued an NPRM to amend 14 CFR part 39 to include an airworthiness directive (AD) that would apply to certain Cessna Aircraft Company (Cessna) Models LC40–550FG, LC41–550FG, and LC42–550FG airplanes. That NPRM was published in the **Federal Register** on December 17, 2009 (74 FR 66927). That NPRM proposed to supersede AD 2009–09–09 (74 FR 19873, April 30, 2009) with a new AD that would retain the inspection requirements of AD 2009–09–09 and add a terminating action for the repetitive inspection requirements.

Actions Since Previous NPRM Was Issued

Since we issued the previous NPRM, the manufacturer revised the service information to include additional airplane serial numbers into the Effectivity section and revised the modification kit instructions.

Comments

We gave the public the opportunity to comment on the original NPRM. We received no comments on that NPRM or on the determination of the cost to the public.

FAA's Determination

We are proposing this supplemental NPRM because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design. Certain changes described above expand the scope of the original NPRM. 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 supplemental NPRM.

Proposed Requirements of the Supplemental NPRM

This supplemental NPRM would require retaining the inspection requirements of AD 2009–09–09 and adding a terminating action for the repetitive inspection requirements using the revised service information.

Cessna has issued Single Engine Service Bulletin SB09–27–01, Revision 3, dated July 20, 2010, which describes procedures for repetitively inspecting the rudder hinges and the rudder hinge brackets for damage, i.e., cracking, deformation, and discoloration. The service information also describes procedures for incorporating Cessna Single Engine Modification Kit MK400–07–01A, dated July 20, 2010, which when incorporated, will terminate the required repetitive inspections.

Costs of Compliance

We estimate that this proposed AD affects 790 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
Inspecting the rudder hinges and rudder hinge brackets for damage with rudder removed (affects 570 airplanes).	1.5 work-hours × $85 per hour = $127.50 per inspection cycle.	Not applicable	$127.50 per inspection cycle.	$72,675 per inspection cycle.
Inspecting the rudder hinges and rudder hinge brackets for damage without rudder removed (affects 570 airplanes).	.5 work-hour × $85 per hour = $42.50 per inspection cycle.	Not applicable	$42.50 per inspection cycle.	$24,225 per inspection cycle.
Incorporating the modification kit for Models LC40–550FG and LC42–550FG airplanes (affects 247 airplanes).	1 work-hour × $85 per hour = $85.	$739	$824	$203,528.
Incorporating the modification kit for Model LC41–550FG airplanes (affects 523 airplanes).	1 work-hour × $85 per hour = $85.	$848	$933	$487,959.
Inspecting the rudder hinge and the rudder brackets attachment hardware for correct thread engagement (affects 20 airplanes).	.5 work-hour × $85 per hour = $42.50.	Not applicable	$42.50	$850.
Inspecting the rudder travel (affects 20 airplanes).	1 work-hour × $85 per hour = $85.	Not applicable	$85	$1,700.

We estimate the following costs to do any necessary repairs that would be required based on the results of the proposed inspection of the rudder hinge and the rudder brackets attachment hardware for correct thread engagement and the rudder travel. We have no way of determining the number of aircraft that might need these repairs:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Repair the rudder hinge and the rudder brackets attachment hardware thread engagement (could affect 20 airplanes).	.5 work-hour × $85 per hour = $42.50	$14	$56.50
Repair the rudder travel (could affect 20 airplanes)	.5 work-hour × $85 per hour = $42.50	14	56.50

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

Cessna Aircraft Company (Type Certificate Previously Held by Columbia Aircraft Manufacturing (Previously The Lancair Company)): Docket No. FAA–2009–1186; Directorate Identifier 2009–CE–065–AD.

Comments Due Date

(a) We must receive comments by December 13, 2010.

Affected ADs

(b) This AD supersedes AD 2009–09–09, Amendment 39–15895.

Applicability

(c) This AD applies to the following Cessna Aircraft Company (type certificate previously held by Columbia Aircraft Manufacturing (previously The Lancair Company)) airplane models and serial numbers that are certificated in any category:

GROUP 1 AIRPLANES

Model	Serial Nos.
LC40–550FG (300)	40001, 40002, and 40004 through 40079.
LC41–550FG (400)	41001 through 41569, 41571 through 41800, 411001 through 411087, 411089 through 411110, 411112 through 411138, 411140, 411142, and 411147.
LC42–550FG (350)	42001 through 42009, 42011 through 42558, 42560 through 42569, 421001 through 421013, 421015 through 421017, and 421019.

GROUP 2 AIRPLANES

Model	Serial Nos.
LC41–550FG (400)	41570, 411088, 411111, 411139, 411141, 411143 through 411146, and 411148 through 411153.
LC42–550FG (350)	42010, 42559, 421014, 421018, and 421020.

Subject

(d) Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 55, Stabilizers.

Unsafe Condition

(e) This AD is the result of reports received of a cracked lower rudder hinge bracket on two of the affected airplanes. We are issuing this AD to detect and correct damage, i.e., cracking, deformation, and discoloration, in the rudder hinges and the rudder hinge brackets, which could result in failure of the rudder. This failure could lead to loss of control.

Compliance

(f) To address this problem, you must do the following, unless already done:

(1) *For Group 1 airplanes specified in paragraph (c) of this AD:* Using the compliance times specified in table 1 of this AD, inspect the rudder hinges and rudder hinge brackets for damage, i.e., cracking, deformation, and discoloration. Do the inspections following Cessna Single Engine Service Bulletin SB09–27–01, dated April 13, 2009; Cessna Single Engine Service Bulletin SB09–27–01, Revision 2, dated November 23, 2009; or Cessna Single Engine Service Bulletin SB09–27–01, Revision 3, dated July 20, 2010.

TABLE 1—INSPECTION COMPLIANCE TIMES

Condition	Initially inspect . . .	Repetitively inspect . . .
(i) For airplanes with 25 hours time-in-service (TIS) or more as of May 11, 2009 (the effective date of AD 2009–09–09):	With the rudder removed and using 10× visual magnification, inspect all three rudder hinges and rudder hinge brackets at whichever of the following occurs first:	Thereafter inspect as follows until the modification required in paragraph (f)(5) of this AD is done:

TABLE 1—INSPECTION COMPLIANCE TIMES—Continued

Condition	Initially inspect . . .	Repetitively inspect . . .
	(A) Within the next 10 hours TIS after May 11, 2009 (the effective date of AD 2009–09–09); or	(A) Every 25 hours TIS or 3 months, whichever occurs first, without removing the rudder, visually inspect all three rudder hinges and rudder hinge brackets; and
	(B) Within the next 30 days after May 11, 2009 (the effective date of AD 009–09–09).	(B) Every 50 hours TIS or 6 months, whichever occurs first, with the rudder removed and using 10× visual magnification, inspect all three rudder hinges and rudder hinge brackets.
(ii) For airplanes with less than 25 hours TIS as of May 11, 2009 (the effective date of AD 2009–09–09):	Without removing the rudder, visually inspect all three rudder hinges and rudder hinge brackets, at whichever of the following occurs later:	Thereafter inspect as follows until the modification required in paragraph (f)(5) of this AD is done:
	(A) Upon accumulating 25 hours TIS; or	(A) Every 25 hours TIS or 3 months, whichever occurs first, without removing the rudder, visually inspect all three rudder hinges and rudder hinge brackets; and
	(B) Within the next 10 hours TIS after May 11, 2009 (the effective date of AD 2009–09–09).	(B) Every 50 hours TIS or 6 months, whichever occurs first, with the rudder removed and using 10× visual magnification, inspect all three rudder hinges and rudder hinge brackets.

(2) *For Group 1 airplanes specified in paragraph (c) of this AD:* Before further flight after any inspection required in paragraphs (f)(1)(i) or (f)(1)(ii) of this AD in which damage is found on any of the rudder hinges and/or rudder hinge brackets, incorporate Cessna Single Engine Modification Kit MK400–27–01, dated November 23, 2009; or Cessna Single Engine Modification Kit MK400–27–01A dated July 20, 2010, as specified in Cessna Single Engine Service Bulletin SB09–27–01, Revision 2, dated November 23, 2009; and Cessna Single Engine Service Bulletin SB09–27–01, Revision 3, dated July 20, 2010. Incorporating either Modification Kit MK400–27–01 or Modification Kit MK400–27–01A, terminates the repetitive inspections required in paragraphs (f)(1)(i) and (f)(1)(ii) of this AD.

(3) *For Group 1 airplanes specified in paragraph (c) of this AD:* If the repetitive inspections required in paragraphs (f)(1)(i) and (f)(1)(ii) of this AD become due at the same time, credit for both inspections will be given by doing the rudder removal and 10× visual inspection.

(4) *For Group 1 airplanes specified in paragraph (c) of this AD:* Within the next 24 months after the effective date of this AD, incorporate Cessna Single Engine Modification Kit MK400–27–01, dated November 23, 2009; or Cessna Single Engine Modification Kit MK400–27–01A, dated July 20, 2010, as specified in Cessna Single Engine Service Bulletin SB09–27–01, Revision 2, dated November 23, 2009; and Cessna Single Engine Service Bulletin SB09–27–01, Revision 3, dated July 20, 2010, unless already done as specified in paragraph (f)(2) of this AD. Incorporating either Modification Kit MK400–27–01 or Modification Kit MK400–27–01A, terminates the repetitive inspections required in paragraphs (f)(1)(i) and (f)(1)(ii) of this AD.

(5) *For Group 1 airplanes specified in paragraph (c) of this AD:* At any time after the initial inspections required in paragraphs (f)(1)(i) and (f)(1)(ii) of this AD, as long as no damage is found, and no later than the compliance time specified in paragraph (f)(4) of this AD, you may incorporate Cessna Single Engine Modification Kit MK400–27–01, dated November 23, 2009; or Cessna Single Engine Modification Kit MK400–27–01A, dated July 20, 2010, as specified in Cessna Single Engine Service Bulletin SB09–27–01, Revision 2, dated November 23, 2009; and Cessna Single Engine Service Bulletin SB09–27–01, Revision 3, dated July 20, 2010, to terminate the repetitive inspections required in paragraphs (f)(1)(i) and (f)(1)(ii) of this AD.

(6) *For any Group 1 airplane with Cessna Single Engine Service Bulletin SB09–27–01, Revision 1, dated August 31, 2009, already incorporated and for all Group 2 airplanes:* Within the next 30 days after the effective date of this AD, inspect for proper rudder hinge and rudder bracket hardware thread engagement and inspect the rudder travel. Do these inspections following the Accomplishment Instructions in Cessna Single Engine Modification Kit MK400–27–01, dated November 23, 2009; or the Accomplishment Instructions in Cessna Single Engine Modification Kit MK400–27–01A, dated July 20, 2010.

(i) Before further flight after the inspection required in paragraph (f)(6) of this AD, if any discrepancies are found in the rudder hinge or rudder bracket hardware, replace the affected hardware. Do the replacements following the Accomplishment Instructions in Cessna Single Engine Modification Kit MK400–27–01, dated November 23, 2009; or the Accomplishment Instructions in Cessna Single Engine Modification Kit MK400–27–01A, dated July 20, 2010.

(ii) Before further flight after the inspection required in paragraph (f)(6) of this AD, if the rudder travel is outside the limits specified in the Accomplishment Instructions in Cessna Single Engine Modification Kit MK400–27–01, dated November 23, 2009; or the Accomplishment Instructions in Cessna Single Engine Modification Kit MK400–27–01A, dated July 20, 2010, reinstall the rudder following the Accomplishment Instructions in either Cessna Single Engine Modification Kit MK400–27–01, dated November 23, 2009; or Cessna Single Engine Modification Kit MK400–27–01A, dated July 20, 2010.

(iii) After the inspection and any necessary corrective actions required in paragraphs (f)(6), (f)(6)(i), and (f)(6)(ii) of this AD, no further action is required.

Credit for Actions Accomplished in Accordance With Previous Service Information

(g) *For all airplanes specified in paragraph (c) of this AD:* As of the effective date of this AD, if Cessna Single Engine Service Bulletin SB09–27–01, Revision 2, dated November 23, 2009, has been already been incorporated, no further action is required.

Alternative Methods of Compliance (AMOCs)

(h)(1) The Manager, Wichita Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD.

(2) Before using any approved AMOC, notify your Principal Maintenance Inspector or Principal Avionics Inspector, as appropriate, or lacking a principal inspector, your local Flight Standards District Office.

(3) AMOCs approved for AD 2009–09–09 are approved for this AD.

Related Information

(i) For more information about this AD, contact Gary Park, Aerospace Engineer, Wichita ACO, FAA, 1801 Airport Road,

Room 100, Wichita, Kansas 67209; telephone: (316) 946–4123; fax: (316) 946–4107; e-mail: *gary.park@faa.gov.*

(j) For service information identified in this AD, contact Cessna Aircraft Company, Product Support, P.O. Box 7706; Wichita, Kansas 67277; telephone: (316) 517–5800; fax: (316) 942–9006; Internet: *http://www.cessna.com.* You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call 816–329–4148.

Issued in Kansas City, Missouri, on October 21, 2010.

Christina L. Marsh,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–27212 Filed 10–26–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2010–0843; Airspace Docket No. 10–ASW–12]

Proposed Amendment of Class E Airspace; Horseshoe Bay, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend Class E airspace at Horseshoe Bay, TX. Decommissioning of the Horseshoe Bay Resort non-directional beacon (NDB) at Horseshoe Bay Resort Airport, Horseshoe Bay, TX, has made this action necessary for the safety and management of Instrument Flight Rules (IFR) operations at the airport.

DATES: 0901 UTC. Comments must be received on or before December 13, 2010.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. You must identify the docket number FAA–2010–0843/Airspace Docket No. 10–ASW–12, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527), is on the ground floor of the building at the above address.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd, Fort Worth, TX 76137; telephone: (817) 321–7716.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. FAA–2010–0843/Airspace Docket No. 10–ASW–12." The postcard will be date/time stamped and returned to the commenter.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (*see* **ADDRESSES** section for address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Central Service Center, 2601 Meacham Blvd, Fort Worth, TX 76137.

Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

This action proposes to amend Title 14, Code of Federal Regulations (14 CFR), part 71 by modifying Class E airspace extending upward from 700 feet above the surface for standard instrument approach procedures at Horseshoe Bay Resort Airport, Horseshoe Bay, TX. Airspace reconfiguration is necessary due to the decommissioning of the Horseshoe Bay Resort NDB and the cancellation of the NDB approach. This action would also reflect the name change of the airport from Horseshoe Bay Airpark to Horseshoe Bay Resort Airport. Controlled airspace is necessary for the safety and management of IFR operations at the airport.

Class E airspace areas are published in Paragraph 6005 of FAA Order 7400.9U, dated August 18, 2010, and effective September 15, 2010, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would modify controlled airspace at Horseshoe Bay Resort Airport, Horseshoe Bay, TX.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9U, Airspace Designations and Reporting Points, dated August 18, 2010, and effective September 15, 2010, is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

ASW TX E5 Austin, Horseshoe Bay Resort Airport, TX [Amended]

Horseshoe Bay Resort Airport, TX
(Lat. 30°31′37″ N., long. 98°21′32″ W.)

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of Horseshoe Bay Resort Airport.

Issued in Fort Worth, TX, on October 19, 2010.

Anthony D. Roetzel,

Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2010–27258 Filed 10–26–10; 8:45 am]

BILLING CODE 4901–13–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 160

RIN 3038–AD13

Privacy of Consumer Financial Information; Conforming Amendments Under Dodd-Frank Act

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commodity Futures Trading Commission ("Commission" or "CFTC") is proposing to amend its rules under part 160 of its Regulations to implement new statutory provisions enacted by Titles VII and X of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). Section 1093 of the Dodd-Frank Act provides for certain amendments to Title V of the Gramm-Leach-Bliley Act ("GLB Act")—which sets forth certain protections for the privacy of consumer financial information—affirming the Commission's jurisdiction in this area. This proposal broadens the scope of Part 160 to cover two new entities created by Title VII of the Dodd-Frank Act: Swap dealers and major swap participants. In addition, the Commission proposes to rename Part 160 as "Privacy of Consumer Financial Information under the Gramm-Leach-Bliley Act" to harmonize the title of this part with other parts of the Commission's Regulations.

DATES: Comments must be received on or before December 27, 2010.

ADDRESSES: You may submit comments, identified by RIN number 3038–AD13, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: infoprivacy@cftc.gov.*
- *Mail:* David A. Stawick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.
- *Hand Delivery/Courier:* Same as mail above.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *http://www.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that is exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552, a petition for confidential treatment of the exempt information may be submitted according to the established rules in section 145.9 of the Commission's Regulations.[1]

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from *http://www.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.,* and other applicable laws, and may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: Carl E. Kennedy, Counsel, Office of General Counsel, (202) 418–6625, e-mail: *c_kennedy@cftc.gov,* Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Background

On July 21, 2010, President Obama signed the "Dodd-Frank Wall Street Reform and Consumer Protection Act" ("Dodd-Frank Act").[2] Title VII of the Dodd-Frank Act,[3] which substantially amended the Commodity Exchange Act ("CEA"),[4] established a comprehensive new regulatory framework for swaps and security-based swaps. It lowers risk in the financial system, increases transparency, and promotes market integrity by, among other things: (1) Providing for the comprehensive regulation of swap dealers and major swap participants; (2) imposing clearing and trade execution requirements on standardized products; (3) creating a robust real-time reporting regime; and (4) enhancing the Commission's enforcement authorities.

Title X of the Dodd-Frank Act creates a new consumer financial services regulator, the Bureau of Consumer Financial Protection (the "Bureau"), that will assume most of the consumer financial services regulatory responsibilities currently spread among numerous agencies. More specifically, the Dodd-Frank Act removes from the jurisdiction of the Federal Trade Commission ("FTC") its rulemaking and other authorities granted pursuant to Federal consumer law, and cedes that authority to the Bureau. In addition, section 1093 of the Dodd-Frank Act amends Title V of the GLB Act (15 U.S.C. 6801 *et seq.*), to, *inter alia,* reaffirm the Commission's authority to promulgate regulations to require entities that are subject to the Commission's jurisdiction to provide certain privacy protections for consumer financial information. Specifically, section 1093 of the Dodd-Frank Act amends section 504 of the GLB Act by providing that "the [CFTC] shall have the authority to prescribe such regulations as may be necessary to carry out the purposes of [Title V of the GLB

[1] 17 CFR 145.9.

[2] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at *http://www.cftc.gov.*

[3] Under Section 701 of the Dodd-Frank Act, Title VII may be cited as the "Wall Street Transparency and Accountability Act of 2010."

[4] 7 U.S.C. 1 *et seq.*

Act] with respect to any financial institutions and *other persons subject to the jurisdiction of the [CFTC]* under section 5g of the [CEA]." (Emphasis added.)

As enacted, Title V of the GLB Act [5] ("Title V"), *inter alia,* limits the instances in which a financial institution may disclose nonpublic personal information about a consumer to nonaffiliated third parties, and requires a financial institution to disclose to all of its customers the institution's privacy policies and practices with respect to information sharing with both affiliates and nonaffiliated third parties.[6]

In 2000, the Commodity Futures Modernization Act of 2000 ("CFMA") created section 5g of the CEA, providing that the Commission be treated as a Federal functional regulator within the meaning of Title V.[7] Section 5g also granted the Commission the authority to adopt rules that establish appropriate standards for financial institutions subject to its jurisdiction to safeguard customer records and information. Section 5g provides that the following entities are subject to the Commission's jurisdiction for the purposes of Title V: Futures commission merchants ("FCMs"), commodity trading advisors ("CTAs"), commodity pool operators ("CPOs"), and introducing brokers ("IBs") (collectively, "CFTC registrants").

The Commission's consumer information privacy rules are set out in Part 160 of the Commission's regulations, which require CFTC registrants to adopt appropriate policies and procedures that address safeguards to customer records and information, including initial and annual privacy notice requirements, opt-out provisions to the extent that these registrants wish to share such records and information with non-affiliates and other measures to protect nonpublic consumer information. The protections provided in Part 160 inure to the benefit of individual consumers.[8] The Commission recently amended the scope of Part 160 and the definition of "financial institution" to include retail foreign exchange dealers ("RFEDs").[9]

Title VII of the Dodd-Frank Act creates two new entities over which the Commission has jurisdiction: Swap dealers ("SDs") and major swap participants ("MSPs").[10] The Commission proposes in this rulemaking to: (1) Expand the scope of Part 160 of its Regulations to apply to SDs and MSPs; (2) in accordance with the transfer of authority in Title X, changing all references in Part 160 from the FTC to the Bureau; and (3) rename Part 160 to "Privacy of Consumer Financial Information under the Gramm-Leach-Bliley Act" to harmonize the title of part 160 with the new part of the Commission's Regulations, which provide protections to certain customer information under the FCRA.

The Commission requests comment on all aspects of these conforming amendments, as well as comment on specific provisions and issues highlighted in the section-by-section analysis below.

II. Section-by-Section Analysis

A. Specific Section Amendments

Renaming Part 160

Another provision in Title X of the Dodd-Frank Act, section 1088, provides that the Commission promulgate regulations under various sections of the Fair Credit Reporting Act, 15 U.S.C. 1608 *et seq.* Similar to Title V of the GLB Act, the FCRA sets forth safeguards for the protection of a broader range of consumer information. Under a separate rulemaking, the Commission proposes to create a new part in its Regulations to provide protections under the FCRA. To harmonize the title of Part 160 with the new part being adopted by the Commission promulgated under Title X of the Dodd-Frank Act, the Commission proposes to rename Part 160 as "Privacy of Consumer Financial Information under the Gramm-Leach-Bliley Act." [11]

Regulation 160.1(b) Scope

Regulation 160.1(b) sets out the scope of the Commission's rules and identifies the financial institutions covered by the rules that include CFTC registrants regardless whether they are required to register with the Commission. The Commission proposes to add SDs and MSPs to the scope of Part 160 (and to the definition of "financial institution" therein) because, for example, these new entities may enter into swap transactions with individuals who qualify as "eligible contract participants".[12] Section 1a(18)(A)(xi) defines "eligible contact participant" to include any individual who has amounts invested on a discretionary basis, the aggregate of which is in excess of either $10,000,000 or, if certain other qualifications are met, $5,000,000. As a result of this addition, SDs and MSPs that transact swaps with individuals would have to comply with the various provisions under Part 160, including requirements to protect the nonpublic personal information of these individuals. Of course, if any SD or MSP has no business interactions with natural persons, no obligations would arise under this proposal. This proposal would ensure that all CFTC registrants that enter into swap transactions with natural persons would provide privacy protections to any nonpublic, consumer information.

Section 160.3—Definitions

Since the scope of the proposed regulations would extend to SDs and MSPs, the Commission proposes to amend section 160.3 to add the definitions of SDs and MSPs to the list of defined terms under section 160.3. Specifically, the Commission proposes to define "major swap participant" to have the same meaning as in section 1a(33) of the CEA, as further defined by the Commission's Regulations, and includes any person registered as such thereunder. The Commission proposes to define "swap dealer" to have the same meaning as in section 1a(49) of the CEA, as further defined by the Commission's Regulations, and includes any person registered as such thereunder. There are existing definitions and related

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[5] Public Law 106–102, 113 Stat. 1338 (1999) (codified in scattered sections of 12 U.S.C. and 15 U.S.C.).

[6] GLB Act sections 501–510, 15 U.S.C. 6801–6809.

[7] The other agencies subject to GLB Act jurisdiction include the Office of the Comptroller of the Currency ("OCC"); Board of Governors of the Federal Reserve System ("Board"); Federal Deposit Insurance Corporation ("FDIC"); Office of Thrift Supervision ("OTS"); National Credit Union Administration ("NCUA"); FTC; and Securities and Exchange Commission ("SEC").

[8] Section 160.3(h)(1) of the Commission's Regulations defines the term consumer to mean "an individual who obtains or has obtained a financial product or service from [a financial institution] that is to be used primarily for personal, family or household purposes, or that individual's legal representative."

[9] *See* 75 FR 55410, 55450 (Sept. 10, 2010).

[10] The terms "SD" and "MSP" as used in this proposed regulation refer to the statutory definitions of such terms as defined in Title VII of the Dodd-Frank Act, and as may be further defined by the Commission in a future rulemaking. *See* section 721(b) of the Dodd-Frank Act, which provides that the Commission has the authority to adopt rules further defining any term in an amendment to the CEA in the Dodd-Frank Act. *See* also section 721(c) which provides that the Commission is required to adopt a rule to further define, *inter alia,* the terms "swap dealer" and "major swap participant" to include transactions and entities that have been structured to evade provisions in the Dodd-Frank Act.

[11] Section 1088 of the Dodd-Frank Act provides the CFTC with authority to implement regulations under sections 624 and 628 of the FCRA.

[12] New section 2(e) of the CEA—as enacted under 723(a)(2) of the Dodd-Frank Act—provides that it is "unlawful for any person, other than an eligible contract participant, to enter into a swap unless the swap is entered into on, or subject to the rules of, a board of trade designated as a contract market under section 5 [of the CEA]."

provisions under Part 160 that must be amended to include these new registrants. Specifically, the definitions of "financial institution", "affiliate", and "you" must be amended to include swap dealers and major swap participants.

Section 160.15—Other Exceptions to Notice and Opt Out Requirements

As noted above, Title X of the Dodd-Frank Act transferred certain authority from the FTC to the Bureau. Accordingly, we changed the reference from the FTC to the Bureau in section 160.15 to reflect that the Bureau is now a Federal functional regulator.

Section 160.17(b)—Relation to State Laws

As a result of the creation of the Bureau and the transfer of certain authority from the FTC to the Bureau, the Commission proposes to amend paragraph (b) by replacing it with the language similar to section 1041(a)(2) of the Dodd-Frank Act. This section clarifies the relationship of Title V to state consumer protection laws. Specifically, section 1041(a)(2) provides, "For the purposes of this section, a [State] statute, regulation, order, or interpretation * * * is not inconsistent with the provisions of [Title V] if the protection that such statute, regulation, order, or interpretation affords to consumers is greater than the protection provided under [Title V]. A determination regarding whether a [State] statute, regulation, order, or interpretation * * * is inconsistent with the provisions of [Title V] may be made by the Bureau on its own motion or in response to a nonfrivolous petition initiated by any interested person."

Section 160.30—Procedures To Safeguard Customer Records and Information

Section 160.30 requires CFTC registrants to adopt policies and procedures that, among other things, address administrative, technical and physical safeguards for the protection of customer records and information. The Commission proposes to amend the introductory sentence of section 160.30 to add SDs and MSPs to the list of CFTC registrants that must comply with this requirement.

B. Effective Date

Pursuant to section 1100H of the Dodd-Frank Act, the Commission proposes to make the proposed regulations—the affiliate marketing rules and the disposal rules—become effective on the "designated transfer date" of authority from various Federal agencies to the Bureau. Section 1062 of the Dodd-Frank Act provides that the "designated transfer date" is a date designated in the **Federal Register** no later than 60 days after the enactment of the Dodd-Frank Act by the Secretary of the Treasury, the Chairman of the Board of Governors, the Chairman of the Federal Trade Commission, and several other Federal agencies.[13] On September 20, 2010, these Federal agencies issued a notice designating July 21, 2011 as the designated transfer date.[14] As a result, the Commission proposes to adopt the affiliate marketing rules and the disposal rules on that date.

III. Related Matters

A. Cost-Benefit Analysis

Section 15(a) of the CEA [15] requires the Commission to consider the costs and benefits of its actions before issuing an order under the CEA. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of amendments to regulations to determine whether the benefits of the amendments outweigh its costs; rather, it requires that the Commission "consider" the costs and benefits of its actions. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular amendment is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the Act. The proposed conforming rule amendments would broaden the scope of Part 160 to cover SDs and MSPs.

With respect to costs, the Commission has determined that the proposed conforming amendments are necessary to implement various consumer financial information privacy provisions as they relate to SDs and MSPs, by adding these new registrants to the list of financial institutions responsible for complying with its provisions under part 160 of its Regulations.

The Commission has determined that market participants and the public may be harmed if these new registrants are not added to part 160. The notice requirements under part 160 were established to protect individual customers who do business with CFTC registrants. There is no reason why SDs and MSPs should be excluded from these requirements to the extent that they conduct business with a natural person. With respect to benefits, the Commission has determined that requiring financial institutions to protect the privacy of nonpublic personal information about consumers is a benefit that must be maintained given the risks to the public if it is not, given the minor costs to the financial institutions affected by the conforming amendments.

The Commission invites public comment on its cost-benefit considerations. Commenters are also invited to submit any data or other information that they may have quantifying or qualifying the costs and benefits of the proposal.

B. Paperwork Reduction Act

Under the Paperwork Reduction Act ("PRA") an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.[16] The proposed amendments to Part 160 of the Commission's Regulations include a collection of information within the meaning of the PRA. The Commission therefore is submitting this proposal to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11, together with a request for approval of a revision to the Commission's currently approved collection associated with part 160. The title of the collection of information to be revised is "Privacy of Consumer Financial Information," OMB Control Number 3038–0055. If approved, the provision of notice to this revised collection of information would be mandatory for SDs and MSPs.

1. Information Provided by Reporting Entities

The proposed rule would require SDs and MSPs to provide initial and annual privacy and opt-out notices to all customers that are natural persons. It is not currently known how many SDs and MSPs will be required to register as such with the Commission, and this will

[13] The heads of the other Federal agencies are: The Comptroller of the Currency; the Director of the Office of Thrift Supervision; the Secretary of the Department of Housing and Urban Development; the Director of the Office of Management and Budget; the Chairman of the National Credit Union Administration Board; and the Chairperson of the Corporation.

[14] *See* 75 FR 57252–02 (Sept. 20, 2010).

[15] 7 U.S.C. 19(a).

[16] 44 U.S.C. 3501 *et seq.*

not be known to the Commission until registration requirements for these entities become effective after July 15, 2011, the date on which the Dodd-Frank Act becomes effective.

Nonetheless, for purposes of calculating PRA burden, the Commission estimates that there will be approximately 300 SDs and MSPs who would be required to provide notices under part 160 on an initial and then on an annual basis.[17] It is anticipated that most SDs and MSPs will not transact business with a significant number of natural persons, causing the Commission to estimate that each SD and MSP will issue an average of 20 notices per year. As previously estimated, the average time per notice will be .24 hours. This will result in an annual aggregate of 1,440 burden hours.

2. Information Collection Comments

The Commission invites the public and other Federal agencies to comment on any aspect of the reporting and recordkeeping burdens discussed above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments in order to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission's estimate of the burden of the proposed collection of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology. Comments may be submitted directly to the Office of Information and Regulatory Affairs, by fax at (202) 395–6566 or by e-mail at *OIRAsubmissions@omb.eop.gov.* Please provide the Commission with a copy of submitted comments so that they can be summarized and addressed in the final rule. Refer to the **ADDRESSES** section of this notice of proposed rulemaking for comment submission instructions to the Commission. A copy of the supporting statements for the collections of information discussed above may be obtained by visiting *RegInfo.gov.* OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is most assured of being fully effective if received by OMB (and the Commission) within 30 days after publication of this notice of proposed rulemaking.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA") requires that agencies consider whether their proposed regulations will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact.[18] The Commission's proposed regulations now will affect SDs and MSPs, in addition to the CFTC registrants that are currently subject to Commission's Regulations under Part 160. These regulations require periodic notice to be provided to individuals who obtain financial products or services primarily for personal, family, or household purposes from the institutions, and may be satisfied by the use of a model notice developed by the Commission and other regulatory agencies to minimize the burden of compliance. Accordingly, the Commission has determined that the obligations created by these rule amendments will not create a significant economic impact on a substantial number of small entities. Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed rules will not have a significant impact on a substantial number of small entities.

List of Subjects in 17 CFR Part 160

Brokers, Dealers, Consumer protection, Privacy, Reporting and recordkeeping requirements.

For the reasons articulated in the preamble, the Commission proposes to amend Part 160 of Title 17 of the Code of Federal Regulations as follows:

1. The heading of part 160 is revised to read as follows:

PART 160—PRIVACY OF CONSUMER FINANCIAL INFORMATION UNDER TITLE V OF THE GRAMM-LEACH-BLILEY ACT

2. The authority citation for part 160 is revised to read as follows:

Authority: 7 U.S.C. 7b–2 and 12a(5); 15 U.S.C 6801, *et seq.,* and title X, sec. 1093, Pub. L. 111–203, 124 Stat. 1376.

3. Amend § 160.1 by revising paragraph (b) to read as follows:

§ 160.1 Purpose and scope.

* * * * *

(b) *Scope.* This part applies only to nonpublic personal information about individuals who obtain financial products or services primarily for personal, family, or household purposes from the institutions listed below. This part does not apply to information about companies or about individuals who obtain financial products or services primarily for business, commercial, or agricultural purposes. This part applies to all futures commission merchants, retail foreign exchange dealers, commodity trading advisors, commodity pool operators, introducing brokers, major swap participants and swap dealers that are subject to the jurisdiction of the Commission, regardless whether they are required to register with the Commission. These entities are hereinafter referred to in this part as "you." This part does not apply to foreign (non-resident) futures commission merchants, retail foreign exchange dealers, commodity trading advisors, commodity pool operators, introducing brokers, major swap participants and swap dealers that are not registered with the Commission.

* * * * *

4. Amend § 160.3 as follows:

a. Revise paragraphs (a), (n)(1)(i), (n)(2)(i), and (o)(1)(i);

b. Redesignating paragraphs (w) and (x) as paragraphs (y) and (z);

c. Redesignating paragraphs (s) through (v) as paragraphs (t) through (w);

d. Adding new paragraphs (s) and (x); and

e. Revising newly designated paragraphs (y)(4) and (5) and adding new paragraphs (y)(6) and (7) to read as follows:

§ 160.3 Definitions.

* * * * *

(a) *Affiliate* of a futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, major swap participant, or swap dealer means any company that controls, is controlled by, or is under common control with a futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, major swap participant, or swap dealer that is subject to the jurisdiction of the Commission. In addition, a futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, major swap participant, or swap dealer subject to the jurisdiction of the Commission will

[17] While staff believes that there may likely be approximately 200 swap dealers, we have taken a conservative approach in estimating that there will be 250 swap dealers for PRA purposes.

[18] 5 U.S.C. 601 *et seq.*

be deemed an affiliate of a company for purposes of this part if:

(1) That company is regulated under Title V of the GLB Act by the Bureau of Consumer Financial Protection or by a Federal functional regulator other than the Commission; and

(2) Rules adopted by the Bureau of Consumer Financial Protection or another Federal functional regulator under Title V of the GLB Act treat the futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, major swap participant, or swap dealer as an affiliate of that company.

* * * * *

(n)(1) * * *

(i) Any futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, major swap participant, or swap dealer that is registered with the Commission as such or is otherwise subject to the Commission's jurisdiction; and

(ii) * * *

(2) * * *:

(i) Any person or entity, other than a futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, major swap participant, or swap dealer that, with respect to any financial activity, is subject to the jurisdiction of the Commission under the Act.

* * * * *

(o)(1) * * *:

(i) Any product or service that a futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, major swap participant, or swap dealer could offer that is subject to the Commission's jurisdiction; and

* * * * *

(s) *Major swap participant.* The term "major swap participant" has the same meaning as in section 1a(33) of the Commodity Exchange Act, 7 U.S.C. 1 *et seq.,* as may be further defined by this title, and includes any person registered as such thereunder.

* * * * *

(x) *Swap dealer.* The term "swap dealer" has the same meaning as in section 1a(49) of the Commodity Exchange Act, 7 U.S.C. 1 *et seq.,* as may be further defined by this title, and includes any person registered as such thereunder.

(y) * * *

(4) Any commodity pool operator;

(5) Any introducing broker;

(6) Any major swap participant; and

(7) Any swap dealer subject to the jurisdiction of the Commission.

* * * * *

5. Amend § 160.15 by revising paragraph (a)(4) to read as follows:

§ 160.15 Other exceptions to notice and opt out requirements.

(a) * * *

(4) To the extent specifically permitted or required under other provisions of law and in accordance with the Right to Financial Privacy Act of 1978, 12 U.S.C. 3401 *et seq.,* to law enforcement agencies (including a Federal functional regulator, the Secretary of the Treasury, with respect to 31 U.S.C. Chapter 53, Subchapter II (Records and Reports on Monetary Instruments and Transactions) and 12 U.S.C. Chapter 21 (Financial Recordkeeping), a State insurance authority, with respect to any person domiciled in that insurance authority's state that is engaged in providing insurance, and the Bureau of Consumer Financial Protection), self-regulatory organizations, or for an investigation on a matter related to public safety;

* * * * *

6. Amend § 160.17 by revising paragraph (b) to read as follows:

§ 160.17 Relation to state laws.

* * * * *

(b) *Greater protection under state law.* For purposes of this section, a state statute, regulation, order or interpretation is not inconsistent with the provisions of this part if the protection such statute, regulation, order or interpretation affords to any consumer is greater than the protection provided under this part. A determination regarding whether a state statute, regulation, order, or interpretation is inconsistent with the provisions of this part may be made by the Bureau of Consumer Financial Protection, after consultation with the Commission, on its own motion or in response to a nonfrivolous petition initiated by any interested person.

7. Revise § 160.30 to read as follows:

§ 160.30 Procedures to safeguard customer records and information.

Every futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, major swap participant, and swap dealer subject to the jurisdiction of the Commission must adopt policies and procedures that address administrative, technical and physical safeguards for the protection of customer records and information.

By the Commission.

Dated: October 19, 2010.

David A. Stawick,

Secretary.

Statement of Chairman Gary Gensler

Privacy of Consumer Financial Information; Conforming Amendments Under Dodd-Frank Act

October 19, 2010

I support today's Commission vote on the notice of public rulemaking, which expands the scope of the Commission's existing protections afforded to consumers' information to two new entities created by the Dodd-Frank Act. The proposed rulemaking expands the Commission's Part 160 rules to customers of swap dealers and major swap participants. Part 160 includes the Commission's existing privacy rules for consumers.

[FR Doc. 2010–26912 Filed 10–26–10; 8:45 am]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 162

RIN Number 3038–AD12

Business Affiliate Marketing and Disposal of Consumer Information Rules

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commodity Futures Trading Commission ("Commission" or "CFTC") is proposing regulations to implement new statutory provisions enacted by Title X of the "Dodd-Frank Wall Street Reform and Consumer Protection Act" ("Dodd-Frank Act"). These proposed regulations apply to futures commission merchants, retail foreign exchange dealers, commodity trading advisors, commodity pool operators, introducing brokers, swap dealers and major swap participants (collectively, "CFTC registrants"). The Dodd-Frank Act provides the CFTC with authority to implement regulations under sections 624 and 628 of the Fair Credit Reporting Act ("FCRA"). The proposed regulations implementing section 624 of the FCRA require CFTC registrants to provide consumers with the opportunity to prohibit affiliates from using certain information to make marketing solicitations to consumers. The proposed regulations implementing section 628 of the FCRA require CFTC registrants that possess or maintain consumer report information in connection with their business activities

to develop and implement a written program for the proper disposal of such information.

DATES: Comments must be received on or before December 27, 2010.

ADDRESSES: You may submit comments, identified by RIN number 3038–AD12, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Regular Mail:* David Stawick, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.
- *E-mail: amr@cftc.gov.*
- *Hand Delivery/Courier:* Same as mail above.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received at *http://www.cftc.gov.* You should submit information only that you wish to make available publicly. If you wish the Commission to consider information that is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the established rules in CFTC Regulation 145.9.[1]

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from *http://www.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.,* and other applicable laws, and may be accessible under the Freedom of Information Act, 5 U.S.C. 552.

FOR FURTHER INFORMATION CONTACT: Carl E. Kennedy, Counsel, (202) 418–6625, Commodity Futures Trading Commission, Office of the General Counsel, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, facsimile number (202) 418–5524, e-mail: *c_kennedy@cftc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[2] Title VII of the Dodd-Frank Act[3] amended the Commodity Exchange Act ("CEA")[4] to establish a comprehensive new regulatory framework for swaps and security-based swaps. The legislation was enacted to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) Providing for the registration and comprehensive regulation of swap dealers and major swap participants; (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating robust recordkeeping and real-time reporting regimes; and (4) enhancing the Commodity Futures Trading Commission's ("Commission" or "CFTC") rulemaking and enforcement authorities with respect to, among others, all registered entities and intermediaries subject to the Commission's oversight.

In addition, Title X of the Dodd-Frank Act—which is entitled the Consumer Financial Protection Act of 2010 ("CFP Act")—established a Bureau of Consumer Financial Protection within the Federal Reserve System and provided this new Federal agency with rulemaking, enforcement, and supervisory powers over many consumer financial products and services and the entities that sell them. In addition, the CFP Act amends a number of other Federal consumer protection laws enacted prior to the Dodd-Frank Act, including the Fair Credit Reporting Act ("FCRA"),[5] the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act")[6] and Title V of the Gramm-Leach-Bliley Act[7] ("GLB Act").

Section 1088 of the CFP Act sets out two amendments to the FCRA and the FACT Act directing the Commission to promulgate regulations that are intended to provide privacy protections to certain consumer information held by any person that is subject to the enforcement jurisdiction of the Commission. One provision of section 1088 amends section 214(b) of the FACT Act—which added section 624 to the FCRA in 2003—and directs the Commission to implement the provisions of section 624 of the FCRA with respect to persons that are subject to the CFTC's enforcement jurisdiction. Section 624 of the FCRA gives consumers the right to prohibit a CFTC registrant[8] from using certain information obtained from an affiliate to make solicitations to that consumer (hereinafter referred to as the "affiliate marketing rules"). The other provision in the CFP Act amends section 628 of the FCRA and mandates that the Commission implement regulations requiring persons subject to the CFTC's jurisdiction who possess or maintain consumer report information in connection with their business activities to properly dispose of that information (hereinafter referred to as the "disposal rules").

Both sections 624 and 628 of the FCRA required various Federal agencies charged with regulating financial institutions in possession of consumer information to issue regulations in final form in consultation and coordination with each other. In particular, these sections required the Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve System ("Board"), the Federal Deposit Insurance Corporation ("FDIC"), the Office of Thrift Supervision ("OTS"), the National Credit Union Administration ("NCUA") (collectively, the "Banking Agencies"), the Securities and Exchange Commission ("SEC") and the Federal Trade Commission ("FTC") (the SEC, FTC and the Banking Agencies, are collectively, the "Agencies") in consultation and coordination with one another, to issue rules implementing these sections of the FCRA. The Agencies already have adopted final affiliate marketing rules and disposal rules.[9] Accordingly, the

[1] 17 CFR 145.9.

[2] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at *http://www.cftc.gov./LawRegulation/OTCDERIVATIVES/index.htm.*

[3] Pursuant to Section 701 of the Dodd-Frank Act, Title VII may be cited as the "Wall Street Transparency and Accountability Act of 2010."

[4] 7 U.S.C. 1 *et seq.*

[5] *See* 15 U.S.C. 1681–1681x. The FCRA, enacted in 1970, sets standards for the collection, communication, and use of information bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living that is collected and communicated by consumer reporting agencies. 15 U.S.C. 1681–1681x.

[6] *See* Public Law 108–159, Section 214, 117 Stat. 1952, 1980 (2003). The FACT Act was signed into law on December 4, 2003. The FACT Act amended the FCRA to enhance the ability of consumers to combat identity theft, to increase the accuracy of consumer reports, to allow consumers to exercise greater control regarding the type and amount of solicitations they receive, and to restrict the use and disclosure of sensitive medical information. A portion of section 214 of the FACT Act amended the FCRA to add section 624 to the FCRA.

[7] *See* Public Law 106–102, 113 Stat. 1338 (1999).

[8] "CFTC registrant" includes a futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, swap dealer or major swap participant.

[9] For the disposal rules adopted by the various Federal agencies, *see* 69 FR 68690 (Nov. 24, 2004) (FTC); 69 FR 77610 (Dec. 28, 2004) (Banking Agencies); 73 FR 13692 (Mar. 13, 2008) (SEC). For the affiliate marketing rules adopted by the various Federal agencies, *see* 72 FR 61424 (Oct. 31, 2007) (FTC); 72 FR 62910 (Nov. 7, 2007) (Banking Agencies); 74 FR 58204 (Sept. 10, 2009) (SEC).

Commission is now proposing to adopt similar rules to the final rules adopted by the Agencies, to the extent possible, to ensure consistency and comparability.

The Commission requests comment on all aspects of the proposed regulations—both the affiliate marketing rules and the disposal rules—that are highlighted in the discussion in Section II below.

II. Explanation of the Proposed Regulations

A. Affiliate Marketing Rules

Section 624 of the FCRA and the Commission's proposed regulations generally provide that consumers can block a CFTC registrant from soliciting the consumer based on "eligibility information" (*i.e.,* certain financial information, such as information regarding the consumer's transactions or experiences with the person) that such registrant received from an affiliate that has or previously had pre-existing business relationship. Under the proposed regulations, these registrants can make solicitations to a consumer based on that consumer's eligibility information if:

(1) The consumer is given clear, conspicuous and concise notice;

(2) The consumer is given a reasonable opportunity to opt out of such use of the information; and

(3) The consumer does not opt out.

Section 624 governs the use of information by an affiliate, not the sharing of information with or among affiliates.[10] While some of the entities that fall under the Commission's jurisdiction may comply already with the regulations promulgated by other Federal agencies implementing the provisions of section 624 of the FCRA, the Commission seeks comment on its proposed regulations implementing section 624 of the FCRA.

Responsibility for Providing Notice and an Opportunity to Opt Out

Section 624 does not specify which affiliate must give the consumer notice and an opportunity to opt out of the use of the information by an affiliate for marketing purposes. The Commission has reviewed the proposed and final regulations issued by the Agencies implementing section 624 and has determined to take a consistent approach with respect to which affiliate may provide the initial opt-out notice. As such, the Commission's proposed regulations provide that the initial opt-out notice must be provided either by an affiliate that has or previously had a "pre-existing business relationship" with the consumer, or as part of a joint notice from two or more members of an affiliated group, provided that at least one of the affiliates on the joint notice has or previously had a pre-existing business relationship with the consumer. The Commission agrees with the Agencies that this approach provides a measure of flexibility and ensures that the notice is provided by an entity that is known to the consumer. The Commission invites comment on whether this approach continues to be a reasonable one.

Scope of Coverage

Section 624 of the FCRA specifies under which circumstances the provisions under this section and the proposed regulation do not apply. Specifically, section 624(a)(4) provides that the requirements and prohibitions of that section do not apply, in part, when: (1) The covered affiliate receiving the information has a pre-existing business relationship with the consumer; (2) the information is used to perform services for another affiliate that does not have such a relationship with the consumer (subject to certain conditions described below); (3) the information is used in response to a communication initiated by the consumer; or (4) the information is used to make a solicitation that has been authorized or requested by the consumer. The Commission has incorporated each of these statutory exceptions into the proposed rule.

In addition, the Commission has set out the persons to whom the proposed rule will apply, as well as the type of consumer information that is the subject of such rule. The Commission solicits comments on whether there should be other circumstances to which the proposed regulations do not apply.

Duration of Opt Out

Section 624(a)(3) of the FCRA provides that a consumer's affiliate marketing opt-out election shall be effective for at least five years. Accordingly, the proposed regulations provide that a consumer's opt-out election would be valid for a period of at least five years (the "opt-out period"), beginning as soon as reasonably practicable after the consumer's opt-out election is received, unless the consumer revokes the election before the opt-out period has expired. When a consumer opts out, unless a statutory exception applies, a receiving affiliate would be unable to make or send marketing solicitations to that consumer based on his or her eligibility information during the opt-out period.

As described in the section-by-section analysis below, an extension notice would be provided to the consumer at the end of the opt-out period if the receiving affiliate wishes to make marketing solicitations. Affiliated persons may wish to avoid the cost and burden of tracking five-year consumer opt-out periods with varying start and end dates, and delivering extension notices to each consumer at the appropriate time, by choosing to treat a consumer's opt-out election as effective for a period longer than five years, including indefinitely. An affiliate without a pre-existing business relationship that chooses to honor a consumer's opt-out election for more than five years would not violate the proposed rules.

In the discussion that follows, the Commission solicits comment on specific aspects of the proposed regulations on a section-by-section basis.

Section 162.1—Purpose, Scope and Examples

Proposed section 162.1 sets forth the purpose and scope of the proposed regulations. This section also provides that examples in this part are not exclusive; compliance with an example, to the extent applicable, constitutes compliance with this subpart.

Section 162.2—Definitions

Proposed section 162.2 contains definitions for, *inter alia,* the following terms: "affiliate"; "clear and conspicuous"; "common ownership or common corporate control"; "communication"; "company"; "consumer"; "covered affiliate"; "eligibility information"; "financial product or service"; "major swap participant"; "person"; "pre-existing business relationship"; "solicitation"; and "swap dealer".

Affiliate

Section 2 of the FACT Act (which, as noted above, added section 624 to the FCRA) defines the term "affiliate" to mean "persons that are related by common ownership or affiliated by corporate control."

The FACT Act and the GLB Act contain a variety of approaches to define the term "affiliate." Proposed paragraph (a) employs the same formulation used by the Commission in defining "affiliate" under part 160 of the

[10] The opt-out right contained in section 624 of the FCRA is distinct from the affiliate sharing provisions under section 603(d)(2)(A)(iii) of the FCRA.

Commission's Regulations.[11] Under the proposed regulation, the definition of "affiliate" will mean any company that is under common ownership or common corporate control with a covered affiliate.[12] The Commission believes it is important to harmonize the treatment of "affiliate" across its Regulations as much as possible and to construe them to have the same meaning. The Commission solicits comments on whether there should be any meaningful difference between the Commission's proposed definitions and the FACT Act and the GLB Act definitions.

Clear and Conspicuous

Proposed paragraph (b) defines the term "clear and conspicuous" to mean reasonably understandable and designed to call attention to the nature and significance of the information presented in the notice. Companies retain flexibility in determining how best to meet the clear and conspicuous standard. Again, the Commission has decided to harmonize the definition of this term across its Regulations. In addition, the Commission believes that the FCRA directs the Commission to provide specific guidance regarding how to comply with the clear and conspicuous standard. *See* 15 U.S.C. 1682s–3(a)(2)(B).

Companies may wish to consider a number of methods to make their notices clear and conspicuous. A notice or disclosure may be made reasonably understandable through methods that include, but are not limited to: Using clear and concise sentences, paragraphs, and sections; using short explanatory sentences; using bullet lists; using definite, concrete, everyday words; using active voice; avoiding multiple negatives; avoiding legal and highly technical business terminology; and avoiding explanations that are imprecise and are readily subject to different interpretations. Various methods may also be used to design a notice or disclosure to call attention to the nature and significance of the information in it, including, but not limited to, using: A plain-language heading; a typeface and type size that are easy to read; wide margins and ample line spacing; or boldface or italics for key words. Companies that provide the notice on an Internet web page may use text or visual cues to encourage scrolling down the page if necessary to view the entire notice, and take steps to ensure that other elements on the Web site (such as pop-up ads, text, graphics, hyperlinks, or sound) do not distract attention from the notice.

When a notice or disclosure is combined with other information, methods for designing the notice or disclosure to call attention to the nature and significance of the information in it may include using distinctive type sizes, styles, fonts, paragraphs, headings, graphic devices, and groupings or other devices. It is unnecessary, however, to use distinctive features, such as distinctive type sizes, styles, or fonts, to differentiate an affiliate marketing opt-out notice from other components of a required disclosure (*e.g.,* where a privacy notice under the GLB Act includes several opt-out disclosures in a single notice). Nothing in the clear and conspicuous standard requires the segregation of an affiliate marketing opt-out notice when it is combined with a privacy notice under the GLB Act or other provisions of law.

It may not be feasible to incorporate all of the methods described above all of the time. For example, a company may have to use legal terminology, rather than everyday words, in certain circumstances to provide a precise explanation. Companies are encouraged, but not required, to consider the practices described above in designing their notices or disclosures, as well as using readability testing to devise notices that are understandable to consumers.

The Commission has proposed model forms in Appendix A that may, but are not required to, be used to facilitate compliance with the affiliate marketing notice requirements. The requirement for clear and conspicuous notices would be satisfied by the appropriate use of one of the model forms.

Common Ownership or Common Corporate Control

Proposed paragraph (f) defines the term "common ownership or common corporate control" for purposes of Part 162 to mirror the definition of "control" under Part 160. Under the proposal, "common ownership or common corporate control" means the power to exercise a controlling influence over the management or policies of a company whether through ownership of securities, by contract, or otherwise. Any person who owns beneficially, either directly or through one or more controlled companies, more than 25 percent of the voting securities of any company is presumed to control the company. Any person who does not own more than 25 percent of the voting securities of a company will be presumed not to control the company.

Company

Proposed paragraph (g) defines the term "company" to mean any corporation, limited liability company, business trust, general or limited partnership, association, or similar organization. This definition is consistent with the definition of company in Part 160 of the Commission's Regulations.

Concise

Proposed paragraph (h) defines the term "concise" to mean a reasonably brief expression or statement. The proposal also provides that a notice required by this subpart may be concise even if it is combined with other disclosures required or authorized by Federal or state law. Such disclosures may include, but are not limited to, a GLB Act privacy notice or other consumer disclosures required under the FCRA or any other provision of law.

As noted above, the Commission has proposed model forms in Appendix A that may, but are not required to, be used to facilitate compliance with the affiliate marketing notice requirements in this subpart. The requirement for concise notices would be satisfied by the appropriate use of one of the model forms.

Consumer

Proposed paragraph (i) defines the term "consumer" to mean an individual person, which follows the statutory definition in section 603(c) of the FCRA. For purposes of this definition, an individual acting through a legal representative qualifies as a consumer. The Commission notes that the

[11] Part 160 of the Commission's Regulations implement the provisions of Title V of the GLB Act. Under Title V of the GLB Act, "financial institutions" (which include futures commission merchants, retail foreign exchange dealers, commodity trading advisors and other CFTC registrants) are required to provide initial and annual privacy notices to their customers. These requirements apply only to customers that are individuals who obtain financial products or services that are primarily used for personal, family, or household purposes. Part 160 also requires financial institutions that share nonpublic, personal information about a customer with non-affiliates to provide the customer with a reasonable opportunity to opt out of the sharing of such information. *See* section 160.7 of the Commission's Regulations.

[12] The terms "swap dealer" and "major swap participant" as used in this proposed regulation refer to the statutory definitions of such terms as defined in Title VII of the Dodd-Frank Act, and as may be further defined by the Commission in a future rulemaking. *See* section 721(b) of the Dodd-Frank Act, which provides that the Commission has the authority to adopt rules further defining any term included in the Dodd-Frank Act, which amends the CEA. *See* also section 721(c) which provides that the Commission is required to adopt a rule to further define, *inter alia,* the terms "swap dealer" and "major swap participant" to include transactions and entities that have been structured to evade provisions in the Dodd-Frank Act.

definition of "consumer" is broader than the definition of that term in the GLB Act and is consistent with the definitions used by the Agencies in their rulemakings promulgated under section 624 of the FCRA. The Commission believes that the use of distinct definitions of "consumer" in the two statutes reflects differences in the scope and objectives of each statute.

Covered Affiliate

Proposed paragraph (h) defines the term "covered affiliate" to mean a futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, swap dealer or major swap participant, which is subject to the jurisdiction of the Commission.

Eligibility information

Under proposed paragraph (j), the term "eligibility information" means any information that would be a consumer report if the exclusions from the definition of "consumer report" in section 603(d)(2)(A) of the FCRA did not apply.[13] Examples of the type of information that would fall within the definition of "eligibility information" includes an affiliate's own transaction or experience information, such as information about a consumer's account history with that person, and other information, such as information from credit bureau reports or applications. The Commission's proposal defines the term "eligibility information" consistently with the definitions in the Agencies' regulations promulgated pursuant to section 624 of the FCRA.

The term "eligibility information" does not include aggregate or blind data that does not contain personal identifiers. Examples of personal identifiers include account numbers, names, or addresses, as well as Social Security numbers, driver's license numbers, telephone numbers, or other types of information that, depending on the circumstances or when used in combination, could identify the consumer.

The Commission invites comment on whether the term "eligibility information", as defined, appropriately reflects the scope of what information should be covered by this proposed regulation.

Financial Product or Service

Proposed paragraph (l) defines the term "financial product or service" to mean any product or service that a futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, major swap participant or swap dealer could offer that is subject to the Commission's jurisdiction. This definition is consistent with the definition of financial product or service in Part 160 of the Commission's Regulations, with certain revisions made to fit within the scope of the proposed regulations. The Commission invites comment on whether the term "financial product or service", as defined, appropriately captures the types of products or services that should be covered by this regulation.

Major Swap Participant

Proposed paragraph (n) defines the term "major swap participant" to have the same meaning as in section 1a(33) of the Commodity Exchange Act, as may be further defined by the Commission's Regulations, and includes any person registered as such thereunder.

Person

Proposed paragraph (o) defines the term "person" to mean any individual, partnership, corporation, trust, association, or other entity. For purposes of this part, actions taken by an agent on behalf of a person that are within the scope of the agency relationship will be treated as actions of that person. The definition of person in the proposed regulation is consistent with the definition of person in CFTC Regulation 1.3(u).

Pre-Existing Business Relationship

Proposed paragraph (p) defines this term to mean a relationship between a person (or a person's licensed agent) and a consumer based on the following: (1) A financial contract between the person and the consumer that is in force on the date on which the consumer is sent a solicitation by this subpart; (2) the purchase, rental, or lease by the consumer of a person's financial products or services, or a financial transaction (including holding an active account or a policy in force or having another continuing relationship) between the consumer and the person, during the 18-month period immediately preceding the date on which a solicitation covered by this subpart is sent to the consumer; or (3) an inquiry or application by the consumer regarding a financial product or service offered by that person during the three-month period immediately preceding the date on which the consumer is sent a solicitation covered by this subpart. The proposed definition generally tracks the statutory definition contained in section 624 of the FCRA, with certain revisions for clarity.

The Commission believes that, for purposes of this proposed regulation, an inquiry should include any affirmative request by a consumer for information, such that the consumer would reasonably expect to receive information from the affiliate about its financial products or services. In addition, the Commission believes that a consumer would not reasonably expect to receive information from the affiliate if the consumer does not request information or does not provide contact information to the affiliate.

The Commission has the statutory authority to define in the regulations other circumstances that qualify as a pre-existing business relationship. The Commission has not proposed to exercise this authority at this time to expand the definition of "pre-existing business relationship" beyond the circumstances set forth in the statute. The Commission solicits comments, however, on whether there are other circumstances that the Commission should include within the definition of "pre-existing business relationship".

Solicitation

Proposed paragraph (q) defines the term "solicitation" to mean the marketing of a financial product or service initiated by a covered affiliate to a particular consumer that is based on eligibility information communicated to the covered affiliate by its affiliate and is intended to encourage the consumer to purchase the covered affiliate's financial product or service. A communication, such as a telemarketing solicitation, direct mail, or e-mail, is a solicitation if it is directed to a specific consumer based on eligibility information. The proposed definition of solicitation does not, however, include communications that are directed at the general public without regard to eligibility information, even if those communications are intended to encourage consumers to purchase

[13] Section 603(d)(2)(A) of the FCRA provides that the term "consumer report" does not include "(i) [any] report containing information solely as to transactions or experiences between the consumer and the person making the report; (ii) communication of that information among persons related by common ownership or affiliated by corporate control; or (iii) communication of other information among persons related by common ownership or affiliated by corporate control, if it is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons and the consumer is given the opportunity, before the time that the information is initially communicated, to direct that such information not be communicated among such persons * * *." Thus, the scope of what falls within the definition of "eligibility information" is broader than, and includes, information that would fall within the definition of "consumer report".

financial products and services from the person initiating the communications. The proposed definition tracks the statutory definition contained in section 624 of the FCRA, with certain revisions for clarity.

The proposed definition of "solicitation" does not distinguish between different mediums of communication. A determination of whether a marketing communication constitutes a solicitation will depend upon the facts and circumstances. The Commission has decided not to make those determinations in this rulemaking.

The Commission has the statutory authority to determine by regulation that other communications do not constitute a solicitation. The Commission has decided to use the same definition of "solicitation" adopted by the Agencies, and as a result, has not proposed to exercise its authority under section 624 at this time to specify other communications that would not be deemed "solicitations" beyond the circumstances set forth in the statute.

The Commission solicits comment, however, on whether there are other communications that the Commission should determine do not meet the definition of "solicitation." The Commission also solicits comment on whether, and to what extent, various tools used in Internet marketing, such as popup ads, may constitute solicitations as opposed to communications directed at the general public, and whether further guidance is needed to address Internet marketing.

Swap Dealer

Proposed paragraph (r) defines the term "swap dealer" to have the same meaning as in section 1a(49) of the Commodity Exchange Act, as may be further defined by the Commission's Regulations, and includes any person registered as such thereunder.

Section 162.3—Affiliate Marketing Opt Out and Exceptions

Proposed section 162.3 establishes the basic rules governing the requirement to provide the consumer with notice, a reasonable opportunity and a simple method to opt out of a company's use of eligibility information that it obtains from an affiliate for the purpose of making solicitations to the consumer.

General Notice Requirement

Proposed paragraph (a) contains three conditions that must be met before a covered affiliate that does not have a pre-existing business relationship with a consumer may use eligibility information about the consumer that it receives from a affiliate that does have such a relationship to make a solicitation for marketing purposes to that consumer. First, the proposal provides that it must be clearly and conspicuously disclosed to the consumer in writing or, if the consumer agrees, electronically, in a concise notice that the covered affiliate that does not have a pre-existing business relationship may use shared eligibility information to make solicitations to the consumer. Second, the consumer must be provided a reasonable opportunity and a reasonable and simple method to opt out of the use of that eligibility information to make solicitations to the consumer. Third, the consumer must not have opted out.

The Commission believes that an opt-out notice may not be provided orally. Indeed, the Commission is concerned that with oral notice, it may be impossible to ensure that a consumer receives the appropriate notice or information on the right to opt out. In addition, the Commission is concerned that oral notice may create enforcement barriers for the Commission.

Persons Responsible for Satisfying the Notice Requirement

Section 624 does not specify explicitly which affiliate must provide the opt-out notice to the consumer. Proposed paragraph (b) sets forth the duty of the persons responsible for satisfying the notice requirement under section 624. This proposal is consistent with the approach taken by the Agencies in their respective rulemakings pursuant to section 624. The proposed regulation strives to provide flexibility by allowing either: (1) The affiliate with a pre-existing business relationship to report the initial opt-out notice directly to the consumer; or (2) one or more of affiliates to provide a joint notice to the consumer, provided that at least one of the affiliates has or previously had the pre-existing business relationship with the consumer. The Commission solicits comments on whether this approach will provide meaningful or effective notice and will not lead to consumer confusion as to whether the opt-out notice is itself a solicitation.

Exceptions to the General Rule

Paragraph (c) contains exceptions to the requirements of this subpart. It incorporates each of the following statutory exceptions to the affiliate marketing notice and opt-out requirements set forth in section 624(a)(4) of the FCRA: (1) Using the information to make a solicitation to a consumer with whom the affiliate has a pre-existing business relationship; (2) using the information to facilitate communications to an individual for whose benefit the affiliate provides employee benefit or other services under a contract with an employer related to, and arising out of, a current employment relationship or an individual's status as a participant or beneficiary of an employee benefit plan; (3) using the information to perform services for another affiliate, unless the services involve sending solicitations on behalf of the other affiliate and such affiliate is not permitted to send such solicitations itself as a result of the consumer's decision to opt out; (4) using the information to make solicitations in response to a communication initiated by the consumer; (5) using the information to make solicitations in response to a consumer's request or authorization for a solicitation; or (6) if compliance with the requirements of section 624 by the affiliate would prevent that affiliate from complying with any provision of state insurance laws pertaining to unfair discrimination in a state where the affiliate is lawfully doing business. Several of these exceptions are discussed immediately below.

Proposed paragraph (c)(1) clarifies that the provisions of this subpart do not apply where the covered affiliate using the information to make a solicitation to a consumer has a "pre-existing business relationship" with that consumer, a key term that is discussed in detail above.

Proposed paragraph (c)(3) clarifies that the provisions of this subpart do not apply where the information is used to perform services for another affiliate, except that the exception does not permit the service provider to make solicitations on behalf of itself or an affiliate if the service provider or the affiliate, as applicable, would not be permitted to make such solicitations as a result of the consumer's election to opt out. Thus, when the notice has been provided to a consumer and the consumer has opted-out, a covered affiliate subject to the consumer's opt-out election that has received eligibility information from its affiliate may not circumvent the opt-out notice requirement by instructing its affiliate or another affiliate to make solicitations to the consumer on its behalf. The Commission requests comment on whether there are other means of circumvention that the final rule should also address.

Proposed paragraph (c)(4) incorporates the statutory exception for information used in response to a communication initiated by the consumer. The proposed rule clarifies

that this exception may be triggered by an oral, electronic, or written communication initiated by the consumer. To be covered by the proposed exception, use of eligibility information must be responsive to the communication initiated by the consumer. For example, if a consumer calls a covered affiliate to ask about business locations and hours, the covered affiliate may not then use eligibility information to make solicitations to the consumer about specific financial products or services because those solicitations would not be responsive to the consumer's communication. Conversely, if the consumer calls a covered affiliate to ask about its financial products or services, then solicitations related to those financial products or services would be responsive to the communication and thus be permitted under the exception. The time period during which solicitations remain responsive to the consumer's communication will depend on the facts and circumstances. The Commission does not intend for this exception to apply to a communication where a covered affiliate makes the initial call and leaves a message for the consumer to call back, and the consumer responds.

Proposed paragraph (c)(5) provides that the provisions of this subpart do not apply where the information is used to make solicitations affirmatively authorized or requested by the consumer. This provision may be triggered by an oral, electronic, or written authorization or request by the consumer. Under this exception, the consumer may provide the authorization or make the request either through the company with whom the consumer has a business relationship or directly to the covered affiliate that will make the solicitation. In addition, the duration of the authorization or request will depend on the facts and circumstances.

The exceptions in proposed paragraphs (c)(1), (4), and (5) described above may overlap in certain situations. For example, if a customer makes a telephone call to the commodity trading advisor's clearing broker affiliate and requests information about its services, the clearing broker affiliate may use information about the consumer it obtains from the commodity trading advisor to make solicitations in response to the telephone call initiated by the consumer under the exception in paragraph (c)(4) for responding to a communication initiated by the consumer. In addition, the consumer's request for information from the clearing broker affiliate triggers the exceptions in paragraph (c)(1) for inquiries by the consumer regarding a financial product or service offered by the clearing broker affiliate under the statutory definition of a "pre-existing business relationship" as well as the exception in paragraph (c)(5) for a use in response to a solicitation requested by the consumer.

Making Solicitations

Proposed paragraph (d) sets forth when a covered affiliate makes a solicitation to a consumer. Section 624 does not describe what a covered affiliate must do in order to make a solicitation. Similarly the legislative history does not contain guidance as to the meaning of making a solicitation. For that reason, the Commission believes it important to provide clear guidance regarding what activities constitute making a solicitation. Proposed section 162.3(d)(1) provides that a covered affiliate makes a solicitation for marketing purposes to a consumer if: (i) The covered affiliate receives eligibility information from an affiliate; (ii) the covered affiliate uses that eligibility information to do one of the following—identify the consumer or type of consumer to receive a solicitation, establish the criteria used to select the consumer to receive a solicitation, or decide which of its financial products or services to market to the consumer or tailor its solicitation to that consumer; and (iii) as a result of the covered affiliate's use of the eligibility information, the consumer is provided a solicitation about the covered affiliate's financial products or services.

The Commission recognizes that several common industry practices create issues in applying the provisions in proposed subparagraph (d)(1). First, affiliated companies often use a common database as the repository for eligibility information obtained by various affiliates, and information in that database may be accessible to multiple affiliates. Second, affiliated companies often use service providers to perform marketing activities, and some of those service providers may provide services for a number of different affiliates. Third, a covered affiliate may use its own eligibility information to market the financial products or services of another affiliate. Proposed sections 162.3(d)(2)–(5) seek to address these issues.

Proposed subparagraph (d)(2) provides that a covered affiliate may receive eligibility information from an affiliate in various ways, including when the covered affiliate places that information into a common database that the covered affiliate may access. Thus, the use of a common database may satisfy the first element of the rule outlined in subparagraph (d)(1) (*i.e.,* through a common database, the covered affiliate receives eligibility information from an affiliate).

Proposed subparagraph (d)(3) provides that a covered affiliate receives or uses an affiliate's eligibility information if a service provider acting on behalf of the covered affiliate receives or uses that information in the manner described in subparagraphs (d)(1)(i) or (d)(1)(ii), except as provided in subparagraph (d)(5), which is discussed below. Proposed subparagraph (d)(3) also provides that all relevant facts and circumstances will determine whether a service provider is acting on behalf of a covered affiliate when it receives or uses its affiliate's eligibility information in connection with marketing the covered affiliate's financial products or services.

Proposed subparagraph (d)(4) describes two situations where a covered affiliate is deemed not to have made a solicitation subject to this subpart. In particular, this section provides that unless a covered affiliate uses a consumer's eligibility information received from an affiliate in a manner described in section 162.3(d)(1)(ii) (*i.e.,* identify the consumer, establish criteria to select the consumer, or decide which financial product or service to market to the consumer), the covered affiliate does not make a solicitation for the purposes of this subpart if the affiliate: (i) uses its own eligibility information obtained in connection with that relationship to market the covered affiliate's financial products or services; or (ii) directs its service provider to use the affiliate's own eligibility information to market the covered affiliate's financial products or services. Both situations (i) and (ii) assume that the covered affiliate whose financial products or services are being marketed has not used eligibility information received from the affiliate. In contrast, the core concept underlying situation (ii) is that the affiliate controls the actions of the service provider using that information. Since the affiliate controls the service provider's use of the eligibility information, the solicitation should not be attributed to the covered affiliate whose financial products or services will be marketed to the consumers. Instead, the solicitation should be attributed to the affiliate.

The Commission also recognizes that there may be situations where the covered affiliate whose financial products or services are being marketed does communicate and have contact

with the service provider of the affiliate. This situation might arise, for example, where the service provider performs services for various affiliates relying on information maintained in and accessed from a common database. In certain circumstances, the covered affiliate whose financial products or services are being marketed may communicate with the service provider, yet the service provider is still acting on behalf of the affiliate when it uses that affiliate's eligibility information in connection with marketing the covered affiliate's financial products or services. Proposed subparagraph (d)(5) describes the conditions under which a service provider (including an affiliated or third-party service provider) would be deemed to be acting on behalf of the affiliate that has or previously had a pre-existing business relationship with a consumer, rather than the covered affiliate whose financial products or services are being marketed, notwithstanding direct communications between the covered affiliate and the service provider.

Proposed subparagraph (d)(5) builds upon the concept of control of a service provider and thus is a natural outgrowth of proposed subparagraph (d)(4). Under the conditions set out in subparagraph (d)(5), the service provider is acting on behalf of an affiliate that obtained the eligibility information in connection with a pre-existing business relationship with the consumer because, *inter alia,* the affiliate controls the actions of the service provider in connection with the service provider's receipt and use of the eligibility information. This provision is designed to minimize uncertainty that may arise from application of the facts and circumstances test in subparagraph (d)(3) to cases that involve direct communications between a service provider and a covered affiliate whose financial products and services will be marketed to consumers.

In particular, proposed subparagraph (d)(5) provides that a covered affiliate does not make a solicitation subject to this subpart if a service provider receives eligibility information (regardless of whether such information is received through a common database or otherwise) from an affiliate and the service provider uses that eligibility information to market the covered affiliate's financial products or services to the consumer, only when five conditions are met.

Those five conditions are:

- First, the affiliate controls access to and use of its eligibility information by the service provider (including the right to establish specific terms and conditions under which the service provider may use such information to market the financial products or services of the covered affiliate that does not have such relationship). This requirement must be set forth in a written agreement between the affiliate and the service provider. The affiliate may demonstrate control by, for example, establishing and implementing reasonable policies and procedures applicable to the service provider's access to and use of its eligibility information.
- Second, the affiliate establishes specific terms and conditions under which the service provider may access and use that eligibility information to market the financial products or services of the covered affiliate that does not have a pre-existing business relationship (or those of affiliates generally) to the consumer, and periodically evaluates the service provider's compliance with those terms and conditions. These terms and conditions may include the identity of the affiliated companies whose financial products or services may be marketed to the consumer by the service provider, the types of financial products or services of affiliated companies that may be marketed, and the number of times the consumer may receive marketing materials. The affiliate must set forth in writing the specific terms and conditions, but need not set forth such terms and conditions in a written agreement. If a periodic evaluation by the affiliate that has or previously had a pre-existing business relationship with a consumer reveals that the service provider is not complying with those terms and conditions, the Commission expects the affiliate to take appropriate corrective action.
- Third, the affiliate requires the service provider to implement reasonable policies and procedures designed to ensure that the service provider uses its eligibility information in accordance with the terms and conditions established by the such affiliate relating to the marketing of the financial products or services of the covered affiliate that does not have a pre-existing business relationship. This requirement must be set forth in a written agreement between the affiliate and the service provider.
- Fourth, the affiliate that has or previously had a pre-existing business relationship with a consumer is identified on or with the marketing materials provided to the consumer. This requirement will be construed flexibly. For example, the affiliate may be identified directly on the marketing materials, on an introductory cover letter, on other documents included with the marketing materials, such as a periodic statement, or on the envelope which contains the marketing materials.
- Fifth, the covered affiliate that does not have a pre-existing business relationship with the consumer does not directly use the eligibility information of the affiliate that does have such relationship in the manner described in section 162.3(d)(1)(ii). These five conditions together ensure that the service provider is acting on behalf of the affiliate because that affiliate controls the service provider's receipt and use of such affiliate's eligibility information.

Section 162.4—Scope and Duration of Opt Out

Scope of Opt Out

The scope of the opt-out election is derived from language of section 624(a)(2)(A) of the FCRA and generally depends upon the content of the opt-out notice. Proposed section 162.4(a)(1) provides that, except as otherwise provided in that section, a consumer's election to opt out prohibits any covered affiliate subject to the scope of the opt-out notice from using the eligibility information received from another affiliate as described in the notice to make solicitations for marketing purposes to the consumer. The scope of the election in the proposed regulations is consistent with the scope of the final regulations promulgated by the Agencies.

Proposed section 162.4(a)(2)(i) clarifies that, in the context of a continuing relationship, an opt-out notice may apply to eligibility information obtained in connection with a single continuing relationship, multiple continuing relationships, continuing relationships established subsequent to delivery of the opt-out notice, or any other transaction with the consumer. Proposed section 162.4(a)(2)(ii) provides the following examples of a continuing relationship: (i) The covered affiliate is a futures commission merchant through whom a consumer has opened an account, or that carries the consumer's account on a fully-disclosed basis, or that effects or engages in commodity interest transactions with or for a consumer, even if the covered affiliate does not hold any assets of the consumer; (ii) the covered affiliate is an introducing broker that solicits or accepts specific orders for trades; (iii) the covered affiliate is a commodity trading advisor with whom a consumer has a contract or subscription, either written or oral, regardless of whether the advice is standardized, or is based on, or tailored

to, the commodity interest or cash market positions or other circumstances or characteristics of the particular consumer; (iv) the covered affiliate is a commodity pool operator, and accepts or receives from the consumer, funds, securities, or property for the purpose of purchasing an interest in a commodity pool; (v) the covered affiliate holds securities or other assets as collateral for a loan made to the consumer, even if the covered affiliate did not make the loan or do not affect any transactions on behalf of the consumer; or (vi) the covered affiliate regularly effects or engages in commodity interest transactions with or for a consumer even if covered affiliate does not hold any assets of the consumer.

Proposed section 162.4(a)(3)(i) limits the scope of an opt-out notice that is not connected with a continuing relationship. This section provides that if there is no continuing relationship between the consumer and a covered affiliate or its affiliate, and if the covered affiliate or its affiliate provides an opt-out notice to a consumer that relates to eligibility information obtained in connection with a transaction with the consumer, such as an isolated transaction, the opt-out notice only applies to eligibility information obtained in connection with that transaction. The notice cannot apply to eligibility information that may be obtained in connection with subsequent transactions or a continuing relationship that may be subsequently established by the consumer with the covered affiliate or its affiliate. Proposed section 162.4(a)(3)(ii) provides the following examples of where no continuing relationship exists: (i) The covered affiliate has acted solely as a "finder" for a futures commission merchant, and the covered affiliate does not solicit or accept specific orders for trades; or (ii) the covered affiliate has solicited the consumer to participate in a pool or to direct his or her account and he or she has not provided the covered affiliate with funds to participate in a pool or entered into any agreement with the covered affiliate to direct his or her account.

Proposed section 162.4(a)(4) provides that a consumer may be given the opportunity to choose from a menu of alternatives when electing to prohibit solicitations. An opt-out notice may give the consumer the opportunity to elect to prohibit: solicitations from certain types of affiliates covered by the opt-out notice but not other types of affiliates covered by the notice; solicitations based on certain types of eligibility information but not other types of eligibility information; or solicitations by certain methods of delivery but not other methods of delivery, so long as one of the alternatives is the opportunity to prohibit all solicitations from all of the affiliates that are covered by the notice. The Commission believes that the language of section 624(a)(2)(A) of the FCRA requires the opt-out notice to contain a single opt-out option for all solicitations within the scope of the notice. The Commission solicits comments as to whether it would be burdensome for consumers to receive a number of different opt-out notices, even from the same affiliate, under the circumstances described above.

Proposed section 162.4(a)(5) contains a special rule for notice following termination of a continuing relationship. This proposed regulation provides that a consumer must be given a new opt-out notice if, after all continuing relationships with a covered affiliate or its affiliate have been terminated, the consumer subsequently establishes a new continuing relationship with the covered affiliate or the same or a different affiliate and the consumer's eligibility information is used to make a solicitation. In addition, this section affords the consumer and the company a fresh start following termination of all continuing relationships by requiring a new opt-out notice if a new continuing relationship is subsequently established.

The new opt-out notice must apply, at a minimum, to eligibility information obtained in connection with the new continuing relationship. The new opt-out notice may apply more broadly to information obtained in connection with a terminated relationship and give the consumer the opportunity to opt out with respect to eligibility information obtained in connection with both the terminated and the new continuing relationships. Further, the consumer's failure to opt out does not override a prior opt-out election by the consumer applicable to eligibility information obtained in connection with a terminated relationship that is still in effect, regardless of whether the new opt-out notice applies to eligibility information obtained in connection with the terminated relationship. The Commission notes, however, that where a consumer was not given an opt-out notice in connection with the initial continuing relationship because eligibility information obtained in connection with that continuing relationship was not shared with affiliates for use in making solicitations, an opt-out notice provided in connection with a new continuing relationship would have to apply to any eligibility information obtained in connection with the terminated relationship that is to be shared with affiliates for use in making future solicitations.

Duration of Opt-Out Election

Proposed section 162.4(b) provides that an opt-out election must be effective for a period of at least five years beginning when the consumer's opt-out election is received and implemented, unless the consumer subsequently revokes the opt-out election in writing or, if the consumer agrees, electronically. The Commission believes that this approach is consistent with the approach taken by the Agencies and the Commission's approach in the GLB Act privacy rule in Part 160. The Commission does not believe it is necessary or appropriate to permit oral revocation.

The Commission believes that this approach provides companies with flexibility in complying with the proposed regulations. For example, to avoid the cost and burden of tracking consumer opt outs over five-year periods with varying start and end dates and sending out extension notices in five-year cycles, some companies may choose to treat the consumer's opt-out election as effective for a period longer than five years, including in perpetuity, unless revoked by the consumer. A company that chooses to honor a consumer's opt-out election for more than five years would not violate the proposed regulations.

The Commission seeks comment on whether the consumers should be given the opportunity to opt-out permanently from receiving marketing solicitations from affiliates regardless of the opt-out period stated in the opt-out notice. This approach would provide consumers with the ability to avoid receiving and responding to extension notices every five years.

Time Period To Opt Out

Proposed section 162.4(c) provides that a consumer may opt out at any time. Indeed, a consumer may opt out even if the consumer did not opt out in response to the initial opt-out notice or if the consumer's election to opt out was not prompted by an opt-out notice. Regardless of when the consumer opts out, the opt out must be effective for a period of at least five years.

No Effect on Opt-Out Period

Proposed section 162.4(d) provides that an opt-out period may not be shortened by sending a renewal notice to the consumer before expiration of the opt-out period, even if the consumer does not renew the opt out.

Section 162.5—Contents of Opt-Out Notice; Consolidated and Equivalent Notices

Contents in General

The Commission believes that proposed section 162.5(a) reflects the intent of Congress, as expressed in section 624(a)(2)(B) of the FCRA, which provides that the notice required by this proposed regulation must be in writing, "clear, conspicuous, and concise," and that the method for opting out must be "simple." Specifically, section 162.5(a)(1)(i)(A) provides that all opt-out notices must identify, by name, the affiliate that has or previously had a pre-existing business relationship with a consumer and is providing the notice. Section 162.5(a)(1)(B) provides that a group of affiliates may jointly provide the notice. If the notice is provided jointly by multiple affiliates and each affiliate shares a common name, then the notice may indicate that it is being provided by multiple companies with the same name or multiple companies in the same group or family of companies. Acceptable ways of identifying the multiple affiliates providing the notice include stating that the notice is provided by "all of the XYZ companies," or by listing the name of each affiliate providing the notice. A representation that the notice is provided by "the XYZ commodity trading advisors and commodity pools" applies to all companies in those categories, not just some of those companies. But if the affiliates providing the notice do not all share a common name, then the notice must either separately identify each affiliate by name or identify each of the common names used by those affiliates.

Proposed section 162.5(a)(1)(ii) provides that an opt-out notice must contain a list of the affiliates or types of affiliates covered by the notice. The notice may apply to multiple affiliates and to companies that become affiliates after the notice is provided to the consumer. The rule for identifying the affiliates covered by the notice is substantially similar to the rule for identifying the affiliates providing the notice in section 162.5(a)(i), as described in the previous paragraph.

Proposed sections 162.5(a)(1)(iii)–(vii), respectively, require the opt-out notice to include the following: A general description of the types of eligibility information that may be used to make solicitations to the consumer; a statement that the consumer may elect to limit the use of eligibility information to make solicitations to the consumer; a statement that the consumer's election will apply for the specified period of time stated in the notice and, if applicable, that the consumer will be allowed to renew the election once that period expires; if the notice is provided to consumers who may have previously opted out, that the consumer who has chosen to limit marketing offers does not need to act again until the consumer receives a renewal notice; and a reasonable and simple method for the consumer to opt out.

Proposed section 162.5(a)(2) provides that the opt-out notice must specify the length of the opt-out period, if the consumer is granted an opt-out period longer than five years. Proposed section 162.5(a)(3), however, provides that a company that subsequently chooses to increase the duration of the opt-out period that it previously disclosed or honor the opt out in perpetuity has no obligation to provide a revised notice to the consumer. In that case, the result is the same as if the company established a five-year opt-out period and then did not send a renewal notice at the end of that period. So long as no solicitations are made using eligibility information received from an affiliate, there would be no violation of the statute or regulation for failing to send a renewal notice in this situation. A covered affiliate receiving eligibility information from an affiliate would be prohibited from using that information to make solicitations to a consumer unless a renewal notice is first provided to the consumer and the consumer does not renew the opt out.

Use of the model form in Appendix A, in appropriate circumstances, would comply with paragraph (a), but is not required.

Joint Relationships

Proposed section 162.5(b) sets out a rule that would apply when two or more consumers jointly obtain a financial product or service from an affiliate subject to the rule (referred to in the proposed regulation as "joint consumers"). Under the proposal, an affiliate subject to the rule could provide a single opt-out notice to joint consumers. The notice would have had to indicate whether the affiliate would consider an opt out by a joint consumer as an opt out by all of the associated consumers, or whether each consumer would have to opt out separately. The affiliate could not require all consumers to opt out before honoring an opt-out election by one of the joint consumers. The revised provision is substantively similar to the joint relationships provision of the GLB Act privacy rule in Part 160, except to the extent that rule refers to the sharing of information among affiliates. The Commission requests comments on whether information about a joint account should be allowed to be used for making solicitations to a joint consumer who has not opted out.

Alternative Contents

Proposed paragraph (c) provides that if the consumer is afforded an alternative but broader right to opt out of receiving marketing than is required by this subpart, the requirements of proposed section 162.5(a) may be satisfied by providing the consumer with a clear, conspicuous, and concise notice that accurately discloses the consumer's opt-out rights.

Consolidated and Equivalent Notices

Proposed section 162.5(d) provides that an opt-out notice required by this subpart could be coordinated and consolidated with any other notice or disclosure required to be issued under any other provision of law, including but not limited to the notice required by Title V of the GLB Act. In addition, proposed section 162.5(e) provides that a notice or other disclosure that is equivalent to the notice required by this subpart, and that is provided to a consumer together with disclosures required by any other provision of law, would satisfy the requirements of this section.

Including an affiliate marketing opt-out notice under this subpart and an initial or annual notice under the GLB Act raises special issues, however, because GLB Act notices typically state that the consumer does not need to opt out again if the consumer previously opted-out. This statement would be accurate if the company and its affiliates choose to make the affiliate marketing opt out effective in perpetuity. However, if the opt-out period is limited to a defined period of five years or more, such a statement would not be accurate with respect to the extension notice, and the notice would have to make clear to the consumer the necessity of opting-out again in order to extend the opt-out election.

The Commission solicits comments on the consolidation of the affiliate marketing notice under this subpart with the GLB Act privacy notices in Part 160.

Model Notices

Proposed section 162.5(f) states that proposed model notices are provided in Appendix A of Part 162. The Commission has provided these proposed model notices to facilitate compliance with the proposed rule. It should be noted, however, that the

proposed rule does not require use of the model notices.

Section 162.6—Reasonable Opportunity to Opt Out

Proposed paragraph (a) sets forth the general rule prohibiting covered affiliates from using eligibility information about a consumer received from an affiliate to make a solicitation to such consumer about the covered affiliate's financial products or services, unless the consumer is provided a reasonable opportunity to opt out, as required by the proposed regulation. The general rule does not set a mandatory waiting period in all cases. Instead, proposed paragraph (b) sets forth several examples illustrating what constitutes a reasonable opportunity to opt out. Paragraph (b) does maintain, however, a safe harbor of 30 days to provide certainty to entities that choose to follow the 30-day waiting period. Although 30 days is a safe harbor in all cases, an affiliate subject to the rule providing an opt-out notice may decide, at its option, to give consumers more than 30 days in which to decide whether to opt out. A shorter waiting period could be adequate in certain situations, depending on the circumstances, in accordance with the general test for a reasonable opportunity to opt out.

Section 162.7—Reasonable and Simple Methods of Opting Out

Section 624 of the FCRA requires that consumers are given reasonable and simple methods of opting out. Proposed paragraph (a) prohibits covered affiliates from using eligibility information about a consumer received from an affiliate to make a solicitation to such consumer about the financial products or services of the covered affiliate, unless the consumer is provided a reasonable and simple method to opt out, as required by this proposed regulation.

Proposed paragraph (b) sets forth reasonable and simple methods of opting out. Such methods include designating a check-off box in a prominent position on an opt-out election form, including a reply form and a self-addressed envelope (in a mailing), providing an electronic means that can be electronically mailed or processed through an Internet Web site, providing a toll-free telephone number, or exercising an opt-out election through whatever means are acceptable under a consolidated privacy notice required under other laws.

Proposed paragraph (c) clarifies that each consumer may be required to opt out through a specific medium, as long as that medium is reasonable and simple for that consumer.

Section 162.8—Acceptable Delivery of Opt-Out Notices

Proposed section 162.8(a) provides that an affiliate that has or previously had a pre-existing business relationship with a consumer must deliver an opt-out notice so that each consumer can reasonably be expected to receive actual notice. For opt-out notices that are delivered electronically at the consumer's election, proposed section 162.8(b) provides that opt-out notices may be delivered either in accordance with the electronic disclosure provisions in section 101 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 et seq. or in accordance with CFTC Regulation 1.4.

Section 162.9—Renewal of Opt Out

Proposed section 162.9 describes the procedures for renewal or extension of an opt-out election. Proposed subparagraph (a)(1) provides that, after the opt-out period expires, and unless an exception in section 162.3(c) applies, a covered affiliate may not make a solicitation to a consumer based on eligibility information received by an affiliate unless: The consumer has been given a renewal notice that complies with requirements of this section and the other sections 162.6 through 162.8; the consumer is given a reasonable opportunity and a reasonable and simple to renew the opt-out election; and the consumer does not opt out. Proposed subparagraph (a)(2) provides that the renewal period for each renewal shall be a period of not less than five years. Proposed subparagraph (a)(3) outlines which affiliates may provide notice required by this section. A renewal notice must be provided either by: The affiliate that provided the previous opt-out notice or its successor; or as part of a joint renewal notice from two or more members of an affiliated group of companies, or their successors, that jointly provided the previous opt-out notice. The Commission believes that this subparagraph will provide flexibility to account for changes in the corporate structure, which may result from mergers and acquisitions, corporate names changes, and other events.

Proposed paragraph (b) addresses the contents of a renewal or extension notice. The Commission recognizes that the content of the renewal notice differs from the content of the initial notice. Nothing in the FCRA, however, requires identical content in the initial and renewal notices. Moreover, the FCRA requires the Commission to provide specific guidance to ensure that opt-out notices are clear, conspicuous and concise. The Commission believes that it is unreasonable to expect consumers, upon receipt of a renewal notice, to remember that they previously opted out five years ago (or longer) or, even if they do remember, to know that they must opt out again in order to renew their opt-out election. Therefore, to ensure that the renewal notice is meaningful, the Commission is proposing that the renewal notice must remind the consumer he or she must opt out again to renew the opt-out election and continue to limit the solicitations from covered affiliates. In addition, proposed paragraph (b) requires that the notice must accurately disclose the same items required to be disclosed in the initial opt-out notice under proposed section 162.5(a), along with a statement explaining that the consumer's prior opt-out election has expired or is about to expire, as applicable, and that if the consumer wishes to keep the consumer's opt-out election in force, the consumer must opt out again.

Proposed paragraph (c) addresses the timing of the renewal notice and provides that a renewal notice can be given to the consumer either a reasonable period of time before the expiration of the opt-out period, or any time after the expiration of the opt-out period but before solicitations that would have been prohibited by the expired opt-out election are made to the consumer. Providing the renewal notice to a consumer within a reasonable period of time before the expiration of the opt-out period is appropriate to facilitate the smooth transition of consumers that choose to change their election. A renewal notice given too far in advance of the expiration of the opt-out period, however, may be confusing to consumers. The Commission does not propose to set a fixed time for what would constitute a reasonable period of time before the expiration of the opt-out period to send a renewal notice, because a reasonable period of time may depend upon the amount of time afforded to the consumer for a reasonable opportunity to opt out, the amount of time necessary to process opt outs, and other factors. Nevertheless, providing a renewal notice on or with the last annual privacy notice required by the GLB Act privacy provisions sent to the consumer before the expiration of the opt-out period shall be deemed reasonable in all cases.

Proposed paragraph (d) clarifies that sending a renewal notice to the consumer before the expiration of the opt-out period does not shorten the five-

year opt-out period, even if the consumer does not renew the opt-out election.

B. Disposal Rules

As noted above, section 1088 of the Dodd-Frank Act also amends section 628 of the FCRA, which directs the Commission to adopt comparable and consistent rules with the Agencies regarding the disposal of sensitive consumer report information. The purpose of these rules is to reduce the risk of identity theft and other consumer harm from improper disposal of a consumer report or any record derived from one. The proposed disposal rules apply to any CFTC registrant that, for a business purpose, maintains or otherwise possesses such consumer report information.

The general disposal requirement provides that CFTC registrants covered by the proposed regulation "take reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal." The standard for disposal is flexible to allow CFTC registrants to determine what measures are reasonable based on the sensitivity of the information, the costs and benefits of different disposal methods, and relevant changes in technology over time. The proposed disposal rule's flexibility should also facilitate compliance for smaller CFTC registrants.

In the discussion that follows, the Commission solicits comment on specific aspects of the proposed disposal rules on a section-by-section basis.

Section 162.2—Definitions

In addition to the definitions previously discussed above, the proposed regulations to implement section 628 of the FCRA require the addition of the following terms to the definition section of the new Part 162.

Consumer Information

Proposed paragraph (h) defines the term "consumer information" to mean any record about an individual, whether in paper, electronic, or other form that is a consumer report or is derived from a consumer report.[14] Consumer information also means a compilation of such records. Consumer information does not include information that does not identify individuals, such as aggregate information or blind data. The Commission believes that a broad definition of the term, which includes all types of records that are consumer reports, or contain consumer information derived from consumer reports, will best effectuate the purposes of the FCRA. However, under this definition, information which does not identify a particular consumer would not be included. The Commission believes that limiting the definition to information which identifies particular consumers is consistent with the purpose of the FCRA.

Dispose or Disposal

Proposed paragraph (i) defines the terms "dispose" or "disposal" to mean the discarding or abandonment of consumer information or the sale, donation, or transfer of any medium, including computer equipment, upon which consumer information is stored. The sale, donation, or transfer of consumer information would not be considered "disposal" under the proposed regulation. For example, an entity subject to the proposed disposal rule that transfers consumer information to a third party for marketing purposes would not be discarding the information for the purposes of the proposed disposal rule. If the entity donates computer equipment on which consumer information is stored, however, the donation would be considered a disposal under the proposed disposal rule. The Commission requests comments on this definition.

Section 162.21—Disposal Rules

Proposed section 162.21 implements section 628(a)(1) of the FCRA. Proposed paragraph (a) would require any covered affiliate to adopt must adopt reasonable, written policies and procedures that address administrative, technical, and physical safeguards for the protection of consumer information. The proposal requires these written policies and procedures to be reasonably designed to: (1) Insure the security and confidentiality of consumer information; (2) protect against any anticipated threats or hazards to the security or integrity of consumer information; and (3) protect against unauthorized access to or use of consumer information that could result in substantial harm or inconvenience to any consumer.

Proposed paragraph (b) would require that any person that maintains or otherwise possesses consumer information to take "reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal." The Commission recognizes that there are few foolproof methods of record destruction. Therefore, the proposed regulation does not require persons subject to the rule to ensure perfect destruction of consumer information in every instance; rather, it requires covered entities to take reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal.

In determining what measures are "reasonable" under this subpart, the Commission expects that entities within the scope of the proposed regulation would consider the sensitivity of the consumer information, the nature and size of the entity's operations, the costs and benefits of different disposal methods, and relevant technological changes. "Reasonable measures" are very likely to require elements such as the establishment of policies and procedures governing disposal, as well as appropriate employee training.

The flexible standard for disposal in the proposed rule would allow persons subject to the rule to make decisions appropriate to their particular circumstances and should minimize the disruption of existing practices to the extent that they already provide appropriate protections for consumers. It is also intended to minimize the burden of compliance for smaller entities.

Despite the benefits of a flexible "reasonableness" standard, the Commission recognizes that such a standard could leave entities within the scope of the proposed regulations with some uncertainty about compliance. While each entity would have to evaluate what is appropriate for its size and the complexity of its operations, proposed paragraph (c) sets forth the following examples of what the Commission believes constitute "reasonable" disposal measures for purposes of the proposed regulation:

- Implementing and monitoring compliance with policies and procedures that require the burning, pulverizing, or shredding of papers containing consumer information so that the information cannot practicably be read or reconstructed;
- Implementing and monitoring compliance with policies and procedures that require the destruction or erasure of electronic media containing consumer information so

[14] The term "consumer report" is defined in section 603(d)(1) of the FCRA as "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for [several purposes, including employment, the provision of credit or insurance]."

that the information cannot practically be read or reconstructed; and

• After due diligence, entering into and monitoring compliance with a written contract with another party engaged in the business of record destruction to dispose of consumer information in a manner that is consistent with this rule.

The Commission invites comment on the proposed standard for disposal. In particular, the Commission seeks comment on whether the proposed "reasonableness" standard provides sufficient guidance to CFTC registrants. The Commission also seeks comment on whether the proposed disposal rule should include alternative standards, specify particular disposal methods, or should provide examples, and what those examples should be.

Proposed paragraph (d) makes clear that nothing in the proposed disposal rule is intended to create a requirement that a covered entity maintain or destroy any record pertaining to an individual. The rule also is not intended to affect any requirement imposed under any other provision of law to maintain or destroy such records, particularly the record keeping requirements located in Part 1 of the Commission's Regulations.

C. Effective Date

Pursuant to section 1100H of the Dodd-Frank Act, the Commission proposes to make the proposed regulations—the affiliate marketing rules and the disposal rules—become effective on the "designated transfer date" of authority from various Federal agencies to the Bureau. Section 1062 of the Dodd-Frank Act provides that the "designated transfer date" is a date designated in the **FEDERAL REGISTER** no later than 60 days after the enactment of the Dodd-Frank Act by the Secretary of the Treasury, the Chairman of the Board of Governors, the Chairman of the Federal Trade Commission, and several other Federal agencies.[15] On September 20, 2010, these Federal agencies issued a notice designating July 21, 2011 as the designated transfer date.[16] As a result, the Commission proposes to adopt the affiliate marketing rules and the disposal rules on that date.

[15] The heads of the other Federal agencies are: The Comptroller of the Currency; the Director of the Office of Thrift Supervision; the Secretary of the Department of Housing and Urban Development; the Director of the Office of Management and Budget; the Chairman of the National Credit Union Administration Board; and the Chairperson of the Corporation.

[16] *See* 75 FR 57252–02 (Sept. 20, 2010).

III. Cost-Benefit Analysis

Section 15(a) of the CEA [17] requires the Commission to consider the costs and benefits of its actions before issuing an order under the CEA. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of an order or to determine whether the benefits of the order outweigh its costs; rather, it requires that the Commission "consider" the costs and benefits of its actions. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular order is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the CEA.

The proposed regulations would implement new statutory provisions enacted by Title X of the Dodd-Frank Act. These proposed regulations would require CFTC registrants to do two things with respect to certain consumer information. First, the proposed regulations would require CFTC registrants to provide consumers with the opportunity to prohibit affiliates from using certain information to make marketing solicitations to consumers. Second, the proposed rules would require CFTC registrants that possess or maintain consumer report information in connection with their business activities to develop and implement a written program for the proper disposal of such information.

With respect to costs, the Commission has determined that costs to market participants would be *de minimis* because: (1) The Commission is providing model notices in the proposed regulations in order to assist these participants in complying with the affiliate marketing rules; (2) the affiliate marketing rules only require periodic notice (*i.e.,* at a maximum, companies would have to provide notice to a consumer once every five years; at a minimum, companies would have to provide notice only once per consumer); (3) market participants can file consolidated and equivalent notices in order to comply with the affiliate marketing rules; and (4) the disposal rules were designed to provide market participants with the greatest flexibility in the development and implementation of a disposal program (which may vary according to a company's size and the complexity of its operations, the costs and benefits of available disposal methods, and the sensitivity of information involved). The Commission also has determined that the costs to the general public are: (1) Absent the implementation of the affiliate marketing rules, consumers would have no control over both the use of their personal information, and the number of solicitations such consumers would receive from affiliates of company with which they have a pre-existing business relationship; and (2) absent the implementation of the disposal rules, would increase the chances that consumer information would be accessible to third parties who may use such information for identity theft or other unlawful purposes.

With respect to benefits, the Commission has determined that, through the implementation of the affiliate marketing rules, consumers generally will be able to opt out of receiving unsolicited and targeted materials from businesses with which the consumers have no pre-existing business relationship. In addition, the Commission has determined that, as a result of the implementation of the disposal rules, the potential for the misuse of consumer information will greatly decrease.

The Commission invites public comment on its cost-benefit considerations. Commenters are also are invited to submit any data or other information that they may have quantifying or qualifying the costs and benefits of the proposed regulations with their comment letters.

IV. Paperwork Reduction Act

Provisions of proposed Part 162 would result in new collection of information requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA"). The Commission therefore is submitting this proposal to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The title for this collection of information is "Part 162—Protection of Consumer Information Under the Fair Credit Reporting Act." If adopted, responses to this new collection of information would be mandatory. The Commission will protect proprietary information according to the Freedom of

[17] 7 U.S.C. 19(a).

Information Act and 17 CFR part 145, "Commission Records and Information." In addition, section 8(a)(1) of the CEA strictly prohibits the Commission, unless specifically authorized by the CEA, from making public "data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers." The Commission also is required to protect certain information contained in a government system of records according to the Privacy Act of 1974, 5 U.S.C. 552a.

1. Information Provided by Reporting Entities/Persons

Under proposed Part 162, reporting or recordkeeping CFTC registrants, which presently would include approximately 3,172 persons (including an estimate of the number of new CFTC registrants pursuant to Title VII of the Dodd-Frank Act),[18] would be required to collect information and keep records for the purposes of providing opt-out notices to consumers at a maximum of at least every five years. The proposed collection for the affiliate marketing rules is estimated to involve 0.01 burden hours per report or record. The estimated number of opt-out notices per five-year period is 412,000. The estimated aggregate number of burden hours each five-year period is 13,068.64 burden hours for the affiliate marketing rules.

The same number of persons would be required to develop written disposal plans only once. The proposed collection for the disposal rules is estimated to involve between three to 10 burden hours per plan, at an average of 3.5 burden hours, for an aggregate of 11,102 burden hours.

2. Information Collection Comments

The Commission invites the public and other Federal agencies to comment on any aspect of the reporting and recordkeeping burdens discussed above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments in order to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission's estimate of the burden of the proposed collection of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Comments may be submitted directly to the Office of Information and Regulatory Affairs, by fax at (202) 395–6566 or by e-mail at *OIRAsubmissions@omb.eop.gov.* Please provide the Commission with a copy of submitted comments so that all comments can be summarized and addressed in the final rule preamble. Refer to the **ADDRESSES** section of this notice of proposed rulemaking for comment submission instructions to the Commission. A copy of the supporting statements for the collections of information discussed above may be obtained by visiting *RegInfo.gov.* OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is most assured of being fully effective if received by OMB (and the Commission) within 30 days after publication of this notice of proposed rulemaking.

V. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA") [19] requires that agencies consider whether the regulations they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact.[20] The regulations proposed by the Commission shall affect only futures commission merchants, introducing brokers, commodity trading advisors, commodity pool operators, swap dealers and major swap participants. The Commission has determined that the notice obligations under this proposed regulation will not create a significant economic impact on a substantial number of small entities. Moreover, the Commission previously has determined that futures commission merchants and commodity pool operators are not small entities for purposes of the RFA.[21] Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed rules, will not have a significant impact on a substantial number of small entities.

VI. Text of Proposed Rules

List of Subjects in 17 CFR Part 162

Consumer protection, Privacy.

For the reasons stated in the preamble, the Commodity Futures Trading Commission proposes to add 17 CFR part 162 to read as follows:

PART 162—PROTECTION OF CONSUMER INFORMATION UNDER THE FAIR CREDIT REPORTING ACT

Sec.

Authority: Sec. 1088, Pub. L. 111–203; 124 Stat. 1376 (2010).

§ 162.1 Purpose and scope.

(a) *Purpose.* The purpose of this part is to implement various provisions in the Fair Credit Reporting Act, 15 U.S.C. 1681, *et seq.* ("FCRA"), which provide certain protections to consumer information.

(b) *Scope.* This part applies to certain consumer information held by the entities listed below. This part shall apply to futures commission merchants, retail foreign exchange dealers, commodity trading advisors, commodity pool operators, introducing brokers,

[18] *See* the National Futures Association's ("NFA") Internet Web site at: *http://www.nfa.futures.org/NFA-registration/NFA-membership-and-dues.HTML* for the most up-to-date number of CFTC registrants. For the purposes of the PRA calculation, Commission staff used the number of registered futures commission merchants, commodity trading advisors, commodity pool operators and introducing brokers on the NFA's Web site as of August 31, 2010.

Commission staff estimated the number of swap dealers and major swap participants, which staff believes will register with the Commission following the issuance of final rules under the Dodd-Frank Act further defining the terms "swap dealers" and "major swap participants" and setting forth a registration regime for these entities. While staff believes that there may likely be approximately 200 swap dealers, we have taken a conservative approach in estimating that there will be 250 swap dealers for Paperwork Reduction Act purposes.

Some of the entities that were registered as futures commission merchants as of August 31, 2010 will soon register as retail foreign exchange dealers. Consequently, the total number of CFTC registrants will not be affected as a result of the change in registration from future commission merchants to retail foreign exchange dealers.

[19] 5 U.S.C. 601 *et seq.*

[20] 5 U.S.C. 601 *et seq.*

[21] Previous determinations for FCMs at 47 FR 18618, 18619 (1982) and CPOs at 47 FR 18618, 18619 (1982).

swap dealers and major swap participants, regardless of whether they are required to register with the Commission. This part does not apply to foreign futures commission merchants, foreign retail foreign exchange dealers, commodity trading advisors, commodity pool operators, introducing brokers, swap dealers and major swap participants unless such entity registers with the Commission. Nothing in this part modifies limits or supersedes the requirements set forth in Part 160 of this title.

(c) *Examples.* The examples in this part are not exclusive. Compliance with an example, to the extent applicable, constitutes compliance with this part. Examples in a section illustrate only the issue described in the section and do not illustrate any other issue that may arise in this part.

§ 162.2 Definitions.

(a) *Affiliate.* The term "affiliate" of a means any company that is under common ownership or common corporate control with a covered affiliate.

(b) *Clear and conspicuous.* The term "clear and conspicuous" means reasonably understandable and designed to call attention to the nature and significance of the information presented in the notice.

(c) *Common ownership or common corporate control.* The term "common ownership or common corporate control" means the power to exercise a controlling influence over the management or policies of a company whether through ownership of securities, by contract, or otherwise. Any person who owns beneficially, either directly or through one or more controlled companies, more than 25 percent of the voting securities of any company is presumed to control the company. Any person who does not own more than 25 percent of the voting securities of a company will be presumed not to control the company.

(d) *Company.* The term "company" means any corporation, limited liability company, business trust, general or limited partnership, association, or similar organization.

(e) *Concise.*—

(1) *In general.* The term "concise" means a reasonably brief expression or statement.

(2) *Combination with other required disclosures.* A notice required by this part may be concise even if it is combined with other disclosures required or authorized by Federal or state law.

(f) *Consumer.* The term "consumer" means an individual person.

(g) *Consumer information.* The term "consumer information" means any record about an individual, whether in paper, electronic, or other form, that is a consumer report or is derived from a consumer report. Consumer information also means a compilation of such records. Consumer information does not include information that does not identify individuals, such as aggregate information or blind data.

(h) *Covered affiliate.* The term "covered affiliate" means a futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, swap dealer or major swap participant, which is subject to the jurisdiction of the Commission.

(i) *Dispose or Disposal.*—

(1) *In general.* The terms "dispose" or "disposal" means:

(i) The discarding or abandonment of consumer information; or

(ii) The sale, donation, or transfer of any medium, including computer equipment, upon which consumer information is stored.

(2) *Sale, donation, or transfer of consumer information.* The sale, donation, or transfer of consumer information is not considered disposal for the purposes of subpart B.

(j) *Dodd-Frank Act.* The term "Dodd-Frank Act" means the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, 124 Stat. 1376 (2010)).

(k) *Eligibility information.* The term "eligibility information" means any information that would be a consumer report if the exclusions from the definition of "consumer report" in section 603(d)(2)(A) of the FCRA did not apply. Examples of the type of information that would fall within the definition of eligibility information includes an affiliate's own transaction or experience information, such as information about a consumer's account history with that affiliate, and other information, such as information from credit bureau reports or applications. Eligibility information does not include aggregate or blind data that does not contain personal identifiers such as account numbers, names, or addresses.

(l) *FCRA.* The term "FCRA" means the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*).

(m) *Financial product or service.* The term "financial product or service" means any product or service that a futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, major swap participant or swap dealer could offer that is subject to the Commission's jurisdiction.

(n) *GLB Act.* The term "GLB Act" means the Gramm-Leach-Bliley Act (Pub. L. No. 106–102, 113 Stat. 1338 (1999)).

(o) *Major swap participant.* The term "major swap participant" has the same meaning as in section 1a(33) of the Commodity Exchange Act, 7 U.S.C. 1 *et seq.,* as may be further defined by this title, and includes any person registered as such thereunder.

(p) *Person.* The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, or other entity.

(q) *Pre-existing business relationship.* The term "pre-existing business relationship" means a relationship between a person, or a person's licensed agent, and a consumer based on—

(1) A financial contract between the person and the consumer which is in force on the date on which the consumer is sent a solicitation by this part;

(2) The purchase, rental, or lease by the consumer of a persons' services or a financial transaction (including holding an active account or policy in force or having another continuing relationship) between the consumer and the person, during the 18-month period immediately preceding the date on which the consumer is sent a solicitation covered by this part; or

(3) An inquiry or application by the consumer regarding a financial product or service offered by that person during the three-month period immediately preceding the date on which the consumer is sent a solicitation covered by this part.

(r) *Solicitation*—(1) *In general.* The term "solicitation" means the marketing of a financial product or service initiated by an affiliate to a particular consumer that is—

(i) Based on eligibility information communicated to that covered affiliate by an affiliate that has or previously had the pre-existing business relationship with a consumer as described in this part; and

(ii) Intended to encourage the consumer to purchase or obtain such financial product or service.

A solicitation does not include marketing communications that are directed at the general public.

(2) *Examples.* Examples of what communications constitute a solicitation include communications such as a telemarketing solicitation, direct mail, or e-mail, when those communications are directed to a specific consumer based on eligibility information. A solicitation does not

include communications that are directed at the general public without regard to eligibility information, even if those communications are intended to encourage consumers to purchase financial products and services from the affiliate initiating the communications.

(s) *Swap dealer.* The term "swap dealer" has the same meaning as in section 1a(49) of the Commodity Exchange Act, 7 U.S.C. 1 *et seq.,* as may be further defined by this title, and includes any person registered as such thereunder.

Subpart A—Business Affiliate Marketing Rules

§ 162.3 Affiliate marketing opt out and exceptions.

(a) *Initial notice and opt out.* A covered affiliate may not use eligibility information about a consumer that the covered affiliate receives from an affiliate with the consumer to make a solicitation for marketing purposes to such consumer unless—

(1) It is clearly and conspicuously disclosed to the consumer in writing or if the consumer agrees, electronically, in a concise notice that the person may use shared eligibility information about that consumer received from an affiliate to make solicitations for marketing purposes to such consumer;

(2) The consumer is provided a reasonable opportunity and a reasonable and simple method to opt out, or prohibit the covered affiliate from using eligibility information to make solicitations for market purposes to the consumer; and

(3) The consumer has not opted out.

(b) *Persons responsible for satisfying the notice requirement.* The notice required by this section must be provided:

(1) By an affiliate that has or previously had a pre-existing business relationship with a consumer; or

(2) As part of a joint notice from two or more members of an affiliated group of companies, provided that at least one of the affiliates on the joint notice has or previously had a pre-existing business relationship with the consumer.

(c) *Exceptions.* These proposed regulations would not apply to the following covered affiliate:

(1) A covered affiliate that has a pre-existing business relationship with a consumer;

(2) Communications between an employer and employee-consumer (or his or her beneficiary) in connection with an employee benefit plan;

(3) A covered affiliate that is currently providing services to the consumer;

(4) If the consumer initiated the communication with the covered affiliate by oral, electronic, or written means;

(5) If the consumer authorized or requested the covered affiliate's solicitation; or

(6) If compliance by a person with these regulations would prevent that person's compliance with state insurance laws pertaining to unfair discrimination.

(d) *Making solicitations.*

(1) *When a solicitation occurs.* A covered affiliate makes a solicitation for marketing purposes if the person—

(i) Receives eligibility information from an affiliate;

(ii) Uses that eligibility information to do one or more of the following:

(A) Identify the consumer or type of consumer to receive a solicitation;

(B) Establish criteria used to select the consumer to receive a solicitation about the covered affiliate's financial products or services; or

(C) Decide which of the services or contracts to market to the consumer or tailor the solicitation to that consumer; and

(iii) As a result of the covered affiliate's use of the eligibility information, the consumer is provided a solicitation.

(2) *Receipt of eligibility information.* A covered affiliate may receive eligibility information from an affiliate in various ways, including when the affiliate places that information into a common database that the covered affiliate may access.

(3) *Service Providers.* Except as provided in paragraph (d)(5) of this section, a covered affiliate receives or uses an affiliate's eligibility information if a service provider acting on the covered affiliate's behalf (regardless of whether such service provider is a third party or an affiliate of the covered affiliate) receives or uses that information in the manner described in paragraph (d)(1)(i) or (d)(1)(ii) of this section. All relevant facts and circumstances will determine whether a service provider is acting on behalf of a covered affiliate when it receives or uses an affiliate's eligibility information in connection with marketing the covered affiliate's financial products or services.

(4) *Use by an affiliate of its own eligibility information.* Unless a covered affiliate uses eligibility information that the covered affiliate receives from an affiliate in the manner described in paragraph (d)(2) of this section, the covered affiliate does not make a solicitation subject to this subpart:

(i) Uses its own eligibility information that it obtained in connection with a pre-existing business relationship it has or previously had with the consumer to market the covered affiliate's financial products or services to the consumer; or

(ii) Directs its service provider to use the affiliate's own eligibility information that it obtained in connection with a pre-existing business relationship it has or previously had with the consumer to market the covered affiliate's financial products or services to the consumer, and the covered affiliate does not communicate directly with the service provider regarding that use.

(5) *Use of eligibility information by a service provider*—(i) *In general.* A covered affiliate does not make a solicitation subject to this subpart if a service provider (including an affiliated or third-party service provider that maintains or accesses a common database that the covered affiliate may access) receives eligibility information from an affiliate that has or previously had a pre-existing business relationship with the consumer and uses that eligibility information to market the covered affiliate's financial products or services to the consumer, so long as—

(A) The affiliate controls access to and use of its eligibility information by the service provider (including the right to establish the specific terms and conditions under which the service provider may use such information to market the covered affiliate's financial products or services);

(B) The affiliate establishes specific terms and conditions under which the service provider may access and use such affiliate's eligibility information to market the covered affiliate's financial products and services (or those of affiliates generally) to the consumer, such as the identity of the affiliated companies whose financial products or services may be marketed to the consumer by the service provider, the types of financial products or services of affiliated companies that may be marketed, and the number of times the consumer may receive marketing materials, and periodically evaluates the service provider's compliance with those terms and conditions;

(C) The affiliate requires the service provider to implement reasonable policies and procedures designed to ensure that the service provider uses such affiliate's eligibility information in accordance with the terms and conditions established by such affiliate relating to the marketing of the covered affiliate's financial products or services;

(D) The affiliate is identified on or with the marketing materials provided to the consumer; and

(E) The covered affiliate does not directly use its affiliate's eligibility

information in the manner described in paragraph (b)(1)(ii) of this section.

(ii) *Writing requirements.* (A) The requirements of paragraphs (b)(5)(i)(A) and (C) of this section must be set forth in a written agreement between the affiliate that has or previously had a pre-existing business relationship with the consumer and the service provider; and

(B) The specific terms and conditions established by the affiliate as provided in paragraph (b)(5)(i)(B) of this section must be set forth in writing.

(e) *Relation to affiliate-sharing notice and opt out.* Nothing in this rulemaking will limit the responsibility of a covered affiliate to comply with the notice and opt-out provisions under other privacy rules under the FCRA, the GLB Act or the CEA.

§ 162.4 Scope and duration of opt out.

(a) *Scope of opt-out election*—(1) *In general.* The consumer's election to opt out prohibits any covered affiliate subject to the scope of the opt-out notice from using eligibility information received from another affiliate to make solicitations to the consumer.

(2) *Continuing relationship*—(i) *In general.* If the consumer establishes a continuing relationship with a covered affiliate or its affiliate, an opt-out notice may apply to eligibility information obtained in connection with—

(A) A single continuing relationship or multiple continuing relationships that the consumer establishes with a covered affiliate or its affiliates, including continuing relationships established subsequent to delivery of the opt-out notice, so long as the notice adequately describes the continuing relationships covered by the opt out; or

(B) Any other transaction between the consumer and the covered affiliate or its affiliates as described in the notice.

(ii) *Examples of a continuing relationship.* A consumer has a continuing relationship with a covered affiliate or its affiliate if:

(A) The covered affiliate is a futures commission merchant through whom a consumer has opened an account, or that carries the consumer's account on a fully-disclosed basis, or that effects or engages in commodity interest transactions with or for a consumer, even if the covered affiliate does not hold any assets of the consumer;

(B) The covered affiliate is an introducing broker that solicits or accepts specific orders for trades;

(C) The covered affiliate is a commodity trading advisor with whom a consumer has a contract or subscription, either written or oral, regardless of whether the advice is standardized, or is based on, or tailored to, the commodity interest or cash market positions or other circumstances or characteristics of the particular consumer;

(D) The covered affiliate is a commodity pool operator, and accepts or receives from the consumer, funds, securities, or property for the purpose of purchasing an interest in a commodity pool;

(E) The covered affiliate holds securities or other assets as collateral for a loan made to the consumer, even if the covered affiliate did not make the loan or do not affect any transactions on behalf of the consumer; or

(F) The covered affiliate regularly effects or engages in commodity interest transactions with or for a consumer even if the covered affiliate does not hold any assets of the consumer.

(3) *No continuing relationship*—(i) *In general.* If there is no continuing relationship between a consumer and the covered affiliate or its affiliate, and the covered affiliate or its affiliate obtain eligibility information about a consumer in connection with a transaction with the consumer, such as an isolated transaction or a credit application that is denied, an opt-out notice provided to the consumer only applies to eligibility information obtained in connection with that transaction.

(ii) *Examples of no continuing relationship.* A consumer does not have a continuing relationship with a covered affiliate or its affiliate if:

(A) The covered affiliate has acted solely as a "finder" for a futures commission merchant, and the covered affiliate does not solicit or accept specific orders for trades; or

(B) The covered affiliate has solicited the consumer to participate in a pool or to direct his or her account and he or she has not provided the covered affiliate with funds to participate in a pool or entered into any agreement with the covered affiliate to direct his or her account.

(4) *Menu of alternatives.* A consumer may be given the opportunity to choose from a menu of alternatives when electing to prohibit solicitations, such as by electing to prohibit solicitations from certain types of affiliates covered by the opt-out notice but not other types of affiliates covered by the notice, electing to prohibit solicitations based on certain types of eligibility information but not other types of eligibility information, or electing to prohibit solicitations by certain methods of delivery but not other methods of delivery. However, one of the alternatives must allow the consumer to prohibit all solicitations from all of the affiliates that are covered by the notice.

(5) *Special rule for a notice following termination of all continuing relationships.* A consumer must be given a new opt-out notice if, after all continuing relationships with the covered affiliate or its affiliate(s) are terminated, the consumer subsequently establishes another continuing relationship with the covered affiliate or its affiliate(s) and the consumer's eligibility information is to be used to make a solicitation. The new opt-out notice must apply, at a minimum, to eligibility information obtained in connection with the new continuing relationship. Consistent with paragraph b of this section, the consumer's decision not to opt out after receiving the new opt-out notice would not override a prior opt-out election by the consumer that applies to eligibility information obtained in connection with a terminated relationship, regardless of whether the new opt-out notice applies to eligibility information obtained in connection with the terminated relationship.

(b) *Duration of opt-out election.* An opt-out election must be effective for a period of at least five years beginning when the consumer's opt-out election is received and implemented, unless the consumer subsequently revokes the opt-out election in writing or, if the consumer agrees, electronically. An opt-out election may be established for a period of more than five years or for an indefinite period unless revoked.

(c) *Time period in which a consumer can opt out.* A consumer may opt out at any time.

(d) *No effect on opt-out period.* An opt-out period may not be shortened by sending a renewal notice to the consumer before expiration of the opt-out period, even if the consumer does not renew the opt out.

§ 162.5 Contents of opt-out notice; consolidated and equivalent notices.

(a) *Contents of the opt-out notice*—(1) *In general.* An opt-out notice must be in writing, be clear and conspicuous, as well as concise, and must accurately disclose the following:

(i)(A) The name of the affiliate that has or previously had a pre-existing business relationship with a consumer, which is providing the notice; or

(B) If jointly provided jointly by multiple affiliates and each affiliate shares a common name, then the notice may indicate that it is being provided by multiple companies with the same name or multiple companies in the same group or family of companies. If the affiliates providing the notice do not share a common name, then the notice must either separately identify each

affiliate by name or identify each of the common names used by those affiliates;

(ii) The list of affiliates or types of affiliates whose use of eligibility information is covered by the notice, which may include companies that become affiliates after the notice is provided to the consumer;

(iii) A general description of the types of eligibility information that may be used to make solicitations to the consumer;

(iv) A statement that the consumer may elect to limit the use of eligibility information to make solicitations to the consumer;

(v) A statement that the consumer's election will apply for the specified period of time and, if applicable, that the consumer will be allowed to renew the election once that period expires;

(vi) If the notice is provided to consumers who have previously elected to opt out, that such consumer does not need to act again until the consumer receives a renewal notice; and

(vii) A reasonable and simple method for the consumer to opt out.

(2) *Specifying length of time period.* If consumer is granted an opt-out period longer than a five-year duration, the opt-out notice must specify the length of the opt-out period.

(3) *No revised notice for extension of opt-out period.* The duration of an opt-out period may be increased for a period longer than the period specified in the opt-out notice without having to provide a revised notice of the increase to the consumer.

(b) *Joint relationships.* (1) If two or more consumers jointly obtain a financial product or service, a single opt-out notice may be provided to joint consumers.

(2) Any of the joint consumers may exercise the right to opt out on behalf of each joint consumer.

(3) The opt-out election notice must explain how an opt-out election by a joint consumer will be treated. That is, the notice should specify whether an opt-out election by a joint consumer will be treated as applying to all of the associated joint consumers, or as applying to each joint consumer separately.

(4) If the opt-out election notice provides that each joint consumer is permitted to opt out separately, one of the joint consumers must be permitted to opt out on behalf of all of the joint consumers and the joint consumer must be permitted to exercise his or her separate rights to opt out in a single response.

(5) A covered affiliate cannot require all joint consumers to opt out before implementing any opt-out election.

(c) *Alternative contents.* If the consumer is afforded a broader right to opt out of receiving marketing than is required by this subpart, the requirements of this section may be satisfied by providing the consumer with a clear, conspicuous, and concise notice that accurately discloses the consumer's opt-out rights.

(d) *Coordinated and consolidated consumer notices.* A notice required by this subpart may be coordinated and consolidated with any other notice or disclosure required to be issued under any other provision of law by the covered affiliate providing the notice, including but not limited to notices in the FCRA or the GLB Act privacy notices.

(e) *Equivalent notices.* A notice or disclosure that is equivalent to the notice required by this part in terms of content, and that is provided to a consumer together with a notice required by any other provision of law, satisfies the requirements of this section.

(f) *Model notices.* Model notices are provided in Appendix A of this part. These notices were meant to facilitate compliance with this subpart; provided, however, that nothing herein shall be interpreted to require persons subject to this part to use the model notices.

§ 162.6 Reasonable opportunity to opt out.

(a) *In general.* A covered affiliate must not use eligibility information about a consumer that the covered affiliate receives from an affiliate to make a solicitation to such consumer about the covered affiliate's financial products or services, unless the consumer is provided a reasonable opportunity to opt out, as required by this subpart.

(b) *Examples.* A reasonable opportunity to opt out under this subpart is:

(1) If the opt-out notice is mailed to the consumer, the consumer has 30 days from the date the notice is mailed to opt out.

(2) If the opt-out notice is sent *via* electronic means to the consumer, the consumer has 30 days from the date the consumer acknowledges receipt to elect to opt out by any reasonable method.

(3) If the opt-out notice is sent *via* e-mail (where the consumer has agreed to receive disclosures by e-mail), the consumer is given 30 days after the e-mail is sent to elect to opt out by any reasonable method.

(4) If the opt-out notice provided to the consumer at the time of an electronic transaction, the consumer is required to decide, as a necessary part of proceeding with the transaction, whether to opt out before completing the transaction.

(5) If the opt-out notice is provided during an in-person transaction, the consumer is required to decide, as a necessary part of completing the transaction, whether to opt out through a simple process.

(6) If the opt-out notice is provided in conjunction with other privacy notices required by law, the consumer is allowed to exercise the opt-out election within a reasonable period of time and in the same manner as the opt out under that privacy notice.

§ 162.7 Reasonable and simple methods of opting out.

(a) *In general.* A covered affiliate shall be prohibited from using eligibility information about a consumer received from an affiliate to make a solicitation to the consumer about the covered affiliate's financial products or services, unless the consumer is provided a reasonable and simple method to opt out, as required by this subpart.

(b) *Examples.* Reasonable and simple methods of opting out include:

(1) Designating a check-off box in a prominent position on an opt-out election form;

(2) Including a reply form and a self-addressed envelope (in a mailing);

(3) Providing an electronic means, if the consumer agrees, that can be electronically mailed or processed through an Internet Web site;

(4) Providing a toll-free telephone number; or

(5) Exercising an opt-out election through whatever means are acceptable under a consolidated privacy notice required under other laws.

(c) *Specific opt-out method.* Each consumer may be required to opt out through a specific method, as long as that method is acceptable under this subpart.

§ 162.8 Acceptable delivery methods of opt-out notices.

(a) *In general.* The opt-out notice must be provided so that each consumer can reasonably be expected to receive actual notice.

(b) *Electronic notices.* For opt-out notices provided electronically, the notice may be provided in compliance with either the electronic disclosure provisions in Sec. 1.4 of this title or the provisions in section 101 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 *et seq.*

§ 162.9 Renewal of opt out.

(a) *Renewal notice and opt-out requirement*—(1) *In general.* Since the

FCRA provides that opt-out elections can expire in a period of no less than five years, an affiliate that has or previously had a pre-existing business relationship with a consumer must provide a renewal notice to the consumer after such time in order to allow its affiliates to make solicitations. After the opt-out election period expires, its affiliates may make solicitations unless:

(i) The consumer has been given a renewal notice that complies with the requirements of this section and Secs. 162.6 through 162.8 of this subpart, and a reasonable opportunity and a reasonable and simple method to renew the opt-out election, and the consumer does not renew the opt out; or

(ii) An exception in Sec. 162.3(c) of this subpart applies.

(2) *Renewal period.* Each opt-out renewal must be effective for a period of at least five years as provided in Sec. 162.4(b) of this subpart.

(3) *Affiliates who may provide the renewal notice.* The notice required by this paragraph must be provided:

(i) By the affiliate that provided the previous opt-out notice, or its successor; or

(ii) As part of a joint renewal notice from two or more members of an affiliated group of companies, or their successors, that jointly provided the previous opt-out notice.

(b) *Contents of renewal or extension notice.* The contents of the renewal notice must include all of the same contents of the initial notices, but also must include:

(1) A statement that the consumer previously elected to limit the use of certain information to make solicitations to the consumer;

(2) A statement that the consumer may elect to renew the consumer's previous election; and

(3) If applicable, a statement that the consumer's election to renew will apply for a specified period of time stated in the notice and that the consumer will be allowed to renew the election once that period expires.

(c) *Timing of renewal notice.* Renewal notices must be provided in a reasonable period of time before the expiration of the opt-out election period or any time after the expiration of the opt-out period, but before solicitations that would have been prohibited by the expired opt-out election are made to the consumer.

(d) *No effect on opt-out period.* An opt-out period may not be shortened by sending a renewal notice to the consumer before the expiration of the opt-out period, even if the consumer does not renew the opt-out election.

§§ 162.10–162.20 [Reserved]

Subpart B—Disposal Rules

§ 162.21 Proper disposal of consumer information.

(a) *In general.* Any covered affiliate must adopt must adopt reasonable, written policies and procedures that address administrative, technical, and physical safeguards for the protection of consumer information. These written policies and procedures must be reasonably designed to:

(1) *Insure the security and confidentiality of consumer information;*

(2) *Protect against any anticipated threats or hazards to the security or integrity of consumer information; and*

(3) *Protect against unauthorized access to or use of consumer information that could result in substantial harm or inconvenience to any consumer.*

(b) *Standard. Any covered affiliate under this part who maintains or otherwise possesses consumer* information for a business purpose must properly dispose of such information by taking reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal pursuant to a written disposal plan.

(c) *Examples.* The following examples are "reasonable" disposal measures for the purposes of this subpart—

(i) Implementing and monitoring compliance with policies and procedures that require the burning, pulverizing, or shredding of papers containing consumer information so that the information cannot practicably be read or reconstructed;

(ii) Implementing and monitoring compliance with policies and procedures that require the destruction or erasure of electronic media containing consumer information so that the information cannot practically be read or reconstructed; and

(iii) After due diligence, entering into and monitoring compliance with a written contract with another party engaged in the business of record destruction to dispose of consumer information in a manner that is consistent with this rule.

(d) *Relation to other laws.* Nothing in this section shall be construed:

(1) To require a person to maintain or destroy any record pertaining to a consumer that is imposed under Sec. 1.31 or any other provision of law; or

(2) To alter or affect any requirement imposed under any other provision of law to maintain or destroy such a record.

Appendix A to Part 162—Sample Clauses

A. Although use of the model forms is not required, use of the model forms in this Appendix (as applicable) complies with the requirement in section 624 of the FCRA for clear, conspicuous, and concise notices.

B. Certain changes may be made to the language or format of the model forms without losing the protection from liability afforded by use of the model forms. These changes may not be so extensive as to affect the substance, clarity, or meaningful sequence of the language in the model forms. Persons making such extensive revisions will lose the safe harbor that this Appendix provides. Acceptable changes include, for example:

1. Rearranging the order of the references to "your income", "your account history", and "your credit score".

2. Substituting other types of information for "income", "account history", or "credit score" for accuracy, such as "payment history", "credit history", or "claims history".

3. Substituting a clearer and more accurate description of the affiliates providing or covered by the notice for phrases such as "the [ABC] group of companies," including without limitation a statement that the entity providing the notice recently purchased the consumer's account.

4. Substituting other types of affiliates covered by the notice for "commodity advisor", "futures clearing merchant", or "swap dealer" affiliates.

5. Omitting items that are not accurate or applicable. For example, if a person does not limit the duration of the opt-out period, the notice may omit information about the renewal notice.

6. Adding a statement informing consumers how much time they have to opt out before shared eligibility information may be used to make solicitations to them.

7. Adding a statement that the consumer may exercise the right to opt out at any time.

8. Adding the following statement, if accurate: "If you previously opted out, you do not need to do so again."

9. Providing a place on the form for the consumer to fill in identifying information, such as his or her name and address.

- A–1 Model Form for Initial Opt-out notice (Single-Affiliate Notice)
- A–2 Model Form for Initial Opt-out notice (Joint Notice)
- A–3 Model Form for Renewal Notice (Single-Affiliate Notice)
- A–4 Model Form for Renewal Notice (Joint Notice)
- A–5 Model Form for Voluntary "No Marketing" Notice

A–1 Model Form for Initial Opt-Out Notice (Single-Affiliate Notice)

[Your Choice To Limit Marketing]/ [Marketing Opt Out]

—[Name of Affiliate] is providing this notice.

—[Optional: Federal law gives you the right to limit some but not all marketing from our affiliates. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from our affiliates.]

—You may limit our affiliates in the [ABC] group of companies, such as our [commodity advisor, futures clearing merchant, and swap dealer] affiliates, from marketing their financial products or services to you based on your personal information that we collect and share with them. This information includes your [income], your [account history with us], and your [credit score].
—Your choice to limit marketing offers from our affiliates will apply [until you tell us to change your choice]/[for x years from when you tell us your choice]/[for at least 5 years from when you tell us your choice]. [Include if the opt-out period expires.] Once that period expires, you will receive a renewal notice that will allow you to continue to limit marketing offers from our affiliates for [another x years]/[at least another 5 years].
—[Include, if applicable, in a subsequent notice, including an annual notice, for consumers who may have previously opted out.] If you have already made a choice to limit marketing offers from our affiliates, you do not need to act again until you receive the renewal notice.

To limit marketing offers, contact us [include all that apply]:

—By telephone: 1–877–###–####
—On the Web: www.—.com
—By mail: check the box and complete the form below, and send the form to:
—[Company name]
—[Company address]

_____ Do not allow your affiliates to use my personal information to market to me.

A–2 Model Form for Initial Opt-out Notice (Joint Notice)

[Your Choice To Limit Marketing]/[Marketing Opt Out]

—The [ABC group of companies] is providing this notice.
—[Optional: Federal law gives you the right to limit some but not all marketing from the [ABC] companies. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from the [ABC] companies.]
—You may limit the [ABC companies], such as the [ABC commodity advisor, futures clearing merchant, and swap dealer] affiliates, from marketing their financial products or services to you based on your personal information that they receive from other [ABC] companies. This information includes your [income], your [account history], and your [credit score].
—Your choice to limit marketing offers from the [ABC] companies will apply [until you tell us to change your choice]/[for x years from when you tell us your choice]/[for at least 5 years from when you tell us your choice]. [Include if the opt-out period expires.] Once that period expires, you will receive a renewal notice that will allow you to continue to limit marketing offers from the [ABC] companies for [another x years]/[at least another 5 years].
—[Include, if applicable, in a subsequent notice, including an annual notice, for consumers who may have previously opted out.] If you have already made a choice to limit marketing offers from the [ABC] companies, you do not need to act again until you receive the renewal notice.

To limit marketing offers, contact us [include all that apply]:

By telephone: 1–877–###–####
On the Web: www.—.com
By mail: check the box and complete the form below, and send the form to:
[Company name]
[Company address]

_____Do not allow any company [in the ABC group of companies] to use my personal information to market to me.

A–3 Model Form for Renewal Notice (Single-Affiliate Notice)

[Renewing Your Choice To Limit Marketing]/[Renewing Your Marketing Opt Out]

—[Name of Affiliate] is providing this notice.
—[Optional: Federal law gives you the right to limit some but not all marketing from our affiliates. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from our affiliates.]
—You previously chose to limit our affiliates in the [ABC] group of companies, such as our [commodity advisor, futures clearing merchant, and swap dealer] affiliates, from marketing their financial products or services to you based on your personal information that we share with them. This information includes your [income], your [account history with us], and your [credit score].
—Your choice has expired or is about to expire.

To renew your choice to limit marketing for [x] more years, contact us [include all that apply]:

By telephone: 1–877–###–####
On the Web: www.—.com
By mail: check the box and complete the form below, and send the form to:
[Company name]
[Company address]

_____Renew my choice to limit marketing for [x] more years.

A–4 Model Form for Renewal Notice (Joint Notice)

[Renewing Your Choice To Limit Marketing]/[Renewing Your Marketing Opt Out]

—The [ABC group of companies] is providing this notice.
—[Optional: Federal law gives you the right to limit some but not all marketing from the [ABC] companies. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from the [ABC] companies.]
—You previously chose to limit the [ABC companies], such as the [ABC commodity advisor, futures clearing merchant, and swap dealer] affiliates, from marketing their financial products or services to you based on your personal information that they receive from other [ABC] companies. This information includes your [income], your [account history], and your [credit score].
—Your choice has expired or is about to expire.

To renew your choice to limit marketing for [x] more years, contact us [include all that apply]:

By telephone: 1–877–###–####
On the web: www.—.com
By mail: check the box and complete the form below, and send the form to:
[Company name]
[Company address]

_____Renew my choice to limit marketing for [x] more years.

A–5 Model Form for Voluntary "No Marketing" Notice

[Your Choice To Stop Marketing]

—[Name of Affiliate] is providing this notice. You may choose to stop all marketing from us and our affiliates.

To stop all marketing offers, contact us [include all that apply]:

By telephone: 1–877–###–####
On the Web: www.—.com
By mail: check the box and complete the form below, and send the form to:
[Company name]
[Company address]

_____Do not market to me.

By the Commission,
Dated: October 19, 2010.

David A. Stawick,

Secretary.

Statement of Chairman Gary Gensler

Business Affiliate Marketing and Disposal of Consumer Information Rules

October 19, 2010

I support today's Commission vote on the proposed rulemaking providing privacy protections to nonpublic, consumer information held by entities that are subject to the jurisdiction of the Commission. The proposed rulemaking provides customers of Commission-regulated entities with the same privacy protections now enjoyed by the customers of entities regulated by other Federal agencies.

The proposal includes two important rules. The first allows customers to prohibit Commission-regulated entities from using certain consumer information obtained from an affiliate to make solicitations to that customer for marketing purposes. This will be done by means of a customer opt out. The second rule requires Commission-regulated entities to develop and implement a written program and procedures for the proper disposal of consumer information. I believe that these rules will help prevent the unauthorized use and disclosure of nonpublic, consumer information.

[FR Doc. 2010–26893 Filed 10–26–10; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 40

[Docket No. RM10–10–000]

Planning Resource Adequacy Assessment Reliability Standard

Issued October 21, 2010.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice of proposed rulemaking.

SUMMARY: Under section 215(d)(2) of the Federal Power Act (FPA), the Federal Energy Regulatory Commission proposes to approve a regional Reliability Standard, BAL–502–RFC–02, Planning Resource Adequacy Analysis, Assessment and Documentation, developed by Reliability*First* Corporation (RFC) and submitted to the Commission by the North American Electric Reliability Corporation (NERC). The proposed regional Reliability Standard requires planning coordinators within the RFC geographical footprint to analyze, assess and document resource adequacy for load in the RFC footprint annually, to utilize a "one day in ten year" loss of load criterion, and to document and post load and resource capability in each area or transmission-constrained sub-area identified.

DATES: Comments are due December 27, 2010.

ADDRESSES: You may submit comments, identified by docket number and in accordance with the requirements posted on the Commission's Web site, *http://www.ferc.gov*. Comments may be submitted by any of the following methods:

- *Electronic Submission:* Documents created electronically using word processing software should be filed in native applications or print-to-PDF format, and not in a scanned format, at *http://www.ferc.gov/docs-filing/efiling.asp*.
- *Mail/Hand Delivery:* Commenters unable to file comments electronically must mail or hand deliver an original copy of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426.

These requirements can be found on the Commission's Web site, *see, e.g.,* the "Quick Reference Guide for Paper Submissions," available at *http://www.ferc.gov/docs-filing/efiling.asp,* or via phone from FERC Online Support at 202–502–6652 or toll-free at 1–866–208–3676.

FOR FURTHER INFORMATION CONTACT:

Karin L. Larson (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8236.

Scott Sells (Technical Information), Office of Electric Reliability, Division of Policy Analysis and Rulemaking, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–6664.

SUPPLEMENTARY INFORMATION:

Notice of Proposed Rulemaking

1. Under section 215(d)(2) of the Federal Power Act (FPA), the Federal Energy Regulatory Commission proposes to approve a regional Reliability Standard BAL–502–RFC–02 (Planning Resource Adequacy Analysis, Assessment and Documentation), developed by Reliability*First* Corporation (RFC) and submitted to the Commission by the North American Electric Reliability Corporation (NERC). The proposed regional Reliability Standard requires planning coordinators within the RFC geographical footprint to analyze, assess and document resource adequacy for load in the RFC footprint annually, to utilize a "one day in ten year" loss of load criterion, and to document and post load and resource capability in each area or transmission-constrained sub-area identified.

I. Background

A. Mandatory Reliability Standards

2. Section 215 of the FPA requires a Commission-certified Electric Reliability Organization (ERO) to develop mandatory and enforceable Reliability Standards, which are subject to Commission review and approval. Once approved, the Reliability Standards may be enforced by the ERO, subject to Commission oversight, or by the Commission independently.[1] In July 2006, the Commission certified NERC as the ERO.[2]

3. Reliability Standards that the ERO proposes to the Commission may include Reliability Standards that are developed by a Regional Entity.[3] A Regional Entity is an entity that has been approved by the Commission to enforce Reliability Standards under delegated authority from the ERO.[4] In Order No. 672, the Commission urged uniformity of Reliability Standards, but recognized a potential need for regional differences.[5] Accordingly, the Commission stated that:

> As a general matter, we will accept the following two types of regional differences, provided they are otherwise just, reasonable, not unduly discriminatory or preferential and in the public interest, as required under the statute: (1) a regional difference that is more stringent than the continent-wide Reliability Standard, including a regional difference that addresses matters that the continent-wide Reliability Standard does not; and (2) a regional Reliability Standard that is necessitated by a physical difference in the Bulk-Power System.[6]

4. Consistent with section 215 of the FPA, the Commission will approve proposed regional Reliability Standard BAL–502–RFC–02 if the Commission finds it is just, reasonable, not unduly discriminatory or preferential, and in the public interest.

B. ReliabilityFirst

5. On April 19, 2007, the Commission approved delegation agreements between NERC and eight Regional Entities.[7] Pursuant to such agreements, the ERO delegated responsibility to the Regional Entities to enforce the mandatory, Commission-approved Reliability Standards. In addition, the Commission approved, as part of each delegation agreement, a Regional Entity process for developing regional Reliability Standards. In the Delegation Agreement Order, the Commission accepted RFC as a Regional Entity and accepted RFC's Standards Development Manual which sets forth the process for RFC's development of regional Reliability Standards.[8] The RFC region is a less than interconnection-wide region that covers all or portions of 14 states and the District of Columbia.

II. RFC Regional Reliability Standard BAL–502–RFC–02

6. On December 14, 2009, NERC submitted for Commission approval, in accordance with section 215(d)(1) of the

[1] *See* 16 U.S.C. 824o(e)(3).

[2] *North American Electric Reliability Corp.,* 116 FERC ¶ 61,062 (ERO Certification Order), *order on reh'g and compliance,* 117 FERC ¶ 61,126 (2006), *aff'd sub nom. Alcoa, Inc.* v. *FERC,* 564 F.3d 1342 (D.C. Cir. 2009).

[3] 16 U.S.C. 824o(e)(4).

[4] *Id.* at 824o(a)(7) and (e)(4).

[5] *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards,* Order No. 672, FERC Stats. & Regs. ¶ 31,204, at P 290; *order on reh'g,* Order No. 672–A, FERC Stats. & Regs. ¶ 31,212 (2006).

[6] Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 291.

[7] *See North American Electric Reliability Corp.,* 119 FERC ¶ 61,060, at P 316–350 (Delegation Agreement Order), *order on reh'g,* 120 FERC ¶ 61,260 (2007).

[8] *Id.* P 339 (clarifying that the RFC Standards Development Manual embodies "rules" which are subject to NERC approval and, if approved by NERC, Commission approval).

FPA,[9] regional Reliability Standard BAL–502–RFC–02 and four associated new definitions.[10] The stated purpose of regional Reliability Standard BAL–502–RFC–02 is to establish common criteria, based on "one day in ten year" loss of load expectation principles, for the analysis, assessment and documentation of resource adequacy in the RFC region.[11] NERC states that the proposed regional Reliability Standard establishes requirements for planning coordinators in the RFC region regarding resource adequacy assessment, which subject matter is not currently addressed in NERC's continent-wide Reliability Standards.[12]

7. Proposed regional Reliability Standard BAL–502–RFC–02 contains two Requirements, which are applicable to each planning coordinator within the RFC footprint.[13] Requirement R1 requires each planning coordinator to perform and document an annual resource adequacy analysis.[14] The seven Sub-requirements define the criteria to be used for the resource adequacy analysis. Sub-requirement R1.1 sets forth the "one day in ten year" criteria to be used to calculate the planning reserve margin. Sub-requirement R1.2 specifies the planning years to be studied. Sub-requirement R1.3 defines system characteristics to be included in the analysis. Sub-requirements R1.4 and R1.5 require the consideration of resource availability and transmission outage plans. Sub-requirements R1.6 and R1.7 require documentation that capacity resources and load were properly accounted for in the analysis. Requirement R2 requires each planning coordinator to annually document the projected load and resource capability for each area and transmission constrained sub-area identified in the analysis. Sub-requirements R2.1 through R2.3 set forth the specific documentation requirements. Each of the main Requirements (R1 and R2) are assigned a violation risk factor (VRF) and violation severity level (VSL). However, RFC did not assign VRFs or VSLs to the Sub-requirements.

8. NERC also proposes to add the following four new definitions, which would be applicable in the RFC region only:

Resource Adequacy: The ability of supply-side and demand-side resources to meet the aggregate electrical demand (including losses).

Net Internal Demand: Total of all end-use customer demand and electric system losses within specified metered boundaries, less Direct Control Load Management and Interruptible Demand.

Peak Period: A period consisting of two (2) or more calendar months but less than seven (7) calendar months, which includes the period during which the responsible entity's annual peak demand is expected to occur.

Year One: The planning year that begins with the upcoming annual Peak Period.

NERC states that these four terms do not presently appear in the NERC Glossary of Terms Used in Reliability Standards (Glossary) and they do not conflict with existing terms.[15]

9. NERC states that on February 24, 2009, RFC submitted the proposed Reliability Standard to NERC for evaluation and approval. On April 17, 2009, NERC provided RFC its evaluation of BAL–502–RFC–02 which highlighted several concerns regarding the proposed standard. NERC's concerns included: (1) Missing time horizons, (2) effective date not meeting NERC's template language, (3) complex sub-requirements, (4) the addition of new defined terms, (5) the assignment of VRFs and VSLs only to the Reliability Standard's two main Requirements and not the sub-requirements, and (6) technical clarity. On June 8, 2009, RFC submitted a response to NERC addressing NERC's concerns.

10. NERC concludes that the proposed RFC regional Reliability Standard addresses matters not currently covered in a continent-wide NERC Reliability Standard and thus meets the Commission's criteria for consideration of a regional Reliability Standard. NERC asserts that the proposed regional Reliability Standard satisfies all of the criteria set forth in Order No. 672 that the Commission applies to determine whether a proposed Reliability Standard is just, reasonable, not unduly discriminatory or preferential and in the public interest.[16] As such, NERC requests approval of proposed regional Reliability Standard BAL–502–RFC–02 and the related definitions.

III. Discussion

11. As discussed below, the Commission proposes to approve BAL–502–RFC–02. The proposed regional Reliability Standard will improve the reliable operation of the Bulk-Power System by ensuring use in the RFC region of a common criterion, the "one day in ten year" principle, to assess resource adequacy during the planning horizon. The Commission also proposes to accept the four related definitions for inclusion in NERC's Glossary for use with RFC's regional Reliability Standards.[17] The Commission further proposes to defer discussion on the proposed VRFs and VSLs for the regional Reliability Standard.

12. Proposed regional Reliability Standard BAL–502–RFC–02 is "more stringent" in that NERC's continent-wide standards currently do not address assessment of Resource Adequacy in the planning horizon. The Commission notes the current continent-wide Reliability Standard TOP–002–2a, Requirement R7 requires Balancing Authorities to plan to meet capacity and energy reserve requirements, including the deliverability/capability for any single contingency.[18] Reliability Standard TOP–002–2 ensures that resources and operational plans are in place to enable system operators to maintain the Bulk-Power System in a reliable state.[19] Thus Reliability Standard TOP–002–2 is a continent-wide Reliability Standard that addresses requirements for reserves during the operations timeframe whereas proposed regional Reliability Standard BAL–502–RFC–02 addresses the assessment of resource adequacy (or planning reserves) during the planning timeframe. If NERC develops a continent-wide Reliability Standard that addresses assessment of resource adequacy in the planning horizon and such Reliability Standard is approved by the Commission, RFC should

[9] 16 U.S.C. 824o.

[10] NERC Petition for Approval of Proposed RFC Regional Reliability Standard BAL–502–RFC–02, Docket No. RM10–10–000 (Dec. 14, 2009) (Petition).

[11] NERC Petition at 7.

[12] *Id.* at 7. NERC notes that it has a pending continent-wide project, Project 2009–05, Resource Adequacy Assessments, that is intended to address resource adequacy assessments. This NERC project has a targeted completion date of third quarter 2011.

[13] According to the RFC April 16, 2010 organization registration (*available at http://rfirst.org/Compliance/Registration.aspx*), there are four registered planning coordinators in the RFC region, each of which is a RFC member. See RFC's January 11, 2010 list of member companies by sector, *available at http://rfirst.org/MiscForms/AboutUs/Membership.aspx.* The four registered planning coordinators are American Transmission Co., LLC; International Transmission Company (ITC Transmission); Midwest Independent Transmission System Operator, Inc. (Midwest ISO); and PJM Interconnection, LLC (PJM).

[14] NERC notes that the proposed Reliability Standard does not require the building or acquisition of new generating capacity. *See* NERC Petition at 9.

[15] The NERC Glossary (updated Apr. 20, 2010) is *available at http://www.nerc.com/docs/standards/rs/Glossary_of_Terms_2010April20.pdf.*

[16] Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 323–337.

[17] NERC's Glossary lists each term that has been defined for use in one or more of NERC's continent-wide or regional Reliability Standards.

[18] Reliability Standard TOP–002–2a, Requirement R7.

[19] *Mandatory Reliability Standards for the Bulk-Power System,* Order No. 693, FERC Stats. & Regs. ¶ 31,242, at P 1590, order on reh'g, Order No. 693–A, 120 FERC ¶ 61,053 (2007). *See also* the Notice of Proposed Rulemaking, Docket No. RM06–16–000, FERC Stats. & Regs., Proposed Regulations 2004–2007, ¶ 32,608 (2006) (Order No. 693 NOPR).

reevaluate the continuing need for regional Reliability Standard BAL–502–RFC–02.

A. Order No. 672 Criteria

13. Order No. 672 provides that a Reliability Standard must be designed to achieve a specified reliability goal and must contain a technically sound means to achieve this goal.[20] Likewise, the Reliability Standard should be based on actual data and lessons learned from actual operations.[21] According to NERC and RFC, proposed regional Reliability Standard BAL–502–RFC–02 is clear and unambiguous regarding what is required and who is required to comply (planning coordinator). NERC and RFC also state that BAL–502–RFC–02 has clear and objective measures for compliance and achieves a reliability goal (namely, providing a common framework for resource adequacy analysis, assessment, and documentation) effectively and efficiently. Based on the Commission's understanding of the proposed regional Reliability Standard, explained below, the Commission believes that BAL–502–RFC–02 satisfies the Order No. 672 criteria.

B. RFC's Proposed Resource Adequacy Reliability Standard Requirements

14. Proposed regional Reliability Standard BAL–502–RFC–02 requires planning coordinators to perform an annual Resource Adequacy analysis and calculate a planning reserve margin that meets the "one day in ten year" criterion. The analysis must be "performed or verified separately" for (i) Year One, (ii) for one year falling in the second through fifth years, and (iii) at least one year in the sixth through tenth years.[22] The regional Reliability Standard further requires the planning coordinators to calculate the planning reserve margin by assessing each of the integrated peak hours for each day within the year being analyzed to determine the probability that generation and demand-side resources cannot meet the demand during that hour for that day (which would result in a loss of load).[23] The calculated planning reserve margin is to be expressed as a percentage of the median forecast peak demand (not including direct control load management and interruptible demand). Regional Reliability Standard BAL–502–RFC–02 states that this median forecast is expected to have a 50 percent probability that the projected load is too high and 50 percent probability that the projected load is too low.[24] In order to determine the appropriate load forecast, the planning coordinators must consider multiple factors including: (i) Variability in the load forecast such as weather and regional economic forecasts, (ii) load diversity, (iii) seasonal load variations, (iv) firm load and (v) interruptible load including contractual arrangements concerning curtailable and/or interruptible demand.[25] In addition, the planning coordinator must document that all load in its area is accounted for in the analysis.[26]

15. Further, the planning coordinator must determine the probability of resources that will be online and available, determine the distribution of the peak load for each day, and include impacts of known transmission limitations.[27] To determine the probability of available resources the planning coordinator must consider multiple factors. Such factors include: (i) The historic resource performance, (ii) seasonal resource ratings, (iii) firm capacity purchases from and sales to entities outside of the planning coordinator area, (iv) resource planned outage schedules, (v) deratings and retirements, (vi) assumptions of intermittent and energy limited resources (such as wind and cogeneration), (vii) criteria for including planned resource additions, (viii) availability and delivery of fuel, (ix) common mode outages that affect resource availability, (x) environmental and regulatory restrictions of resources, (xi) available demand response programs, (xii) sensitivity to resource outage rates, (xiii) extreme weather/drought condition impacts on resource availability, (xiv) assumptions for emergency operation procedures in order to make reserves available, and (xv) uncommitted resources within the planning coordinator area.[28] Also, the planning coordinator must document that all capacity resources in the planning coordinator area are appropriately accounted for in the analysis.[29]

16. The planning coordinator is also required to consider the impacts of transmission limitations that could prevent the delivery of generation to the load including criteria for including planned transmission facilities in the study as well as transmission maintenance outage schedules.[30] Proposed regional Reliability Standard BAL–502–RFC–02, Requirement R1.3.4 requires planning coordinators to include in their assessment of transmission limits assistance from other interconnected systems including multi-area assessment considering transmission limitations into the study area.

17. Overall, the Commission believes that factors to be considered in the resource adequacy analysis as set forth in Requirement R1 and, as discussed above, are a technically sound means to set up the analysis for the probability of not having enough resources in order to meet demand and avoid loss of load. However, the Commission questions or seeks clarity on three details of the resource adequacy analysis: (i) The loss of load calculation, (ii) use of capacity benefit margin; and (iii) meaning of common mode outages.

18. Requirement R1.1 states that the assessment shall calculate a planning reserve margin that will result in the sum of probabilities for loss of load for each planning year equal to 0.1, or comparable to "one day in ten years" when available capacity will not meet the load. With respect to the loss of load calculation, proposed regional Reliability Standard BAL–502–RFC–02 specifically identifies two circumstances that will not count in the loss of load calculation: (1) Utilization of direct control load management[31] and (2) curtailment of interruptible load.[32] Notwithstanding these two exceptions to the loss of load calculation, the Commission seeks comment on how other actions that could be taken by a system operator, such as voltage reduction or other, non-voluntary, types of load reduction plans, would be modeled and documented in this analysis.

19. With respect to the capacity benefit margin, the Commission notes that the requirements do not explicitly state whether planning coordinators may rely upon capacity benefit

[20] Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 324.

[21] *Id.*

[22] *See* proposed Reliability Standard BAL–502–RFC–02, Requirement R1.2.

[23] *See id.* at Requirement R1.1.

[24] *See id.* at Requirement R1.1.2 n.2.

[25] *See id.* at Requirement R1.3.1.

[26] *See id.* at Requirements R1.7.

[27] *See id.* at Requirements R1.3.1, R1.3.2, and R1.3.3.

[28] *See id.* at Requirements R1.3.2 and R1.4.

[29] *See id.* at Requirement R1.6.

[30] *See id.* at Requirements R1.3.3, R1.3.3.1, R1.3.3.2 and R1.5.

[31] NERC defines direct control load management (DCLM) as "Demand-Side Management that is under the direct control of the system operator. DCLM may control the electric supply to individual appliances or equipment on customer premises. DCLM as defined here does not include Interruptible Demand."

[32] NERC defines Interruptible Load as "Demand that the end-use customer makes available to its Load-Serving Entity via contract or agreements for curtailment."

margin [33] to satisfy BAL–502–RFC–02's Requirements. During the standard development posting period, RFC received comments regarding potential conflicts or lack of coordination between BAL–502–RFC–02 and MOD–004–1—Capacity Benefit Margin.[34] The Commission does not believe the proposed regional Reliability Standard is in conflict with the continent-wide Reliability Standard, but does note there could be some confusion regarding whether capacity benefit margin could or could not be used in order to meet the Requirements of BAL–502–RFC–02.[35] Accordingly, we seek comment on whether capacity benefit margin may be used to satisfy BAL–502–RFC–02's Requirements.

20. With respect to Requirement R1.4, which requires the resource adequacy analysis to consider resource availability characteristics including "common mode outages that affect resource availability," the Commission seeks comment on whether planning coordinators, when evaluating "common mode outages that affect resource availability" will consider only outages within the generation facility, or if the analysis will also include outages of transmission facilities that would have an impact on resource or generator availability.

C. Missing Time Horizons

21. NERC's Petition notes its concern that the proposed regional Reliability Standard BAL–502–RFC–02 does not identify time horizons for each Requirement. Time horizons are used as a factor in determining the size of a sanction. If an entity violates a Requirement and there is no time to mitigate the violation because the Requirement takes place in real-time, then the sanction associated with the violation is higher than it would be for violation of a Requirement that could be mitigated over a longer period of time.[36] According to NERC's template for Reliability Standards, each main Requirement in a Reliability Standard should be assigned one of the following time horizons: (1) Long-Term Planning (a planning horizon of one year or longer), (2) Operations Planning (operating and resource plans from day-ahead up to and including seasonal), (3) Same-day Operations (routine actions required within the timeframe of a day, but not real-time), (4) Real-time Operations (actions required within one hour or less to preserve the reliability of the bulk electric system), and (5) Operations Assessment (follow-up evaluations and reporting of real time operations).

22. According to NERC, time horizons are used for compliance assessments as described in NERC's Sanctions Guidelines.[37] Time horizons are used when determining the severity of a violation risk factor and for determining the penalty for a violation. RFC states that it did not include time horizons because its *Reliability Standards Development Procedure* (RSDP) does not include time horizons in its template for Reliability Standards. The RFC RSDP sets forth the required elements of a Standard and includes a Reliability Standard template. RFC's RSDP does not include "time horizons" as a required element.[38] Thus, RFC states that including time horizons in BAL–502–RFC–02 would have been a deviation from its Commission-approved Standards template. RFC also notes that "the standard focuses on 'planning oriented' subject matter for one year and beyond," and, as such, the "appropriate time horizons are relatively straight forward." [39]

23. The Commission agrees with NERC that it is important to identify the time horizons for each Reliability Standard. However, time horizons are not critical to our determination of whether to approve this proposed Reliability Standard. As the Commission has previously stated, the "most critical element of a Reliability Standard is the Requirements." [40] Moreover, the Commission notes that with respect to proposed regional Reliability Standard BAL–502–RFC–02, the time horizon "Long-Term Planning" can be gleaned from the context of the standard for the purpose of determining the severity of a violation risk factor, or for determining the penalty for a violation. However, the Commission notes that RFC currently is in the process of modifying its RSDP such that it will be required to use the most current version of the approved NERC Reliability Standard template when developing a RFC regional Reliability Standard.[41] NERC's "Template Guide for New Standards," "Template Quality Review of Standards," and "Time Horizons" documents all call for the inclusion of time horizons in new Reliability Standards.[42] Thus RFC's proposed change to its RSDP would require RFC to tag each new Reliability Standard Requirement with a time horizon. We believe that the identification of the appropriate time horizon for each Requirement is useful and improves clarity and consistency in compliance assessments. Because RFC appears to be moving toward requiring the assignment of time horizons as part of its standard drafting process, as well as the benefits of assigning time horizons, the Commission proposes to direct RFC to add time horizons to the two main Requirements when RFC reviews regional Reliability Standard BAL–502–RFC–02 in its scheduled five-year review.

D. Proposed Effective Date

24. Proposed regional Reliability Standard BAL–502–RFC–02's stated effective date is "upon RFC Board approval," which occurred on December 4, 2008. NERC raises the concern that "[t]he effective date should follow the latest language found in the [NERC] standards template to meet the needs of the compliance program." [43] NERC's "standards template" provides that the effective date should be "the first day of the first quarter after regulatory approval." [44] RFC responded that the proposed RFC Board approval effective date set forth in BAL–502–RFC–02 is appropriate because of the regional nature of the Standard and because the

[33] The NERC Glossary defines capacity benefit margin (CBM) as "the amount of firm transmission transfer capability preserved by the transmission provider for Load-Serving Entities (LSE), whose loads are located on that Transmission Service Provider's system, to enable access by the LSEs to generation from interconnected systems to meet generation reliability requirements. Preservation of CBM for an LSE allows that entity to reduce its installed generating capacity below that which may otherwise have been necessary without interconnections to meet its generation reliability requirements. The transmission transfer capability preserved as CBM is intended to be used by the LSE only in times of emergency generation deficiencies."

[34] *See* NERC Petition, Exhibit C, comments from ITC Transmission.

[35] Reliability Standard MOD–004–1 addresses capacity benefit margin, or a capacity preserved for firm transmission transfer capability. Conversely, the Requirements in proposed Reliability Standard BAL–502–RFC–02 address an analysis regarding the capability of generation to serve the projected load. While capacity benefit margin could be a method of meeting the requirements of BAL–502–RFC–02, the two standards do not contradict each other.

[36] *See* NERC's "Time Horizons" document, available on NERC's Web site at *http://www.nerc.com/files/Time_Horizons.pdf.*

[37] NERC Petition at 22.

[38] RFC Reliability Standards Development Procedure, at 3 (May 22, 2008) *available at http://www.rfirst.org/Documents/Standards/Reliability%20Standards%20Developmental%20Procedure.pdf.*

[39] NERC Petition at 24.

[40] Order No. 693 NOPR, FERC Stats. & Regs., Proposed Regulations 2004–2007, ¶ 32,608 at p. 105.

[41] RFC project SDP–501–RFC–03 was posted for 15-day category ballot the "Draft 2 Standards Development Procedure" on Sept. 1, 2010 and can be found on RFC's Web site at *http://rsvp.rfirst.org/SDP501RFC03/default.aspx.*

[42] The "Template Guide for New Standards," "Template Quality Review of Standards," and "Time Horizons" documents can all be found on the NERC Web site at *http://www.nerc.com/commondocs.php?cd=2.*

[43] NERC Petition at 22.

[44] *Id.*

Requirements under BAL–502–RFC–02 are already being implemented. Specifically, RFC noted that upon RFC Board approval, BAL–502–RFC–02 became effective and enforceable with respect to RFC members under their "Terms of Membership" contained in RFC's bylaws.[45] Because BAL–502–RFC–02 only applies to planning coordinators within RFC's region, all of which are RFC members, BAL–502–RFC–02's Requirements are currently effective. As such, no additional implementation time is required.[46] RFC acknowledges that upon Commission approval, the Reliability Standard will be mandatory and enforceable, and that non-compliance will be subject to financial penalties.

25. We propose to find that with respect to proposed Reliability Standard BAL–502–RFC–02, no additional implementation time is required as the four registered planning coordinators in the RFC region, as RFC members, are already operating under the Standard.[47] There are no other planning coordinators to whom the requirements will apply after Commission approval. While we note that reliability standards are generally implemented prospectively, in this case the real impact of Commission approval is to make BAL–502–RFC–02 prospectively enforceable through civil penalties. Accordingly, the Commission proposes that Reliability Standard BAL–502–RFC–02 will become mandatory and enforceable on the effective date of the Commission's final rule approving the Reliability Standard.

E. Provision of Data

26. Proposed Reliability Standard BAL–502–RFC–02 requires planning coordinators to perform a resource adequacy analysis and assessment. Gathering data is a necessary component of doing so. The Commission is concerned that proposed Reliability Standard BAL–502–RFC–02 does not require other entities (load-serving entities, balancing authorities, transmission operators, resource planners, or transmission planners) to provide the planning coordinators subject to BAL–502–RFC–02 the necessary data for the resource adequacy analysis. In short, the Commission is concerned that planning coordinators will be subject to a mandatory and enforceable Reliability Standard without the necessary tools to fulfill the Standard's Requirements. The Commission recognizes that this concern is somewhat alleviated by the fact that, within the RFC, many of the planning coordinators are also the entities that would have the needed data,[48] or may obtain some of the needed data as a result of some continent-wide Reliability Standards' Requirements.[49] The Commission invites comment on whether the planning coordinators have encountered problems with collecting necessary data in order to complete the resource adequacy assessment that is the subject of BAL–502–RFC–02.

F. Regional Definitions

27. Proposed regional Reliability Standard BAL–502–RFC–02 includes four new definitions that apply only to the RFC region: Resource Adequacy, Net Internal Demand, Peak Period, and Year One. NERC plans to publish the definitions in a distinct section of the NERC Glossary noting their limited applicability to entities within RFC.

28. The Commission proposes to accept the four new defined terms to be applicable only in the RFC region. However, the Commission cautions NERC and the Regional Entities to be aware of "a potential re-proliferation of regional terminology, and consequently, the need to prevent possible inconsistent use of terminology among regions."[50]

29. For example, the Commission notes that RFC's proposed term "Resource Adequacy" is used in NERC's continent-wide Reliability Standard MOD–004–1[51] as well as in NERC's definitions of "Generation Capability Import Requirement"[52] and "Resource Planner"[53] as set forth in NERC's Glossary. While RFC's definition of "Resource Adequacy" does not appear to conflict with the use of this term within the continent-wide Reliability Standard MOD–004–1 or in NERC's Glossary, the addition of "Resource Adequacy" as a defined regional term highlights the need for NERC to remain vigilant regarding re-proliferation of regional terminology. This is particularly relevant with respect to terms like "Resource Adequacy" where other Regional Entities may have differing definitions of resource adequacy and differing understandings of how those definitions apply to the continent-wide Reliability Standard MOD–004–1 and NERC's defined terms "generation capability import requirement" and "resource planner." Accordingly, the Commission urges NERC and the Regional Entities to be vigilant to assure that any proposed regional definition is consistent with both NERC definitions and the approved terms used in other regions.

[45] Pursuant to RFC's bylaws, RFC members are subject to a regional Reliability Standard once the Standard is approved by the RFC Board. Although a Board-approved Standard is enforceable under the RFC bylaws as a term of membership, a member would not be subject to potential financial penalties. *See* NERC Petition at 25.

[46] *Id.*

[47] The Commission notes that under the current NERC compliance registry entities register as "planning authorities," not "planning coordinators." NERC defines "planning coordinator" in its Glossary by simply referencing "*See* Planning Authority." The Commission understands that for reliability purposes planning authorities and planning coordinators are interchangeable. Thus any entity registered with NERC as a planning authority is subject to any Reliability Standard that applies to planning coordinators.

[48] The four planning coordinators currently registered in RFC are also registered as other functional entities. American Transmission Co., LLC and ITC Transmission are both registered as transmission owners, transmission operators and transmission planners. Midwest ISO is registered as a balancing authority, interchange authority, reliability coordinator and transmission service provider. PJM is registered as balancing authority, interchange authority, reliability coordinator, resource planner, transmission operator, transmission planner, and transmission service provider.

[49] For example, it appears that the following continent-wide Reliability Standards allow planning coordinators to obtain data needed to conduct the resource adequacy analysis and assessment: (i) MOD–001, Requirement R9 (requires transmission service providers to provide data regarding available transfer capability or available flowgate capability calculations to the planning coordinator upon request); (ii) MOD–004, Requirement R9 (requires transmission service providers and transmission planners to provide data used for determining or allocating CBM to the planning coordinator upon request); (iii) MOD–008, Requirement R3 (requires transmission operators to provide the TRM implementation document to the planning coordinator upon request); (iv) PRC–023, Requirements R2 and R3 (gives planning coordinators access to facility ratings and the identification of facilities critical to reliability); and (v) TPL–001, TPL–002, TPL–003 and TPL–004 (gives planning coordinators access to data related to the determination of whether the transmission system is planned to meet firm demand under certain conditions).

[50] *Western Electricity Coordinating Council Regional Reliability Standard Regarding Automatic Time Error Correction,* Order No. 723, 127 FERC ¶ 61,176, at P 39 (2009) (Final Rule).

[51] Reliability Standard MOD–004–1—Capacity Benefit Margin, Requirements R4.1, R5.1 and R6.1 each include a bullet stating: "Reserve margin or *resource adequacy* requirements established by other entities, such as municipalities, state commissions, regional transmission organizations, independent system operators, Regional Reliability Organizations, or regional entities." (Emphasis added).

[52] "Generation Capability Import Requirement" is defined in the Glossary as: "The amount of generation capability from external sources identified by a Load-Serving Entity (LSE) or Resource Planner (RP) to meet its generation reliability or resource adequacy requirements as an alternative to internal resources."

[53] "Resource Planner" is defined as: "The entity that develops a long-term (generally one year and beyond) plan for the resource adequacy of specific loads (customer demand and energy requirements) within a Planning Authority Area."

G. Technical Recommendation (Resources Beyond RFC Footprint)

30. With respect to proposed BAL–502–RFC–02, NERC raises the concern of "how entities within RFC that have load and resources outside the RFC footprint account for these resources in their [resource adequacy] analysis." [54] Specifically, NERC asked RFC to clarify if planning coordinators within the RFC footprint are expected to only include RFC load and resources in the analysis. RFC responded to NERC's technical recommendation stating:

> The intent is to cover all load within the RFC footprint. Planning Coordinators may include load outside the RFC footprint as deemed appropriate. Even if a Planning Coordinator has load outside of the Reliability*First* footprint, as long as it operates as a single area, the adequacy of that Planning Coordinator area will indicate adequacy of the part of the area within the Reliability*First* footprint. From a converse perspective, if the Planning Coordinator operates as a single area, that area must be assessed as a whole or the assessment will be inadequate for the area within the RFC footprint. (If transmission constraints exist, the Planning Coordinator's constrained areas would have to be addressed separately in any event.) [55]

The Commission generally agrees with the response provided by RFC. However, as discussed in detail below, the Commission expects that a planning coordinator may benefit from a common process for including resources and loads outside of the RFC footprint in its resource adequacy analysis.

31. As RFC noted in its response to NERC on this issue that in order to perform a valid assessment, it may be necessary to represent a portion of areas outside of the RFC footprint in order to determine the impact those areas may have on the footprint being analyzed. RFC has incorporated into the proposed regional Reliability Standard a high level of detail necessary to perform a valid assessment. Similarly, the Commission notes how NERC's continent-wide transmission planning Reliability Standards [56] require a valid assessment, and explicitly state in the Standard what is expected to be completed in order to have a valid assessment. One important aspect of a valid assessment is that it should include an appropriate model of areas outside of the area being analyzed in order for the analysis to accurately represent what could be expected during actual operation.[57]

Otherwise, the resource adequacy analysis could be skewed by showing adequacy within the RFC footprint while leaving out an inadequate area outside of the RFC footprint. To avoid this potential issue, the Commission expects that a RFC planning coordinator would have a common process or procedure that addresses the planning reserves assessments, which could include either (i) a methodology to determine whether or how the planning coordinator would include resources and loads outside of the RFC footprint in its resource adequacy analysis or (ii) models which the resource adequacy assessment should utilize that would already include the appropriate modeling of external areas. The Commission seeks comments on any concerns or suggestions to address load and resources outside of the RFC footprint during a planning assessment and also seeks comments on how entities currently perform this task or other similar planning tasks where load and resources occur outside of boundaries required by the assessment.

H. Planning Gap Identification

32. Proposed regional Reliability Standard BAL–502–RFC–02 includes two main Requirements: (1) To annually perform and document resource adequacy analysis (R1); and (2) to annually document the projected load and resource capability for each area identified in the resource adequacy analysis (R2). BAL–502–RFC–02 does not include a Requirement to document any gap between the planning reserve margin calculated in R1.1 (the amount of planning reserve needed to ensure a "one day in ten year" criterion) and the actual planning reserve determined in the resource adequacy analysis.

33. The Commission believes that it would be useful for planning coordinators to identify and document a deficiency in planning reserves. Identification of a planning gap could help ensure that entities are aware of potential risks regarding the capability to balance resources and demand in a planning timeframe. Acknowledging potential risk to the Bulk-Power System during the planning timeframe would allow affected entities time to develop a solution before the identified deficiency in planning reserves leads to adverse reliability impacts. For example, NERC's continent-wide transmission planning Reliability Standards [58] include Requirements for entities to develop a corrective action plan when system simulations indicate an inability of the systems to respond as prescribed in the Standards. Accordingly, the Commission proposes to direct RFC, when reviewing BAL–502–RFC–02 during its scheduled five-year review, to consider modifying BAL–502–RFC–02 to include a Requirement to identify any gap between the needed amount of planning reserves defined in Requirement R1.1 and the planning reserves determined from the resource adequacy analysis. This would be a documentation Requirement only and would not require entities to install additional generation or transmission capacity.

I. Violation Risk Factors/Violation Security Levels

34. To determine a base penalty amount for a violation of a Requirement within a Reliability Standard, NERC, or in this case RFC as the developer of proposed Reliability Standard BAL–502–RFC–02, must first determine an initial range for the base penalty amount. To do so, RFC is to assign a VRF to each Requirement and sub-Requirement of a Reliability Standard that relates to the expected or potential impact of a violation of the Requirement on the reliability of the Bulk-Power System. The Commission has established guidelines for evaluating the validity of each VRF assignment.[59]

35. The Reliability Standard developer also is to assign each Requirement and sub-Requirement one of four VSLs—low, moderate, high, and severe—as measurements for the degree to which the Requirement was violated in a specific circumstance. On June 19, 2008, the Commission issued an order

[54] NERC Petition at 24.

[55] NERC Petition at Exhibit C, NERC's April 17, 2009 Quality Assurance Review Summary at 4.

[56] Transmission Planning Reliability Standards TPL–001 Requirement R1, TPL–002 Requirement R1, TPL–003 Requirement R1, and TPL–004 Requirement R1 all require a valid assessment stating: "The Planning Authority and Transmission Planner shall each demonstrate through a valid assessment. * * *" Further, the sub-requirements under Requirement R1 of each of the above-identified transmission planning Reliability Standards detail what is expected in order to have a valid assessment.

[57] Requirement R1.3.5 of Reliability Standards TPL–001 through TPL–003 and Requirement 1.3.4 of Reliability Standard TPL–004 state that in order to have a valid assessment, the simulation shall "have all projected firm transfers modeled." This is one example of how areas outside of the area being analyzed must be appropriately modeled in order to simulate the impact on the area being analyzed.

[58] *See* Reliability Standards TPL–001–0, Requirements R2 and R3; TPL–002–0, Requirements R2 and R3; TPL–003–0, Requirements R2 and R3; and TPL–004–0, Requirements R2 and R3.

[59] *See North American Electric Reliability Corp.,* 119 FERC ¶ 61,145, *order on reh'g,* 120 FERC ¶ 61,145, at P 8–13 (2007) (Violation Risk Factor Rehearing Order). The guidelines are: (1) Consistency with the conclusions of the Blackout Report; (2) consistency within a Reliability Standard; (3) consistency among Reliability Standards; (4) consistency with NERC's definition of the violation risk factor level; and (5) treatment of requirements that co-mingle more than one obligation.

establishing four guidelines for the development of VSLs.[60]

36. With respect to proposed Reliability Standard BAL–502–RFC–02, RFC assigned VRFs only to the two main Requirements and did not propose VRFs for any of the sub-Requirements.[61] Requirement R1 of BAL–502–RFC–02 is assigned a "medium" VRF and Requirement R2 is assigned a "lower" VRF. Similarly, RFC assigned VSLs only to the main Requirements, R1 and R2, of proposed BAL–502–RFC–02, and not to any of the sub-Requirements. NERC notes that RFC's assignment of both VRFs and VSLs only to the main Requirements is consistent with NERC's August 10, 2009 Informational Filing Regarding the Assignment of VRFs and VSLs.[62]

37. On May 5, 2010, NERC incorporated by reference into Docket No. RR08–4–005,[63] its August 10, 2009 information filing in which NERC proposes assigning VRFs and VSLs only to the main Requirements in each Reliability Standard, and not to the sub-Requirements. Because the VRFs and VSLs for both Requirements R1 and R2 of proposed Reliability Standard BAL–502–RFC–02 are affected by the NERC's pending petition, we propose to defer discussion on the proposed VRFs and VSLs assigned to BAL–502–RFC–02 until after we act on NERC's petition in Docket No. RR08–4–005.

J. Summary

38. In summary, proposed regional Reliability Standard BAL–502–RFC–02 appears to be just, reasonable, not unduly discriminatory or preferential, and in the public interest. Accordingly, the Commission proposes to approve regional Reliability Standard BAL–502–RFC–02 as mandatory and enforceable and to accept the four related defined terms as terms applicable to the RFC region only. In addition, the Commission proposes to defer discussion on the proposed VRFs and VSLs, as described above. The Commission invites comments on these proposals.

IV. Information Collection Statement

39. The Office of Management and Budget (OMB) regulations require approval of certain information collection requirements imposed by agency rules.[64] Upon approval of a collection(s) of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the filing requirements of an agency rule will not be penalized for failing to respond to these collections of information unless the collections of information display a valid OMB control number. The Paperwork Reduction Act (PRA)[65] requires each federal agency to seek and obtain OMB approval before undertaking a collection of information directed to ten or more persons or contained in a rule of general applicability.[66]

40. The Commission is submitting these reporting and recordkeeping requirements to OMB for its review and approval under section 3507(d) of the PRA. Comments are solicited on the Commission's need for this information, whether the information will have practical utility, the accuracy of provided burden estimates, ways to enhance the quality, utility, and clarity of the information to be collected, and any suggested methods for minimizing the respondent's burden, including the use of automated information techniques.

41. This Notice of Proposed Rulemaking (NOPR) proposes to approve one new regional Reliability Standard, BAL–502–RFC–02, that was developed by RFC, a Regional Entity, and submitted by NERC as the ERO. The proposed regional Reliability Standard requires planning coordinators within the RFC geographical footprint to analyze, assess and document resource adequacy, annually, and to document and post projected load and resource capability in each area and transmission-constrained sub-area identified in the resource adequacy assessment. The proposed regional Reliability Standard, which applies to approximately four planning coordinators located in the eastern portion of the U.S., does not require planning coordinators to file information with the Commission. It does require planning coordinators to develop, document, publicly post, and retain certain information, subject to compliance monitoring by RFC. However, the Commission does not believe that approval of the RFC regional Reliability Standard will result in a substantive increase in reporting burdens because it implements the current practices in RFC. As RFC has represented, the affected RFC-member planning coordinators have been subject to these requirements since August 2009 and would continue to be subject to them even if the Commission did not approve BAL–502–RFC–02 as a regional Reliability Standard. Thus, the Commission finds that the requirement to develop, document, and maintain information in the regional Reliability Standard is a current and ongoing requirement for RFC members and, therefore, the Commission's proposed action in this Notice of Proposed Rulemaking would not impose any additional burden on RFC-member planning coordinators. The Commission therefore concludes that this proposed rule will not substantively increase the reporting burden nor impose any additional information collection requirements. The proposed regional Reliability Standard is a new standard and was not included in the original standards submitted for review and approval by OMB. In addition, Commission approval of proposed regional Reliability Standard BAL–502–RFC–02 makes the standard mandatory and enforceable. Therefore, the Commission will submit this proposed rule to OMB for review and approval of the reporting requirements and propose a de minimis burden to reflect the prior implementation by RFC as part of its region's standard practices.

42. The Commission does not foresee any impact on the reporting burden for small businesses.

43. Based on currently available information and the fact that the burden is an existing part of the business process for registered planning coordinators in the RFC region, the Commission estimates that the increased Public Reporting Burden is de minimis as follows:

[60] *North American Electric Reliability Corp.,* 123 FERC ¶ 61,284, at P 20–35 (Violation Severity Level Order), *order on reh'g and compliance,* 125 FERC ¶ 61,212 (2008). The guidelines provide that VSL assignments should: (1) Not lower the current level of compliance; (2) ensure uniformity and consistency in the determination of penalties; (3) be consistent with the corresponding requirement; and (4) be based on a single violation.

[61] We note that in *Version Two Facilities Design, Connections and Maintenance Reliability Standards,* Order No. 722, 126 FERC ¶ 61,255, at P 45 (2009), the ERO proposed to develop VRFs and VSLs for Requirements but not sub-requirements. The Commission denied the proposal as "premature" and, instead, encouraged the ERO to "develop a new and comprehensive approach that would better facilitate the assignment of violation severity levels and violation risk factors." As directed, on March 5, 2010, NERC submitted a comprehensive approach that is currently pending with the Commission in Docket No. RR08–4–005.

[62] NERC Petition at 24.

[63] Docket No. RR08–4–005 comprises NERC's March 5, 2010 Violation Severity Level Compliance Filing submitted in response to Order No. 722. *See* Order No. 722, 126 FERC ¶ 61,255 at P 45.

[64] 5 CFR 1320.8.

[65] 44 U.S.C. 3501–3520.

[66] OMB's regulations at 5 CFR 1320.3(c)(4)(i) require that "Any recordkeeping, reporting, or disclosure requirement contained in a rule of general applicability is deemed to involve ten or more persons."

Proposed data collection FERC–725–H	Number of respondents	Number of responses	Hours per respondent	Total annual hours
Registered planning coordinators [67] in the RFC region	4	1	10	40
Total				40

InformationCollection Costs: The Commission seeks comments on the costs to comply with these requirements.

- *Total annual costs* = $2,651.41 ((40 hours/2080 hours/year) × $137,874/year).
- *Title:* (proposed) FERC–725–H, Regional Reliability Standard BAL–502–RFC–02 (Planning Resource Adequacy Analysis, Assessment and Documentation).
- *Action:* Proposed Collection of Information.
- *OMB Control No:* To Be Determined.
- *Respondents:* Registered planning coordinators in the RFC region.
- *Frequency of Responses:* On Occasion.
- *Necessity of the Information:* The proposed Regional Reliability Standard requires planning coordinators to document and maintain, for two years, their resource adequacy analyses and the projected load and resource capability subject to review by the Commission, NERC, and RFC to ensure compliance with the Reliability Standard.
- *Internal Review:* The Commission has reviewed the proposed regional Reliability Standard BAL–502–RFC–02 and believes it to be just, reasonable, not unduly discriminatory or preferential, and in the public interest. The Commission has assured itself, by means of internal review, that there is specific, objective support for the burden estimates associated with the information requirements.

44. Interested persons may obtain information on the reporting requirements by contacting: Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 [Attention: Ellen Brown, Office of the Executive Director, Phone: (202) 502–8663, fax: (202) 273–0873, e-mail: *DataClearance@ferc.gov*]. Comments on the requirements of this order may also be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission]. For security reasons, comments should be sent by e-mail to OMB at *oira_submission@omb.eop.gov.* Please reference FERC–725H and the docket number of this proposed rulemaking in your submission.

[67] At this time, there are only four registered planning coordinators in the RFC region.

V. Environmental Analysis

45. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[68] The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. Included in the exclusion are rules that are clarifying, corrective, or procedural or that do not substantially change the effect of the regulations being amended.[69] The actions proposed herein fall within this categorical exclusion.

VI. Regulatory Flexibility Act Certification

46. The Regulatory Flexibility Act of 1980 (RFA)[70] generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The entities to which the requirements of this Rule would apply; i.e., planning coordinators within the RFC region, do not fall within the definition of small entities.[71] Moreover, the proposed regional Reliability Standards reflect a continuation of existing resource planning assessment requirements for these planning coordinators and are "new" only with respect to the fact that once approved by the Commission, they would be subject to enforcement by either NERC or the Commission. Based on the foregoing, the Commission certifies that this Rule will not have a significant impact on a substantial number of small entities. Accordingly, no regulatory flexibility analysis is required.

[68] *Regulations Implementing the National Environmental Policy Act of 1969,* 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs., Regulations Preambles 1986–1990 ¶ 30,783 (1987).

[69] 18 CFR 380.4(a)(2)(ii).

[70] 5 U.S.C. 601–612.

[71] The RFA definition of "small entity" refers to the definition provided in the Small Business Act (SBA), which defines a "small business concern" as a business that is independently owned and operated and that is not dominant in its field of operation. *See* 15 U.S.C. 632. According to the SBA, a small electric utility is defined as one that has a total electric output of less than four million MWh in the preceding year.

VII. Comment Procedures

47. The Commission invites interested persons to submit comments on the matters and issues proposed in this NOPR to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due December 27, 2010. Comments must refer to Docket No. RM10–10–000, and must include the commenter's name, the organization they represent, if applicable, and their address in their comments.

48. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's Web site at *http://www.ferc.gov.* The Commission accepts most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

49. Commenters that are not able to file comments electronically must send an original copy of their comments to: [72] Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426.

50. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

VIII. Document Availability

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

[72] The number of copies to be filed is set forth in the Commission's "Quick Reference Guide for Paper Submissions" (as updated), *available at http://www.ferc.gov/docs-filing/efiling.asp.*

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

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

By direction of the Commission.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–27132 Filed 10–26–10; 8:45 am]

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 284

[Docket No. RM11–1–000]

Capacity Transfers on Intrastate Natural Gas Pipelines

October 21, 2010.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice of inquiry.

SUMMARY: The Federal Energy Regulatory Commission is seeking comments on whether and how holders of firm capacity on intrastate natural gas pipelines providing interstate transportation and storage services under section 311 of the Natural Gas Policy Act of 1978 and Hinshaw pipelines providing such services pursuant to blanket certificates issued under § 284.224 of the Commission's regulations should be permitted to allow others to make use of their firm interstate capacity.

DATES: Comments are due December 27, 2010.

FOR FURTHER INFORMATION CONTACT: James Sarikas (Technical Information), Office of Energy Market Regulation, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–6831, *James.Sarikas@ferc.gov;* Anna Fernandez (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–6682, *Anna.Fernandez@ferc.gov.*

SUPPLEMENTARY INFORMATION:

Notice of Inquiry

1. Recently, the Commission issued an order finding that the Commission's policy prohibiting buy/sell transactions applies to interstate open-access transportation services provided by (1) intrastate natural gas pipelines pursuant to section 311 of the Natural Gas Policy Act of 1978 (NGPA) [1] and (2) Hinshaw pipelines [2] pursuant to blanket certificates issued under section 284.224 of the Commission's regulations.[3] In this Notice of Inquiry (NOI), the Commission is seeking comments on whether and how holders of firm interstate capacity on section 311 and Hinshaw pipelines should be permitted to allow others to make use of their firm interstate capacity, including to what extent buy/sell transactions should be permitted.[4]

I. Current Commission Policy

2. NGPA section 311 authorizes the Commission to allow intrastate natural gas pipelines to transport natural gas "on behalf of" interstate pipelines or local distribution companies served by interstate pipelines "under such terms and conditions as the Commission may prescribe." [5] NGPA section 601(a)(2) exempts transportation service authorized under NGPA section 311 from the Commission's NGA jurisdiction. Congress adopted these provisions in order to eliminate the regulatory barriers between the intrastate and interstate markets and to promote the entry of intrastate pipelines into the interstate market. Such entry eliminates the need for duplication of facilities between interstate and intrastate pipelines.[6] Subpart C of the Commission's Part 284 open access regulations (18 CFR § 2841.121–126) implements the provisions of NGPA section 311 concerning transportation by intrastate pipelines.[7]

3. Shortly after the adoption of the NGPA, the Commission authorized Hinshaw pipelines to apply for NGA section 7 certificates, authorizing them to transport natural gas in interstate commerce in the same manner as intrastate pipelines may do under NGPA section 311.[8] Specifically, section 284.224 of the Commission's regulations provides for the issuance of blanket certificates to Hinshaw pipelines to provide open access transportation service "to the same extent that, and in the same manner" as intrastate pipelines are authorized to perform such service by subpart C.

4. The Part 284, subpart C, regulations require that intrastate pipelines performing interstate service under NGPA section 311 must do so on an open-access basis.[9] However, consistent with the NGPA's goal of encouraging intrastate pipelines to provide interstate service, the Commission has not imposed on intrastate pipelines all of the Part 284 requirements imposed on interstate pipelines. For example, when the Commission first adopted the Part 284 open access regulations in Order No. 436, the Commission exempted intrastate pipelines from the requirement that they offer open access service on a firm basis.[10] The Commission found that requiring intrastate pipelines to offer firm service to out-of-state shippers could discourage them from providing any interstate service, because such a requirement could progressively turn the intrastate pipeline into an interstate pipeline against its will and against the will of the responsible state authorities. For the same reasons, when the Commission adopted Order No. 636 [11] restructuring

[1] 15 U.S.C. 3371(a)(2).

[2] Section 1(c) of the Natural Gas Act (NGA) exempts from the Commission's NGA jurisdiction those pipelines which transport gas in interstate commerce if (1) They receive natural gas at or within the boundary of a state, (2) all the gas is consumed within that state and (3) the pipeline is regulated by a state Commission. This exemption is referred to as the Hinshaw exemption after the Congressman who introduced the bill amending the NGA to include section 1(c). *See ANR Pipeline Co.* v. *Federal Energy Regulatory Comm'n,* 71 F.3d 897, 898 (1995) (ANR) (briefly summarizing the history of the Hinshaw exemption).

[3] *Arizona Public Service Co. and Sequent Energy Management, L.P.,* 132 FERC ¶ 61,064 (2010) (APS/Sequent).

[4] This NOI relates to firm capacity on section 311 and Hinshaw pipelines used for interstate service subject to our jurisdiction under the NGPA or NGA and does not extend to non-jurisdictional capacity used for purely intrastate service.

[5] 15 U.S.C. 3371(c).

[6] *EPGT Texas Pipeline,* 99 FERC ¶ 61,295, at 62,252 (2002) (EPGT).

[7] 18 CFR 284.121–126 (2010).

[8] *Certain Transportation, Sales, and Assignments by Pipeline Companies not Subject to Commission Jurisdiction Under Section 1(c) of the Natural Gas Act,* Order No. 63, FERC Stats. & Regs. ¶ 30,118, at 30,824–25 (1980).

[9] 18 CFR 284.7(b), 284.9(b) and 284.122 (2010).

[10] *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol,* Order No. 436, FERC Stats. & Regs. ¶ 30,665, at 31,502 (1985).

[11] *See Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation and Regulation of Natural Gas Pipeline After Partial Wellhead Decontrol,* Order No. 636, FERC Stats. & Regs. ¶ 30,939, order on reh'g, Order No. 636–A, FERC Stats. & Regs. ¶ 30,950, *order on reh'g,* Order No. 636–B, 61 FERC ¶ 61,272 (1992), *order on reh'g,* 62 FERC ¶ 61,007 (1993), aff'd *in part and remanded in part sub nom.*

the services provided by interstate pipelines, the Commission exempted intrastate pipelines from the requirements of Order No. 636, including capacity release, electronic bulletin boards (now Internet Web sites) and flexible receipt and delivery points.[12]

5. Order No. 636 adopted the capacity release program in order to permit holders of firm capacity on interstate pipelines to "reallocate unneeded firm capacity" to the person who values it the most.[13] The Commission reasoned that the capacity release program would promote efficient load management by the pipeline and its customers and would, therefore, result in the efficient use of firm interstate pipeline capacity throughout the year. It further concluded that, "because more buyers will be able to reach more sellers through firm transportation capacity, capacity reallocation comports with the goal of improving nondiscriminatory, open access transportation to maximize the benefits of the decontrol of natural gas at the wellhead and in the field."[14]

6. Prior to Order No. 636, the Commission had permitted interstate pipelines to obtain certificates for capacity brokering programs that would allow customers to assign their capacity directly to other customers on a first-come, first-served basis, without any requirement that the brokering shipper post the availability of its capacity or allocate it to the highest bidder.[15] In Order No. 636, however, the Commission decided that it could not monitor those certificated capacity brokering programs adequately to ensure against undue discrimination in the allocation of capacity.[16] When transactions occurred directly and privately between shippers, there was no way to verify that certain purchasers were not being favored unreasonably over others.[17] The Commission explained that "there are simply too many potential assignors of capacity and too many different programs for the Commission to oversee."[18]

7. The capacity release program addressed those concerns by, among other things, requiring that all reassignments be transparent. Order No. 636 prohibited private transfers of capacity between shippers and, instead, required that all release transactions be conducted through the pipeline. Therefore, when a releasing shipper releases its capacity, the replacement shipper must enter into a contract directly with the pipeline, and section 284.13(b) of the Commission's regulations requires the pipeline to post information about the replacement shipper's contract including any special terms and conditions.[19] In addition, the capacity release program requires certain categories of releases to be posted for bidding.[20]

8. In orders issued concurrently with Order No. 636, the Commission terminated the capacity brokering program.[21] The Commission also stated it would not authorize any more buy/sell transactions.[22] Traditionally, a buy/sell transaction is a commercial arrangement whereby a shipper holding interstate pipeline capacity buys gas at the direction of, on behalf of, or directly from another entity (e.g., an end-user), ships that gas through its interstate pipeline capacity, and then resells an equivalent quantity of gas to the downstream entity at the delivery point. The Commission believed that to permit buy/sell transactions to utilize interstate pipeline capacity after the capacity release mechanism went into effect would frustrate the new, nationally uniform capacity release program.[23]

9. On June 25, 2010, Arizona Public Service Company (APS) and Sequent Energy Management, L.P. (Sequent) (collectively, Petitioners) sought clarification that a certain proposed transaction involving a Hinshaw storage facility was not a prohibited buy/sell transaction as contemplated by Commission policy.[24] They contended that the Commission's buy/sell prohibition was inapplicable to service on Hinshaw pipelines, because the buy/sell prohibition was intended to prevent the circumvention of the Commission's capacity release program instituted in Order No. 636 and Hinshaw pipelines do not offer capacity release. Alternatively, Petitioners requested a limited waiver should the Commission determine that the transaction was a prohibited buy/sell transaction. Under the proposed agreement, APS would have the right to deliver gas to Sequent and Sequent would take title to the gas and inject it into storage at Chevron Keystone Gas Storage, LLC (Keystone Storage), a Hinshaw pipeline with a limited blanket certificate to provide certain storage and hub services in interstate commerce. APS would have the right to require Sequent to redeliver gas to APS and title would pass back to APS at the Keystone Storage delivery point. Like other section 311 and Hinshaw pipelines, Keystone Storage's tariff requires that the storage or transportation capacity holder possesses title to the gas being stored or transported.

10. The Petitioners raised an issue which the Commission had not previously addressed—whether the prohibition on buy/sell transactions applies to interstate open-access transportation services provided by section 311 and Hinshaw pipelines, and the *APS/Sequent* order found that the prohibition did apply. The Commission explained that, while Order No. 636 adopted the prohibition on buy/sell transactions in conjunction with the creation of the capacity release program for interstate pipelines, the prohibition on buy/sell transactions, together with the shipper-must-have-title rule, play a more fundamental role than just preventing the circumvention of the capacity release program.[25] These rules help enforce the central requirement of the Commission's Part 284 regulations that all open-access pipelines, including section 311 and Hinshaw pipelines, "must provide such service without undue discrimination, or preference."[26] They do this by ensuring that capacity is allocated among shippers in a transparent manner based on the procedures and not unduly discriminatory priorities in the pipeline's Commission-approved tariff, either for the direct sale of capacity by the pipeline or for capacity release by firm shippers.[27]

United Distribution Cos. v. *FERC,* 88 F.3d 1105 (D.C. Cir. 1996), *order on remand,* Order No. 636–C, 78 FERC ¶ 61,186 (1997), *order on reh'g,* Order No. 636–D, 83 FERC ¶ 61,210 (1998).

[12] Order No. 636–B, 61 FERC at 61,992 n.26.

[13] Order No. 636, FERC Stats. & Regs. ¶ 30,939 at 30,418.

[14] *Id.*

[15] *See Algonquin Gas Transmission Corp.,* 59 FERC ¶ 61,032 (1992) (Algonquin).

[16] Order No. 636, FERC Stats. & Regs. ¶ 30,939 at 30,416.

[17] *United Distributions Co.* v. *FERC,* 88 F.3d at 1149–50 (quoting Order No. 636 at 30,416).

[18] *Id.*

[19] As Order No. 636 emphasized:

> The main difference between capacity brokering as it now exists and the new capacity release program is that under capacity brokering, the brokering customer could enter into and execute its own deals without involving the pipeline. Under capacity releasing, all offers must be put on the pipeline's electronic bulletin board and contracting is done directly with the pipeline.

Order No. 636, FERC Stats. & Regs. ¶ 30,939 at 30,420 (emphasis in original).

[20] 18 CFR 284.8(c)–(e), (h) (2010).

[21] *Algonquin,* 59 FERC ¶ 61,032.

[22] *El Paso Natural Gas Co., et al.,* 59 FERC ¶ 61,031 (1992) (El Paso).

[23] *Id.* at 61,080.

[24] According to their petition, APS is Arizona's largest electric utility company and Sequent purchases and sells natural gas and provides other energy-related services to customers throughout the United States.

[25] *APS/Sequent,* 132 FERC ¶ 61,064 at P 16.

[26] *Id.* (citing sections 284.7(b)(1) and 284.9(b) of the Commission's regulations, which are applicable to intrastate pipelines providing service under Subpart C of the Part 284 regulations).

[27] *APS/Sequent,* 132 FERC ¶ 61,064 at P 16.

11. The Commission acknowledged that it does not require section 311 and Hinshaw pipelines to include capacity release provisions in their tariffs, nor have any such pipelines done so. However, it did not follow from this fact that the prohibition on buy/sell transactions was unnecessary. Rather, the Commission stated that the absence of a capacity release program for section 311 and Hinshaw pipelines means that their tariffs contain no provisions to ensure that capacity reassignments by shippers are transparent and non-discriminatory. In these circumstances, a blanket authorization of buy/sell transactions would allow holders of capacity on such pipelines to privately contract to allow another party to make use of their capacity without informing the pipeline or publicly disclosing the transaction. This, the Commission stated, would create the same potential for discrimination and inability of the Commission to monitor capacity reassignment which led to the adoption of the capacity release program as the sole method for capacity reassignment on interstate pipelines.[28]

12. Recognizing, however, that capacity reassignments could promote more efficient use of firm pipeline capacity, and given the absence of any generic capacity reassignment programs on section 311 and Hinshaw pipelines, the Commission agreed to consider, on a case-by-case basis, requests for waiver of the buy/sell prohibition, where it can be shown that a particular buy/sell transaction provides significant benefits to the market.[29] Along those same lines, the Commission found that, in this case, good cause existed to grant Petitioners a limited waiver of the Commission's buy/sell prohibition in order to allow the proposed agreement to proceed.[30]

13. Neither of the Petitioners sought rehearing of the *APS/Sequent* order. However, following that order, fifteen motions to intervene out-of-time were filed. Also filed were five requests for rehearing of the *APS/Sequent* order and each of those requests were filed by entities seeking late intervention. The entities seeking rehearing are: (1) Texas Pipeline Association (TPA); (2) BG Energy Merchants, LLC (BG Energy); (3) Morgan Stanley Capital Group Inc. (Morgan Stanley); (4) the Associations; [31] and (5) the Marketer Group.[32] Of the five rehearing requests, four asked that the Commission reverse its ruling expanding the buy/sell prohibition to section 311 and Hinshaw pipelines and one asked the Commission to consider requiring section 311 and Hinshaw pipelines to offer capacity release. Two of the four requests seeking reversal stated that issues regarding the secondary market on section 311 and Hinshaw pipelines, including the buy/sell prohibition, should have been addressed in a NOI proceeding to examine the available options and their implications.

14. The Marketer Group, Morgan Stanley, TPA and the Associations requested that the Commission reverse its ruling expanding the buy/sell prohibition to section 311 and Hinshaw pipelines.[33] They contended, among other things, that the Commission erred by expanding the buy/sell prohibition to section 311 and Hinshaw pipelines on the basis of discrimination concerns without a record establishing the existence of discrimination. If the Commission seeks transparency, Morgan Stanley argued that a necessary precursor is a capacity release mechanism. In fact, Morgan Stanley argued that the efficiency gains cited by the *APS/Sequent* order cannot be fully realized absent a capacity release mechanism on section 311 and Hinshaw facilities. The Associations suggested that if the Commission wishes to address any issues with regard to the secondary market of capacity on section 311 and Hinshaw pipelines, it should initiate a notice of inquiry proceeding to examine any available options and their implications.

15. The Marketer Group, Morgan Stanley, TPA and the Associations also argued that the *APS/Sequent* order failed to establish a record addressing the potential effect, results, and impacts on shippers. Among the issues they argued the *APS/Sequent* order did not consider are: (1) The potential market uncertainty that may result from the expansion of the buy/sell prohibition to section 311 and Hinshaw pipelines; (2) the impact on the efficient use of section 311 and Hinshaw pipeline capacity; (3) the burden and impracticability of entities having to seek a waiver for buy/sell transactions on section 311 and Hinshaw pipelines; and (4) the extent of the Commission's jurisdiction to impose the buy/sell prohibition on section 311 and Hinshaw pipelines given Congress' decision to provide the Commission with only limited jurisdiction over section 311 and Hinshaw pipelines. The Marketer Group states that, if the Commission believes that it may be in the public interest to apply the buy/sell prohibition to section 311 and Hinshaw pipelines, the Commission should issue a NOI in which a record can be compiled to examine the necessity for and the implications associated with the issue.

16. In its rehearing request, BG Energy requested that the Commission institute a notice and comment proceeding to consider requiring a uniform capacity release program for section 311 and Hinshaw pipelines that requires capacity to be posted and subject to bidding on a non-discriminatory basis. It contended that a firm shipper on a section 311 or Hinshaw pipeline that wants to release or acquire interstate capacity encounters cumbersome, lengthy, and non-transparent procedures.

17. In a contemporaneous order in the *APS/Sequent* proceeding, the Commission is denying the late interventions and dismissing the requests for rehearing.[34] In that order, the Commission finds that the entities requesting late intervention seek only to raise general policy issues concerning capacity reassignment on section 311 and Hinshaw pipelines which are more appropriately addressed in a rulemaking proceeding.

II. Discussion

18. As stated above, the Commission is issuing this NOI to consider whether and how holders of firm interstate capacity on section 311 and Hinshaw natural gas pipelines should be permitted to allow others to make use of their firm interstate capacity, including to what extent buy/sell transactions should be permitted. Specifically, the Commission requests comments on the following questions:

A. Questions Related to Application of Buy/Sell Prohibition to Section 311 and Hinshaw Pipelines

1. The requests for rehearing in *APS/Sequent* suggest that marketers and others holding firm interstate capacity

[28] *Id.* P 17.

[29] *Id.* P 19.

[30] *Id.* P 21.

[31] The Associations include Natural Gas Supply Association, Electric Power Supply Association, and Independent Petroleum Association of America.

[32] The Marketer Group includes Barclays Capital Energy Inc., Chevron U.S.A. Inc., Citigroup Energy Inc., ConocoPhillips Company, Encana Marketing (USA) Inc., Iberdrola Renewables, Inc., J.P. Morgan Ventures Energy Corporation, Tenaska Marketing Ventures, Sempra Energy Trading LLC and Shell Energy North America (U.S.) L.P.

[33] TPA, in addition to the foregoing, requests that the Commission clarify that the shipper-must-have-title rule also does not apply to section 311 and Hinshaw pipelines. Section 311 and Hinshaw pipelines generally include in their statements of operating conditions a requirement that shippers possess title to the gas being stored or transported.

[34] *Arizona Public Service Company and Sequent Energy Management, L.P.,* 133 FERC ¶ 61,049 (2010).

on section 311 and Hinshaw pipelines are using buy/sell transactions to allow others to make use of their capacity. Are buy/sell transactions commonly used in connection with service on section 311 and Hinshaw pipelines or are such transactions relatively rare? Are such transactions more commonly used with respect to storage capacity as in *APS/Sequent* or are they used with respect to all types of services? Have such transactions provided for more efficient use of firm capacity on section 311 and Hinshaw pipelines?

2. Are there any experiences or concerns of undue discrimination or preference or loss of market transparency related to the buy/sell transactions which have occurred on section 311 and Hinshaw pipelines?

3. Could buy/sell transactions be allowed without risk of undue discrimination or preference or loss of market transparency? Section 311 and Hinshaw pipelines generally include in their statements of operating conditions a requirement that shippers possess title to the gas being stored or transported. Is application of the shipper-must-have-title rule sufficient to minimize concerns about undue discrimination and transparency, since it ensures that the capacity holder has an interest in the gas being transported? [35]

4. When the Commission grandfathered existing buy/sell transactions at the time of Order No. 636, the Commission required participants in those transactions to notify the interstate pipeline of them, and the Commission required the pipeline, for informational purposes, to post notice of the transactions on its electronic bulletin board.[36] Would a similar reporting requirement for participants in buy/sell transactions to notify the relevant section 311 and Hinshaw pipelines and for those pipelines to post notice of them reasonably mitigate concerns related to undue discrimination or preference or loss of market transparency?

5. In *ANR,*[37] the U.S. Court of Appeals for the District of Columbia Circuit held that the Commission must provide a reasonable justification for excluding section 311 pipelines from requirements imposed on interstate pipelines, where such regulatory differences may place the interstate pipelines at a competitive disadvantage. Would allowing buy/sell transactions on section 311 and Hinshaw pipelines, but not on interstate natural gas pipelines, cause any competitive disadvantage to interstate pipelines?

6. Consistent with the NGPA's goal of encouraging intrastate pipelines to provide interstate service, the Commission has not imposed on intrastate pipelines all of the Part 284 requirements imposed on interstate pipelines. Would extending the buy/sell prohibition to service on section 311 and Hinshaw pipelines deter intrastate pipelines from participating in the interstate market? If so, explain what burdens such a prohibition places on section 311 and Hinshaw pipelines that would make them less likely to offer interstate service.

B. Questions Related to Requiring Section 311 and Hinshaw Pipelines Providing Firm Service To Also Allow Capacity Release

1. The Commission has consistently held that capacity reassignments promote more efficient use of firm pipeline capacity by enabling a holder of such capacity to permit its capacity to be used by another party for a higher valued use. However, Order No. 636 did not require section 311 and Hinshaw pipelines providing firm interstate services to offer capacity release because of a concern that imposing all the requirements of Order No. 636 on such pipelines could discourage them from offering interstate services. Should the Commission reexamine its decision not to require section 311 and Hinshaw pipelines to offer capacity release in light of market changes since the issuance of Order No. 636 in 1992 and the success of the interstate capacity release program?

2. As discussed above, the U.S. Court of Appeals for the District of Columbia Circuit has held that the Commission "must provide a reasonable justification for excluding" an intrastate pipeline from a requirement that binds interstate pipelines.[38] Similarly, the Commission has held that it may grant intrastate facilities "additional flexibility," but not if lighter regulation would "harm any party [or] impede the Commission's goal of fostering a national pipeline grid." [39] Does the absence of a transparent method for shippers on section 311 and Hinshaw pipelines to reassign their capacity interfere with the Commission's goal of fostering an efficient national pipeline grid in which buyers and sellers of natural gas have the maximum ability to reach one another? Would requiring some or all section 311 and Hinshaw pipelines to offer capacity release provide sufficient benefits to the market as a whole to outweigh any costs incurred as a result of such a requirement? Does exempting section 311 and Hinshaw pipelines from offering capacity release give them a competitive advantage over interstate pipelines?

3. Should any requirement for section 311 and Hinshaw pipelines to offer capacity release be limited to some category of such pipelines whose services significantly affect interstate markets? If so, how should that category be defined (e.g., based on size as shown by annual throughput above a certain level, percentage of business that is interstate, or storage providers with market-based rates)?

4. In Order No. 720,[40] the Commission required major non-interstate pipelines, defined as those pipelines that are not natural gas companies under the NGA and deliver annually more than 50 million MMBtu measured in average deliveries over the past three years, to post daily scheduled volume information. Should the Commission adopt the threshold utilized in Order No. 720 to determine which section 311 and Hinshaw pipelines would be required to offer capacity release?

5. In this regard, based upon our review of existing section 311 and Hinshaw pipelines, there are some intrastate pipelines whose current service consists virtually entirely of interstate service provided under NGPA section 311.[41] This is particularly true of some of the newer section 311 and Hinshaw storage providers. Should any requirement to offer capacity release be limited to section 311 and Hinshaw pipelines whose business is predominantly interstate? If so, what standard should be used to determine if such a pipeline's business is predominantly interstate?

6. The capacity release program is only applicable to firm services, and the Commission does not require section 311 and Hinshaw pipelines to offer firm services. Would a requirement that section 311 and Hinshaw pipelines offering firm service also offer capacity release discourage such pipelines from offering any firm interstate service?

[35] *See El Paso,* 59 FERC ¶ 61,031 at 61,079.

[36] *Id.* at 61,080.

[37] *See ANR,* 71 F.3d 897.

[38] *See ANR,* 71 F.3d 897.

[39] *See EPGT,* 99 FERC ¶ 61,295 at 62,252–3.

[40] *Pipeline Posting Requirements under Section 23 of the Natural Gas Act,* Order No. 720, FERC Stats. & Regs. ¶ 31,283 (2008), Order No. 720–A, 75 FR 5178 (Jan. 21, 2010), FERC Stats. & Regs. ¶ 31,302 (2010), Order No. 720–B, 75 FR 44,893 (July 30, 2010), FERC Stats. & Regs. ¶ 31,314 (2010).

[41] For example, Regency Intrastate Gas, LLC and Bay Gas Storage, Ltd. transport over 95 percent of their throughput as interstate gas. Crosstex LIG, LLC and Enterprise Texas, LLC along with Regency Intrastate Gas, LLC predominately serve the interstate market and have recently undertaken major expansions that are primarily dedicated to moving shale gas into the interstate marketplace.

Would this concern be minimized if the requirement to offer capacity release is limited to larger section 311 and Hinshaw pipelines whose services are predominantly interstate?

7. If section 311 and Hinshaw pipelines are required to offer capacity release, should the regulations be the same as the capacity release regulations for interstate pipelines set forth in section 284.8 of the Commission's regulations? Would a subset of those regulations be sufficient for purposes of preventing undue discrimination and promoting transparency, while minimizing any burden on the pipelines offering capacity release?

19. Finally, as we recognized in the *APS/Sequent* order, the Commission has not previously addressed the issue of whether the buy/sell prohibition applies to interstate service provided by section 311 and Hinshaw pipelines. Thus, until the Commission issued that order, there was no clear policy prohibiting such transactions. Therefore, the Commission will not institute any enforcement actions with respect to prior buy/sell transactions involving section 311 and Hinshaw pipelines. In addition, the Commission grants a blanket waiver of the prohibition on buy/sell transactions to allow existing and new buy/sell transactions involving section 311 and Hinshaw pipelines to continue to take place until the Commission issues a further order in this proceeding. This will avoid disrupting any ongoing relationships established through currently existing buy/sell transactions and also avoid discouraging beneficial new arrangements, while the Commission considers the policy issues raised in this proceeding. As we recognized in the *APS/Sequent* order, capacity reassignments can promote more efficient use of firm pipeline capacity by enabling a holder of such capacity to permit its capacity to be used by another party for a higher valued use.

III. Procedure for Comments

20. The Commission invites interested persons to submit comments and other information on the matters, issues, and specific questions identified in this notice. Comments are due 60 days from the date of publication in the **Federal Register**. Comments must refer to Docket No. RM11–1–000, and must include the commenter's name, the organization they represent, if applicable, and their address.

21. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's Web site at *http://www.ferc.gov.* The Commission accepts most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

22. Commenters unable to file comments electronically must mail or hand deliver an original copy of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426. The current requirements are specified on the Commission's Web site, see, e.g., the "Quick Reference Guide for Paper Submissions," *available* at *http://www.ferc.gov/docs-filing/efiling.asp,* or via phone from FERC Online Support at 202–502–6652 or toll-free at 1–866–208–3676.

23. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters are not required to serve copies of their comments on other commenters.

IV. Document Availability

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

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

26. User assistance is available for eLibrary and the Commission's Web site during normal business hours. For assistance, please contact the Commission's Online Support at 1–866–208–3676 (toll free) or 202–502–6652 (e-mail at *FERCOnlineSupport@ferc.gov*) or the Public Reference Room at 202–502–8371, TTY 202–502–8659 (e-mail at *public.referenceroom@ferc.gov*).

By direction of the Commission.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–27156 Filed 10–26–10; 8:45 am]

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DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

19 CFR Part 111

[Docket No. USCBP–2010–0038]

RIN 1651–AA80

Permissible Sharing of Client Records by Customs Brokers

AGENCIES: Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend Customs and Border Protection (CBP) regulations in title 19 of the Code of Federal Regulations (CFR) pertaining to the obligations of customs brokers to keep clients' information confidential. The proposed amendment would allow brokers, upon the client's consent in a written authorization, to share client information with affiliated entities related to the broker so that these entities may offer non-customs business services to the broker's clients. The proposed amendment would also allow customs brokers to use a third-party to perform photocopying, scanning, and delivery of client records for the broker. These proposed changes are intended to update the regulation to reflect modern business practices, while protecting the confidentiality of client (importer) information. In addition, the proposed changes would align the regulations with CBP's previously published rulings concerning brokers' confidentiality of client information.

DATES: Comments must be received on or before December 27, 2010.

ADDRESSES: You may submit comments, identified by *docket number,* by *one* of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments via docket number USCBP–2010–0038.
- *Mail:* Trade and Commercial Regulations Branch, U.S. Customs and Border Protection, 799 9th Street, NW. (Mint Annex), Washington, DC 20229–1179.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All

comments received will be posted without change to *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.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.* Submitted comments may also be inspected on regular business days between the hours of 9 a.m. and 4:30 p.m. at the Trade and Commercial Regulations Branch, Regulations and Rulings, Office of International Trade, U.S. Customs and Border Protection, 799 9th Street, NW. (5th Floor), Washington, DC. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 325–0118.

FOR FURTHER INFORMATION CONTACT: For legal aspects, Carrie Owens, Chief, Entry Process & Duty Refunds Branch, Regulations and Rulings, Office of International Trade, (202) 325–0266. For operational aspects, Anita Harris, Chief, Broker Compliance Branch, Trade Policy and Programs, Office of International Trade, (202) 863–6069.

SUPPLEMENTARY INFORMATION:

Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on any aspect of the proposed rule. Customs and Border Protection (CBP) also invites comments that relate to the economic, environmental, or federalism effects that might result from this proposal. If appropriate to a specific comment, the commenter should reference the specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

Background

The statutory provision governing customs brokers is found in section 641, Tariff Act of 1930, as amended (19 U.S.C. 1641). Specifically, section 641(f) authorizes CBP to promulgate "rules and regulations relating to the customs business of customs brokers as the Secretary * * * considers necessary to protect importers and the revenue of the United States * * * including rules and regulations governing * * * the keeping of * * * records by customs brokers * * * " *See* 19 U.S.C. 1641(f). The implementing regulations issued under the authority of § 641 are set forth in part 111 of title 19 of the Code of Federal Regulations (19 CFR part 111).

In order to meet its obligations to protect the revenue and enforce the customs laws, it is essential that CBP receive full and complete information from importers with respect to their customs transactions. These transactions contain confidential business information, the unauthorized disclosure of which could cause competitive harm to the importer or other companies. Brokers occupy a unique role as conduits with respect to import transactions. As entities that are licensed and regulated by the U.S. government, brokers act as intermediaries between importers and CBP to assure that complete and accurate information is provided. Thus, a special relationship exists between the broker, its client (the importer), and CBP. The duties and responsibilities of customs brokers in transacting customs business on behalf of their clients, and, in particular, the confidential treatment that brokers must accord their records of such transactions, are governed by the regulations in 19 CFR part 111 issued under the authority of 19 U.S.C. 1641(f).

It is well settled that customs brokers have a fiduciary duty to protect client information. As such, brokers are subject to certain recordkeeping requirements set forth in part 111 of 19 CFR. In that regard, part 111 requires, among other things, that a broker maintain records of transactions (19 CFR 111.21), retain records (19 CFR 111.23), and make records available for official CBP inspection (19 CFR 111.25). Additionally, in carrying out its duties and responsibilities, a broker is required to exercise responsible supervision and control over the transaction of customs business (19 CFR 111.28(a)) (*see also* 19 U.S.C. 1641(b)(4)), and exercise due diligence in handling customs business matters (19 CFR 111.29(a)). Further, a broker is precluded from entering into an agreement with an unlicensed person to transact customs business if the fees generated from the transaction would inure to the benefit of the unlicensed person (19 CFR 111.36(b)).

Another significant requirement set forth in part 111 is that brokers maintain the confidentiality of client records. *See* 19 CFR 111.24. Section 111.24 of CBP regulations (19 CFR 111.24) covers a broad range of records as defined in § 163.1(a) (19 CFR 163.1(a)), and protects client records and the information contained in those records. Specifically, § 111.24 currently provides that with the exception of certain accredited officers or agents of the United States and the surety involved in a particular transaction, brokers may not disclose client information to third persons except when ordered to by a court. The purpose of the regulation is to prevent a broker from disclosing information it receives from a client to a third-party without the consent of the broker's client. It is noted that when a broker is issued its license by CBP, it agrees to abide by the rules governing brokers, including rules pertaining to the confidentiality of client records. To overcome this confidentiality requirement, a broker need merely request, and receive, a written release from the client authorizing disclosure of that client's information. Absent such a release, a broker who engages in information sharing is subject to disciplinary action for violating the confidentiality requirements of 19 CFR 111.24.

The issue of whether brokers may share client information with third-party business entities has previously been considered by CBP in the form of published rulings. CBP's longstanding position on this matter is that absent written client consent, a broker may not share client information. Specifically, in Headquarters ruling letters (HQ) 116025 (September 29, 2003) and HQ 116190 (June 14, 2004), CBP was asked whether a broker within a family of companies (such as related affiliates, subsidiaries, and parent companies) may share certain client background or aggregate revenue information with related affiliates who were not licensed brokers, but who were separately-incorporated and owned by the same parent company. CBP has consistently held that separately-incorporated companies constitute separate legal entities under the law, notwithstanding common ownership (*see* HQ 223804 (June 29, 1992); HQ 114166 (February 2, 1998); HQ 115248 (August 28, 2001)). Therefore, CBP found that absent a written release from the client authorizing disclosure of client information, section 111.24 precludes a broker from sharing client information with separately-incorporated affiliates of the same parent company. In CBP's view, client background and aggregate revenue information is collected and compiled from, and connected with, records pertaining to the business of clients serviced by the broker. As such, that information falls within the protection of § 111.24. CBP's position is that brokers can secure waivers of confidentiality from their clients in order not to violate the confidentiality requirements of section 111.24.

Similarly, in HQ 114404 (March 16, 1999), CBP held that a licensed broker must ensure that it will not disclose its clients' records to a parent company, unless disclosure is authorized by the client.

In HQ 114758 (November 7, 2000), the question presented was whether a licensed broker may transfer its ancillary financial functions to a related or affiliated company that is not a licensed broker. In that instance, CBP reiterated its position that disclosure to an unauthorized party of any information emanating from a transaction with a client of the broker would constitute a violation, and would subject the violating broker to possible penalty or other disciplinary action. CBP found that outsourcing ancillary financial and administrative services would run afoul of the broker confidentiality provisions, since the records sought to be outsourced would contain financial data or information derived from clients' files pertaining to customs business.

In that ruling, however, CBP acknowledged that there may be situations in which a broker may legitimately transfer some of its business operations to another company. For instance, in HQ 114411 (November 22, 1999), CBP had allowed a broker to outsource its human resources department to an employee leasing company on the condition that the leasing company would have no access to, or involvement in, the actual customs business work of the broker, and that the records of the clients of the broker would be kept confidential from the leasing company. Relying on HQ 114411, CBP held in HQ 114758 that a broker may outsource ancillary financial and administrative functions provided that the same safeguards are in place. Specifically, the broker would be allowed to outsource financial or administrative functions, provided the new service provider had no access to, or involvement in, the actual customs business work of the broker client. This meant that the new service provider could not perform any functions that would be dependent on information or data derived from client files. The broker could only outsource the aforementioned functions provided that the records of the broker's clients, and the information contained in those records would not be disclosed to the new service provider.

Finally, in determining whether a broker is meeting the requirements to keep clients' records confidential, CBP considers how the broker is exercising responsible supervision and control over the customs business it conducts pursuant to 19 U.S.C. 1641(b)(4). *See* HQ 225006 (February 15, 1994).

CBP continues to believe that protection of the client's business information remains a paramount concern. At the same time, however, CBP recognizes that the development of more modern and efficient business practices, brought about by the changing structure and environment of the business community, has rendered the blanket prohibition of the current regulation somewhat antiquated. In particular, CBP understands that in an effort to streamline business practices, a broker may need to use a third-party service provider to perform the tasks of photocopying, scanning, and delivering client documents to support the business functions of the brokerage services. CBP further acknowledges that a broker may have a legitimate financial interest in providing its clients additional non-customs business services which are offered by affiliated entities related to the broker.

To that end, CBP believes policy reasons favor amending § 111.24 to update the regulation to reflect modern business practices, while protecting the confidentiality of client (importer) information. Therefore, consistent with the holdings in CBP's previously published rulings, this document proposes to amend the CBP regulations to align them with its rulings.

Explanation of Proposed Amendments

Permissible Sharing With Client Consent/Written Authorization

With respect to a broker's interest in providing additional non-customs business services to its clients, CBP proposes to permit a broker to share client information with affiliated entities related to the broker so that the related affiliate may offer non-customs business services to the broker's client only on the condition that the client provides its express consent in a written authorization. The written authorization must specify the information the client authorizes the broker to share outside of the brokerage with affiliated entities related to the broker or with a party bound by contract to the broker. Requiring such consent would balance CBP's interest in the broker's maintaining confidentiality of importers' records with the business interest of the broker to offer additional non-customs business services to its clients.

Other Third-Party Services

Photocopying and Scanning. CBP proposes to amend 19 CFR 111.24 to permit a broker to use a third-party service provider for the limited routine non-customs functions of photocopying and scanning for the broker without violating § 111.24, because these two functions are ancillary to the conduct of "customs business." It is noted, however, that even in providing the administrative tasks of photocopying and scanning, business information pertaining to the broker's client would be revealed in the process. Therefore, in order to achieve a balance between the broker's need for a streamlined business process, and the requirement to maintain the confidentiality of client information, safeguards must be in place to ensure that the requirements arising from 19 U.S.C. 1641 and 19 CFR 111.24 are not compromised.

In that regard, the proposed amendment requires that the broker, consistent with its obligations under § 111.29(a), exercise due diligence in the selection of the third-party service provider. The broker must ensure that the requirements in § 111.36(b) pertaining to a broker's relations with unlicensed persons are complied with. Moreover, in accordance with § 111.28(a), a broker is required to exercise responsible supervision and control over its brokerage business. Thus, the broker must ensure that the party to whom records will be provided for photocopying or scanning will safeguard the information it obtains in the course of providing the subject services. Accordingly, the proposed amendment requires that the broker enter into a non-disclosure agreement with the third-party service provider that requires the third-party to keep the contents and information contained in any records pertaining to the broker's client confidential.

The written consent and the non-disclosure agreement as contemplated in the proposed amendment will be subject to the recordkeeping requirements prescribed for brokers as set forth in §§ 111.21(a), 111.23, and 111.25.

The proposed amendment in this document is designed to codify CBP's previously published rulings and to update the regulation so that it is streamlined with modern and efficient business practices, while protecting the confidentiality of client (importer) information.

Messenger Delivery Services. Because messenger/delivery services are also ancillary to the conduct of "customs business," CBP proposes to further amend 19 CFR 111.24 to provide that a broker may use a third-party messenger service for transporting and/or delivering client documents on the broker's behalf, if the broker safeguards

the clients' records by sealing the documents so that the messenger cannot view, alter, or amend them.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires Federal agencies to examine the impact a rule would have on small entities. A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act); a small not-for-profit organization; or a small governmental jurisdiction (locality with fewer than 50,000 people).

This rule proposes to allow a broker, upon the client's consent in a written authorization, to share client (importer) information with affiliated entities related to the broker in order to offer non-customs business services to its clients. If brokers choose to share client (importer) information with an affiliated entity related to the broker, the changes to the regulation would potentially benefit the broker's client (importer) through the availability and access to additional non-customs business services. This rule also proposes to allow a broker to outsource its photocopying and scanning tasks to a third-party service provider, and to use a third-party messenger service provider for transport and delivery of client records. To the extent that brokers would use third-parties for copying, scanning and messenger services, the changes to the regulation would confer a benefit to the broker by allowing it to streamline its business.

The entities affected by this proposed amendment are brokers, importers, and third-party service providers and would likely consist of a broad range of large, medium, and small businesses; thus, the number of entities subject to this proposed rule would be considered "substantial." The effects of this amendment, however, would not rise to the level of being considered a "significant" economic impact.

Accordingly, CBP believes that the proposed amendment, if adopted, would not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. However, we welcome comments on that assumption. The most helpful comments are those that can give us specific information or examples of a direct impact on small entities. If we do not receive comments that demonstrate that the rule causes small entities to incur significant direct costs, CBP may, during the process of drafting the final rule, certify that this action does not have a significant economic impact on a substantial number of small entities.

Executive Order 12866

The proposed amendment in this document does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866 because it will not result in expenditures totaling $100 million or more in any one year. The Office of Management and Budget (OMB) has not reviewed this regulation under that order. To the extent that licensed customs brokers are able to use lower cost third-party service providers to perform limited administrative tasks, this rule, if finalized, should confer benefits to brokers. Please see the Regulatory Flexibility Act section of this preamble for additional information regarding the potential economic impact of this proposed rule.

The Paperwork Reduction Act

The information collected under the provisions of this proposed rule has been submitted for approval by the Office of Management and Budget (OMB) under OMB control number 1651–0034. Under the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB. The burden estimates for recordkeeping for the non-disclosure agreement as well as the client consent/written authorization are presented below:

Non-Disclosure Agreement

Estimated Number of Recordkeepers: 11,986.

Estimated Number of Responses per Recordkeeper: 1.

Estimated Number of Total Annual Responses: 11,986.

Estimated Time per Response: 1 hour.

Estimated Total Annual Burden Hours: 11,986.

Client Consent/Written Authorization

Estimated Number of Recordkeepers: 711,000.

Estimated Number of Responses per Recordkeeper: 1.

Estimated Number of Total Annual Responses: 711,000.

Estimated Time per Response: 1 hour.

Estimated Total Annual Burden Hours: 711,000.

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the Office of Management and Budget, Attention: Desk Officer for the Department of Homeland Security, Office of Information and Regulatory Affairs, Washington, DC 20503. A copy should also be sent to the Trade and Commercial Regulations Branch, Regulations and Rulings, Office of International Trade, U.S. Customs and Border Protection, 799 9th Street, NW. (5th Floor), Washington, DC 20229–1179.

Comments are invited on:

(a) Whether the recordkeeping 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 the burden of the recordkeeping;

(c) Ways to enhance the quality, utility, and clarity of the recordkeeping;

(d) Ways to minimize the burden of the recordkeeping on respondents, including through the use of automated recordkeeping techniques or other forms of information technology; and

(e) Estimates of capital or startup costs and costs of operations, maintenance, and purchases of services to provide recordkeeping.

Unfunded Mandates Reform Act of 1995

This notice of proposed rulemaking will not impose an unfunded mandate under the Unfunded Mandates Reform Act of 1995. It will not result in costs of $100 million or more, in the aggregate, to any of the following: State, local, or Native American Tribal governments, or the private sector.

Executive Order 13132

In accordance with the principles and criteria contained in Executive Order 13132 (Federalism), this notice of proposed rulemaking will have no substantial effect on the States, the current Federal-State relationship, or on the current distribution of power and responsibilities among local officials.

Signing Authority

This document is being issued in accordance with 19 CFR 0.2(a), which provides that the authority of the Secretary of the Treasury with respect to CBP regulations that are not related to customs revenue functions was transferred to the Secretary of Homeland Security pursuant to section 403(1) of the Homeland Security Act of 2002 and that such regulations are signed by the Secretary of Homeland Security (or her delegate).

List of Subjects in 19 CFR Part 111

Customs brokers, Duties and responsibilities, Records confidential.

Proposed Amendments to the CBP Regulations

For the reasons stated above, it is proposed to amend part 111 of title 19 of the CFR (19 CFR part 111) as set forth below.

PART 111—CUSTOMS BROKERS

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

Authority: 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States (HTSUS)), 1624, 1641.

* * * * *

2. Section 111.24 is revised to read as follows:

§ 111.24 Records confidential.

(a) *Client Records.* The records referred to in this part and pertaining to the business of the clients serviced by the broker are considered confidential. Except as provided in paragraphs (b) and (c) of this section, the broker must not disclose the contents or any information connected with client records to any persons other than those clients, their surety on a particular entry, and the Field Director, Office of International Trade, Regulatory Audit, the CBP port director, the Immigration and Customs Enforcement agent, or other duly accredited officers or agents of the United States, except on subpoena by a court of competent jurisdiction.

(b) *Disclosure to Affiliated Entity Related to Broker.* Upon the client's consent in a written authorization to share client information outside the brokerage, a broker may disclose only to an affiliated entity related to the broker, information specified in the written authorization pertaining to the customs business of that client so that the affiliated entity may offer non-customs business services to the broker's client.

(c) *Other Third-Party Service Providers*—(1) *Photocopying and Scanning Services.* A broker may provide its clients' records to a third-party service provider for photocopying and/or scanning without violating the prohibitions set forth in the provisions of this part pertaining to confidentiality, provided that:

(i) The broker exercises due diligence in accordance with § 111.29(a) of this part in the selection of the third-party service provider for photocopying and/or scanning by ensuring that its association with the third-party does not violate the provisions in § 111.36(b) of this part; and

(ii) The broker enters into a non-disclosure agreement with the third-party service provider for photocopying and/or scanning that requires the third-party to keep the information contained in any records pertaining to the broker's client confidential.

(2) *Messenger Services.* A broker may provide its clients' records to a third-party messenger service provider for transport and delivery without violating the prohibitions set forth in the provisions of this part pertaining to confidentiality, provided that the clients' records are sealed in such a manner so that the third-party messenger service provider may not view, alter, or amend the documents to be delivered.

Dated: October 21, 2010.

David V. Aguilar,

Acting Commissioner, U.S. Customs and Border Protection.

[FR Doc. 2010–27106 Filed 10–26–10; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF JUSTICE

28 CFR Parts 35 and 36

RIN 1190–AA61; 1190–AA62; 1190–AA63; 1190–AA64

Nondiscrimination on the Basis of Disability in State and Local Government Services, Public Accommodations and in Commercial Facilities; Hearings

AGENCY: Civil Rights Division, Department of Justice.

ACTION: Notice of proposed hearings.

SUMMARY: On July 26, 2010, the Department of Justice (Department) published four Advanced Notices of Proposed Rulemaking (ANPRMs) in the **Federal Register** to amend regulations issued under the Americans with Disabilities Act (ADA). These four ANPRMs include: Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations; Nondiscrimination on the Basis of Disability in State and Local Government Services; Accessibility of Next Generation 9–1–1; Nondiscrimination on the Basis of Disability; Movie Captioning and Video Description; and Nondiscrimination on the Basis of Disability by State and Local Governments and Places of Public Accommodation; Equipment and Furniture. To provide an opportunity for interested persons to express their views directly to Department officials, the Department will hold three public hearings on the ANPRMs.

DATES: The hearing dates are:

1. November 18, 2010, 9:30 a.m. to 4 p.m., CST, Chicago, IL.

2. December 16, 2010, 9:30 a.m. to 4 p.m., EST, Washington, DC.

3. January 2011 in San Francisco, CA, on a date to be announced in the near future on the ADA Home Page at *http://www.ada.gov.*

ADDRESSES: The hearing locations are:

1. Access Living, 115 West Chicago Avenue, Chicago, IL 60654.

2. United States Access Board, 1331 F Street, NW., Washington, DC 20004.

3. San Francisco, CA, at a location to be announced in the near future on the ADA Home Page at *http://www.ada.gov.*

FOR FURTHER INFORMATION CONTACT: Linda Garrett, Civil Rights Program Specialist, Disability Rights Section, Civil Rights Division at (202) 353–0423 (TTY). This is not a toll-free number. Information also may be obtained from the Department's toll-free ADA Information Line at (800) 514–0301 (Voice) or (800) 514–0383 (TTY), 9:30 a.m. to 5:30 p.m. Monday, Tuesday, Wednesday, and Friday, and 12:30 p.m. to 5 p.m. on Thursday.

SUPPLEMENTARY INFORMATION: On July 26, 2010, the Department published four ANPRMs seeking public comment on whether to revise the ADA regulations to address Web site accessibility, movie captioning and video description, accessible features for Next Generation 9–1–1, and accessible equipment and furniture. The Department has scheduled three public hearings on the ANPRMs to provide an opportunity to interested persons to express their views about the questions and issues raised in the ANPRMs. Entities, organizations, and individuals who wish to present comments at a particular hearing are encouraged to register in advance by calling the ADA Information Line at (800) 514–0301 (Voice) or (800) 514–0383 (TTY) at least five business days in advance of the hearing date. Organizations should designate no more than one individual to speak on behalf of the organization. Commenters who are not able to testify in person will have the option to present their comments using a speaker telephone, telephone relay service, or video relay service. The Department will attempt to provide an approximate time for the receipt of comments from those who register in advance; however, persons who register in advance should report to the registration desk at the hearing at least one-half hour prior to their scheduled time in order to confirm the time and order of their presentations. Those who register to comment via speaker telephone, telephone relay service, or video relay service should be

available at the number they provided during pre-registration at least one-half hour before their scheduled time.

Some time at the hearing will be reserved for those who do not register in advance. These persons may register on-site at the registration desk, which will open one hour before the hearing is scheduled to begin and will operate throughout the day. Time to make their presentations will be assigned when open slots are available.

Comments will be limited to five minutes per person or organization, but commenters who wish to may supplement their testimony with written statements that will be made part of the official hearing record. If the Department determines that there is not enough time to hear from all those wishing to present comments, the Department will select among those wishing to testify to ensure representation of a range of viewpoints and interests. A laptop computer and projection screen will be available for commenters wishing to use a PowerPoint presentation in conjunction with their testimony.

The hearing sites will be accessible to individuals with disabilities. Sign language interpreters, real-time captioning, and assistive listening devices will be provided. Individuals who require other accommodations, auxiliary aids, or foreign language translation should contact Linda Garrett at (202) 353–0423 (TTY) or by e-mail at *Linda.Garrett@usdoj.gov* no later than one week before the date of the hearing they wish to attend. Additional information, including information about accessible public transportation and parking, will be available on the ADA Home Page at *http://www.ada.gov.* The ANPRMs are available electronically in accessible formats at *http://www.regulations.gov* and *http://www.ada.gov.* This hearing notice is available electronically in accessible formats at *http://www.ada.gov.* Copies of this notice also are available in formats accessible to individuals who are blind or have low vision and may be obtained by calling the ADA Information Line.

Those persons who are not able to participate in the public hearing are encouraged to submit written comments electronically to *http://www.regulations.gov* or by mail as follows: Disability Rights Section, Civil Rights Division, U.S. Department of Justice, P.O. Box 2885, Fairfax, VA 22031–0885. Overnight deliveries should be sent to the Disability Rights Section, Civil Rights Division, U.S. Department of Justice, located at 1425 New York Avenue, NW., Suite 4039, Washington, DC 20005. All comments will be made available for public viewing online at *http://www.regulations.gov* and must be received by January 24, 2011.

Dated: October 19, 2010.

Thomas E. Perez,

Assistant Attorney General for Civil Rights.

[FR Doc. 2010–27092 Filed 10–26–10; 8:45 am]

BILLING CODE 4410–13–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51, 52, 72, 78, and 97

[EPA–HQ–OAR–2009–0491; FRL–9217–7]

Notice of Data Availability Supporting Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone: Revisions to Emission Inventories

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of data availability (NODA).

SUMMARY: EPA is providing notice that it is supplementing the record for the Proposed Transport Rule (75 FR 45210). EPA has placed in the docket for the Proposed Transport Rule (Docket ID No. EPA–HQ–OAR–2009–0491) additional information relevant to the rulemaking, including updated emissions inventory data for 2005, 2012 and 2014 for several stationary and mobile source inventory components. The data revisions reflect new approaches to calculating emissions inventories for specific source categories and related new information and models that have become available since the emissions data were developed and modeled for the proposed rule. EPA is requesting comment on the new data provided in the docket and the proposed revisions identified in this document. These data and revisions could impact the final rule, although such impacts have not yet been quantified by EPA.

DATES: Comments on the NODA must be received on or before November 26, 2010. Please refer to **SUPPLEMENTARY INFORMATION** for additional information on submitting comments.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2009–0491, by one of the following methods:

- *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Fax:* (202) 566–9744. Attention Docket ID No. EPA–HQ–OAR–2009–0941.
- *Mail:* EPA Docket Center, EPA West (Air Docket), Attention Docket ID No. EPA–HQ–OAR–2009–0491, U.S. Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please include a total of 2 copies.
- *Hand Delivery:* U.S. Environmental Protection Agency, EPA West (Air Docket), 1301 Constitution Avenue, NW., Room 3334, Washington, DC 20004, Attention Docket ID No. EPA–HQ–OAR–2009–0491. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2009–0491. 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 e-mail. 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 e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail 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 *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 either electronically in *http://www.regulations.gov* or in hard copy at the Air and Radiation Docket and Information Center, EPA/DC, EPA East Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: For questions regarding the revised future-year emissions data, contact Rich Mason, Air Quality Assessment Division, Environmental Protection Agency, C339–02, 109 T.W. Alexander Drive, Research Triangle Park, NC 27709; telephone number: (919) 541–3405; fax number: (919) 541–0684; e-mail address: *mason.rich@epa.gov*. For all other questions on these data, contact Alison Eyth, Air Quality Assessment Division, Environmental Protection Agency, C339–02, 109 T.W. Alexander Drive, Research Triangle Park, NC 27709; telephone number: (919) 541–2478; fax number: (919) 541–0684; e-mail address: *eyth.alison@epa.gov.*

SUPPLEMENTARY INFORMATION: Detailed background information describing the proposed rulemaking may be found in a previously published document: Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Proposed Transport Rule); Proposed Rule (75 FR 45210, August 2, 2010). The information placed in the docket is also available for public review on the Web site for the Transport Rule at *http://www.epa.gov/airtransport/*. If additional relevant supporting information becomes available in the future, EPA will place this information in the docket and make it available for public review on this Web site. EPA is requesting comment only on the data and revisions explicitly identified in this document. EPA requested comment on all aspects of its emissions inventories in the proposed Transport Rule. The comment period for that proposal closed on October 1, 2010. EPA has not yet reviewed all comments received on the proposed Transport Rule and notes that emission inventory data may be further revised based on comments received on the proposed Transport Rule or on additional information that becomes available before the rule is finalized.

I. Additional Information on Submitting Comments

A. How can I help EPA ensure that my comments are reviewed quickly?

To expedite review of your comments by Agency staff, you are encouraged to send a separate copy of your comments, in addition to the copy you submit to the official docket, to: Alison Eyth, Air Quality Assessment Division, USEPA, C339–02, 109 T.W. Alexander Drive, Research Triangle Park, NC 27709; e-mail address: *eyth.alison@epa.gov*.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through EDOCKET, *http://www.regulations.gov,* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to the EPA docket office specified in the Instructions, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.*

When submitting comments, remember to:

i. Identify the NODA by docket number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain your comments, why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns, and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Web Site for Rulemaking Information

EPA has previously established a Web site for the proposed rulemaking at *http://www.epa.gov/airtransport.* The Web site includes the proposed rulemaking actions and other related information that the public may find useful in addition to a link to this NODA.

III. New Information Placed in the Docket

EPA requests comment on the information described below that has been added to the proposed Transport Rule docket: EPA–HQ–OAR–2009–0491.

- Revised 2012 and 2014 projected non-electric generating units (EGU) emissions for the cement industry, including new units and facilities and closures; and for 2014, only expected facility changes as provided by the Industrial Sector Integrated Solutions model as described by the National Emission Standards for Hazardous Air Pollutants From the Portland Cement Manufacturing Industry, and Standards of Performance for Portland Cement Plants, September 9, 2010 (75 FR 54969).
- Revised 2012 and 2014 projected emissions from the non-EGU point and nonpoint emissions sectors to reflect emissions reductions resulting from the National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines, August 20, 2010 (75 FR 51570).
- Revised 2012 and 2014 non-EGU point and nonpoint projected emissions to reflect controls required by the New York State Implementation Plan.
- Revised 2012 and 2014 nonpoint emissions to reflect improved information on the oil and gas production sector in Texas and Oklahoma.
- Revised spatial surrogate used to allocate county-level oil and gas emissions into grid cells for 2005, 2012, and 2014.
- Revised temporal allocation for the nonpoint fugitive dust emissions sector.
- Revised allocation of volatile organic compounds to the species used by the air quality modeling for headspace vapor associated with the nonroad mobile emissions sector.
- Expanded summary spreadsheet for point sources to add total particulate matter less than 2.5 microns ($PM_{2.5}$) emissions split into a filterable and condensable portion of $PM_{2.5}$ for each

facility. This spreadsheet does not include the other changes listed above that affect point sources. Documentation is provided in the spreadsheet on the location of the data used for computing the condensable $PM_{2.5}$ emissions in the 2005 point inventory.

Additionally, EPA seeks comment on whether or not to revise projected non-EGU emissions inventories for 2014 to reflect sulfur dioxide (SO_2) and $PM_{2.5}$ reductions from the proposed National Emissions Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters (75 FR 32006), hereafter referred to as the "Major Source Boiler Rule." The information included in the docket reflects reductions that would be expected if the rule were finalized as proposed. If the projected reductions associated with the final Major Source Boiler Rule were to differ from the projected reductions associated with the proposal, EPA would use the projections for the final rule if they become available in time for use in EPA's modeling for the final Transport Rule.

In addition, EPA requests comment on the following modified approaches to calculating emissions inventories that we intend to use in the modeling for the final Transport Rule.

• EPA proposes to use the latest public release of the Motor Vehicle Emissions Simulator (MOVES) (*http://www.epa.gov/otaq/models/moves/index.htm*) to estimate on-road mobile emissions data in 2005, 2012, and 2014 for all modeled pollutants and emissions processes in all States, except California. Future-year vehicle miles traveled will be revised from proposal to reflect the latest available data. This approach differs from the proposal in the following significant ways: (1) EPA will use a newer version of MOVES which has different emissions values from the version of MOVES used for the proposal; (2) EPA will use MOVES instead of the Mobile Source Emission Factor Model version 6.2 (MOBILE6) for diesel vehicles and motorcycles; (3) EPA will use MOVES instead of MOBILE6 for additional pollutants, including SO_2, ammonia (NH_3), and $PM_{2.5}$ from brake and tire wear; (4) the revised MOVES reflects NH_3 decreases in future years that were not reflected by MOBILE6; and, (5) EPA will use actual MOVES runs for 2012 and 2014 rather than scaling 2005 MOVES emissions. With the exception of these changes, EPA intends to continue to apply MOVES using the same approaches described in the Emission Inventory Technical Support Document released with the Transport Rule proposal (*http://www.epa.gov/airquality/transport/pdfs/TR_Proposal_Emissions_TSD.pdf;* Section 3.3.1). The revised approach will be similar to the approach described in the Technical Support Document for the proposed rule in the following key ways: (1) EPA will allocate State-total MOVES results to counties by pollutant and process using results from MOBILE6 and the National Mobile Inventory Model; and (2) EPA will use MOVES defaults rather than State-specific or county-specific MOVES inputs.

• EPA proposes to use the final projections from 2002 to 2005, 2012, and 2014 emissions for the category 3 commercial marine sector to reflect the final category 3 commercial marine Emissions Control Area proposal to the International Maritime Organization (EPA–420–F–10–041, August 2010).

• EPA proposes to reduce the boundaries used to allocate category 3 commercial marine emissions to States from 200 nautical miles to reflect State waters (3–10 nautical miles) based on Mineral Management Service State-federal boundary data consistent with approaches used for the 2005 and 2008 National Emissions Inventories.

• EPA proposes to include the data revisions identified above in the final Transport Rule, modified to address any comments that EPA receives as part of the transport rulemaking effort. Changes in the emissions data could impact the final rulemaking in a number of ways including, but not limited to:

1. Changing base year emissions and emissions projections could impact which downwind areas have projected air quality concerns absent this rulemaking (i.e., non-attainment or maintenance).

2. Changing emissions projections could impact EPA assessment of which States contribute to those problems.

Between now and the time that EPA finalizes the Transport Rule, additional information used to support the final transport rulemaking may be placed in the docket. As noted above, EPA is requesting comment only on the data and revisions explicitly identified in this document. EPA requested comment on all aspects of its emissions inventories in the proposed Transport Rule. The comment period for that proposal closed on October 1, 2010. EPA has not yet reviewed all comments received on the proposed Transport Rule and notes that emission inventory data may be further revised based on comments received on the proposed Transport Rule or on additional information that becomes available before the rule is finalized.

Dated: October 20, 2010.

Mary Henigin,

Acting Director, Office of Air Quality Planning and Standards.

[FR Doc. 2010–27171 Filed 10–26–10; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Part 1244

[Docket No. EP 646 (Sub-No. 3)]

Waybill Data Released in Three-Benchmark Rail Rate Proceedings

AGENCY: Surface Transportation Board, DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Board is republishing its April 2, 2010 proposal to amend its rules with respect to the Three-Benchmark methodology used to adjudicate simplified rate case complaints, to include an expanded discussion of its rationale and regulatory objectives. This proposal provides for release to the parties to a Three-Benchmark proceeding of the unmasked Waybill Sample data of the defendant carrier for the 4 years that correspond with the most recently published Revenue Shortfall Allocation Method (RSAM) figures. The parties would then use the released Waybill Sample data to form their traffic comparison groups. The Board seeks comments concerning the amount of data that would be available under the proposed rule, and the proposal that the parties would be permitted to draw from all 4 years of waybill data to form their comparison groups.

DATES: Comments on this proposal are due by November 26, 2010; replies are due by December 27, 2010.

ADDRESSES: Comments may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the E-FILING link on the Board's Web site, at *http://www.stb.dot.gov.* Any person submitting a filing in the traditional paper format should send an original and 10 copies to: Surface Transportation Board, Attn: Docket No. EP 646 (Sub-No. 3), 395 E Street, SW., Washington, DC 20423–0001.

Copies of written comments will be available for viewing and self-copying at the Board's Public Docket Room, Room 131, and will be posted to the Board's Web site.

FOR FURTHER INFORMATION CONTACT: Valerie Quinn at (202) 245–0382. (Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.)

SUPPLEMENTARY INFORMATION: In *Simplified Standards for Rail Rate Cases* (*Simplified Standards*), EP 646 (Sub-No. 1) (STB served Sept. 5, 2007), *aff'd sub nom. CSX Transp., Inc.* v. *STB* (*CSX Transp. I*), 568 F.3d 236 (DC Cir. 2009), *and vacated in part on reh'g, CSX Transp., Inc.* v. *STB* (*CSX Transp. II*), 584 F.3d 1076 (DC Cir. 2009), the Board modified its simplified rail rate guidelines, creating a simplified stand-alone cost approach for medium-size rail rate disputes and revising its Three-Benchmark approach for smaller rail rate disputes.

The Three-Benchmark method compares a challenged rate of the "issue traffic" to the rates of a comparison group of traffic drawn from the Waybill Sample data of the defendant carrier. The Waybill Sample is a statistical sampling of railroad waybills of the carrier's shipments that is collected and maintained for use by the Board. *See* 49 CFR 1244.1(c). The proposed rule in *Simplified Standards* would have required parties to draw their traffic comparison groups from the most recent year of Waybill Sample data of the carrier's other shipments. *Simplified Standards for Rail Rate Cases,* EP 646 (Sub-No. 1), slip op. at 32–33 (STB served July 28, 2006). The final rule, however, allowed parties to form comparison groups using Waybill Sample data from the 4 most recent years. *Simplified Standards,* slip op. at 80.

Several railroads [1] and the Association of American Railroads challenged the final rule in court on the basis that, under 5 U.S.C. 553(b)(3), the Board had not provided adequate notice and opportunity to comment on the change from 1 to 4 years of data from which the parties could draw to form their proposed comparison groups. *CSX Transp. I,* 568 F.3d at 246. Initially, the court determined that it would not address the merits of petitioners' argument, because the issue had not been presented to the Board prior to seeking judicial review and, therefore, had been waived. *Id.* at 246–47.

On rehearing, however, the court reversed its waiver determination and considered the merits of petitioners' argument. The court concluded that the Board had failed to provide adequate notice of the final rule regarding the available range of Waybill Sample data. Accordingly, the court vacated that portion of *Simplified Standards. CSX Transp. II,* 584 F.3d at 1078. As a result, there is currently a gap in the Board's rules; *i.e.,* there is no defined period for which unmasked Waybill Sample data is to be released in a Three-Benchmark proceeding.

On April 2, 2010, the Board, through a notice of proposed rulemaking, proposed to provide for release to the parties in Three-Benchmark proceedings of the unmasked Waybill Sample data of the defendant carrier for the 4 years that correspond with the most recently published RSAM figures. The parties would then draw their comparison groups in any combination they choose from the released Waybill Sample data. The Board solicited comments on this proposal.

The Board received comments from shippers, railroads, the U.S. Department of Agriculture, and other interested organizations. Some commenters expressed concern that the Board did not provide the rationales and regulatory objectives behind the proposed rules. In response, this decision will provide the Board's rationales and regulatory objectives. This notice of proposed rulemaking proposes rules that are identical to those proposed on April 2, 2010.

The use of multiple years of data for the Waybill Sample would be consistent with the Board's current practice in other contexts in Three-Benchmark cases. The Board already uses a 4-year averaging period to determine the other two benchmark components used in a Three-Benchmark case: The RSAM and $R/VC_{>180}$ benchmarks. *See Rate Guidelines—Non-Coal Proceedings,* (*Rate Guidelines*) 1 S.T.B. 1004, 1032–33 (1996). The reason for using this 4-year averaging period is to "smooth out annual variations and minimize the impact of any year that may have been aberrational for that carrier." *Rate Guidelines,* 1032–33.

A similar rationale applies to the rule proposed here. The availability of 4 years of Waybill Sample data would allow parties more flexibility to choose a comparison group that is a reasonable reflection of the traffic at issue and to avoid having to use data that may be aberrational. Giving the option to choose movements over a multi-year period would provide the parties with more data from which to choose, which should assist the parties in selecting a comparison group that more closely resembles the issue traffic. At the same time, limiting the pool of data to the 4 years that correspond with the most recently published RSAM figures would prevent the use of data that are too old to be reliable. By contrast, a shorter period, such as the 1-year time span envisioned earlier, could cause the comparison groups to be too small.

If the proposed rules are adopted, parties would not have incentive to specifically choose only the most favorable data from the 4-year data set because the Board will choose the comparison group that more closely resembles the traffic at issue. Thus, if a party selects a group that heavily favors its position at the expense of a reasonable comparison, then it is less likely that the Board would choose that comparison group.

The Board will now provide an opportunity for additional input regarding the rules proposed here. While we will consider the comments and replies previously submitted in this proceeding, interested parties (whether or not they have already participated in this proceeding) may file additional comments and replies.

The Board has authority to promulgate rules to meet statutory objectives. *See* 49 U.S.C. 721(a). The Board is issuing this notice of proposed rulemaking pursuant to the mandate to "establish a simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case." 49 U.S.C. 10701(d)(3). This proposed rule, if implemented, will be part of the framework for the simplified and expedited method of challenging rail rates.

Under the Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, a notice of proposed rulemaking must either include an initial regulatory flexibility analysis, 5 U.S.C. 603(a), or a certification that the proposed rule will not have a "significant economic impact on a substantial number of small entities," 5 U.S.C. 605(b). The proposed rule fills in a gap in the Three-Benchmark rate complaint framework by specifying the number of years of Waybill Sample data that will be made available to the parties in those cases. By providing clarity on that issue, the proposed rule would have a positive economic effect on small entities because it would allow Three-Benchmark rate cases to proceed more efficiently. Moreover, while the proposed rule delineates the range of data that would be made available, it does not require the parties to use any particular quantum of data. Accordingly, pursuant to 5 U.S.C.

[1] Canadian Pacific Railway Co., Soo Line Railroad Company, Delaware & Hudson Railway Company, CSX Transportation, Inc., Norfolk Southern Railway Company, and Union Pacific Railroad Company.

605(b), the Board certifies that the regulations proposed herein would not have a significant impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

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

Authority: 49 U.S.C. 721(a); 49 U.S.C. 10701(d)(3).

Decided: October 21, 2010.

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

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2010–27167 Filed 10–26–10; 8:45 am]

BILLING CODE 4915–01–P

Notices

Federal Register
Vol. 75, No. 207
Wednesday, October 27, 2010

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

October 22, 2010.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Rural Housing Service

Title: Fire and Rescue Loans—7 CFR 1942, Subpart C.

OMB Control Number: 0575–0120.

Summary of Collection: The Rural Housing Service (RHS) is authorized by Section 306 of the Consolidated Farm and Rural Development Act (7 U.S.C. 1926) to make loans to public agencies, nonprofit corporations, and Indian Tribes for the development of essential community facilities primarily servicing rural residents. The primary regulation for administering this Community Facility program is 7 CFR 1942–A. The information must be collected to determine eligibility, analyze financial feasibility, take security, monitor the use of loan funds, and monitor the financial condition of borrowers, and otherwise assisting borrowers.

Need and Use of the Information: The Rural Development requires that an application form SF–424 be completed by applicant/borrowers with each application package in addition to other necessary information. This form gives basic information regarding the applicant, including the type of loan/grant assistance they are seeking. This information will be used to determine applicant/borrower eligibility, project feasibility, and ensure borrowers operate on a sound basis and use loan funds for authorized purposes.

Description of Respondents: Business or other for-profit; Not-for-profit institutions; State, Local or Tribal Government.

Number of Respondents: 1,200.

Frequency of Responses: Reporting: On occasion; Quarterly; Annually.

Total Burden Hours: 12,391.

Rural Housing Service

Title: Community Facilities Grant Program—7 CFR 3570–B.

OMB Control Number: 0575–0173.

Summary of Collection: The Consolidated Farm and Rural Development Act (7 U.S.C. 1926) authorizes Rural Housing Service (RHS) to make grants to public agencies, nonprofit corporations, and Indian Tribes to develop essential community facilities and services for public use in rural areas. These facilities include schools, libraries, childcare, hospitals, clinics, assisted-living facilities, fire and rescuer stations, police stations, community centers, public buildings, and transportation. The Department of Agriculture through its Community Programs strives to ensure that facilities are readily available to all rural communities.

Need and Use of the Information: Rural Development field offices will collect information from applicant/borrowers and consultants. This information is used to determine applicant/borrower eligibility, project feasibility, and to ensure borrowers operate on a sound basis and use loan and grant funds for authorized purposes. Failure to collect the information could result in improper determinations of eligibility, improper use of funds, and or unsound loans.

Description of Respondents: Not-for-profit institutions.

Number of Respondents: 1,085.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 7,428.

Rural Housing Service

Title: Rural Community Development Initiative (RCDI).

OMB Control Number: 0575–0180.

Summary of Collection: Congress created the Rural Community Development Initiative (RCDI) in fiscal year 2000 and funds were appropriated under the Rural Community Advancement Program. The intent of the RCDI grant program is to develop the capacity and ability of rural area recipients to undertake projects through a program of financial and technical assistance provided by qualified intermediary organizations. Intermediaries are required to provide matching funds in an amount equal to the RCDI grant. Eligible recipients are private, nonprofit community-based housing and community development organizations and low-income rural communities.

Need and Use of the Information: RHS will collect information to determine applicant/grantee eligibility, project feasibility, and to ensure that grantees operate on a sound basis and use grant funds for authorized purposes. Failure to collect this information could result in improper use of Federal funds.

Description of Respondents: Not-for-profit institutions; State, Local or Tribal Government.

Number of Respondents: 1,200.

Frequency of Responses: Recordkeeping; Reporting: Quarterly; Annually; Third party disclosure.

Total Burden Hours: 4,191.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. 2010–27195 Filed 10–26–10; 8:45 am]

BILLING CODE 3410–XT–P

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

Meetings

AGENCY: Architectural and Transportation Barriers Compliance Board.

ACTION: Notice of meetings.

SUMMARY: The Architectural and Transportation Barriers Compliance Board (Access Board) plans to hold its regular committee and Board meetings in Washington, DC, Monday through Wednesday, November 8–10, 2010, at the times and location noted below.

DATES: The schedule of events is as follows:

Monday, November 8, 2010

9:30–Noon Public Hearing: Americans with Disabilities Act Accessibility Guidelines for Transportation Vehicles; Proposed Rule.
1:30–5 p.m. Ad Hoc Committee Meetings: Closed to Public.

Tuesday, November 9, 2010

9:30–11 a.m. Planning and Evaluation Committee.
11–Noon Budget Committee.
1:30–2:30 p.m. Technical Programs Committee.
2:30–4 p.m. Frontier Issues Ad Hoc Committee.

Wednesday, November 10, 2010

9:30–Noon Ad Hoc Committee Meetings: Closed to Public.
1:30–3 p.m. Board Meeting.

ADDRESSES: All meetings will be held at the Access Board Conference Room, 1331 F Street, NW., suite 800, Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: For further information regarding the meetings, please contact David Capozzi, Executive Director, (202) 272–0010 (voice) and (202) 272–0082 (TTY).

SUPPLEMENTARY INFORMATION: At the Board meeting scheduled on the afternoon of Wednesday, November 10, 2010, the Access Board will consider the following agenda items:

- Approval of the draft July 28, 2010 meeting minutes.
- Budget Committee Report.
- Planning and Evaluation Committee Report.
- Technical Programs Committee Report.
- Ad Hoc Committee Reports.
- Executive Director's Report.
- ADA and ABA Guidelines; Federal Agency Updates.
- Public Comment, Open Topics.

All meetings are accessible to persons with disabilities. An assistive listening system, computer assisted real-time transcription (CART), and sign language interpreters will be available at the Board meetings and hearing. Persons attending Board meetings are requested to refrain from using perfume, cologne, and other fragrances for the comfort of other participants (*see http://www.access-board.gov/about/policies/fragrance.htm* for more information).

David M. Capozzi,

Executive Director.

[FR Doc. 2010–27102 Filed 10–26–10; 8:45 am]

BILLING CODE 8150–01–P

DEPARTMENT OF COMMERCE

[Docket No. 101019526–0526–01]

Privacy Act of 1974; System of Records

AGENCY: U.S. Census Bureau, Department of Commerce.

ACTION: Notice of Amendment, Privacy Act System of Records; COMMERCE/CENSUS–8, Statistical Administrative Records System.

SUMMARY: In accordance with the Privacy Act of 1974, as amended, Title 5 United States Code (U.S.C.) 552a(e)(4) and (11); and Office of Management and Budget (OMB) Circular A–130, Appendix I, "Federal Agency Responsibilities for Maintaining Records About Individuals", the Department of Commerce is issuing an amendment to a notice of intent to amend the system of records under COMMERCE/CENSUS–8, Statistical Administrative Records System published previously on March 25, 2009. This amendment would change certain provisions concerning the purpose of the system of records, categories of individuals and records covered by the system, retrievability, and safeguards for the records in the system; in addition to minor administrative updates. Accordingly, the COMMERCE/CENSUS–8, Statistical Administrative Records System notice published in the **Federal Register** on January 20, 2000 (65 FR 3202), is amended as below. We invite public comment on the system amendment announced in this publication.

DATES: *Comment Date:* To be considered, written comments on the proposed amended system must be submitted on or before November 26, 2010.

Effective Date: Unless comments are received, the amended system of records will become effective as proposed on the date of publication of a subsequent notice in the **Federal Register.**

ADDRESSES: Please address comments to: Chief Privacy Officer, Privacy Office, Room HQ—8H168, U.S. Census Bureau, Washington, DC 20233–3700.

SUPPLEMENTARY INFORMATION: On March 25, 2009, the Department of Commerce published and requested comments on a proposed Privacy Act System of Records notice entitled COMMERCE/CENSUS–8, Statistical Administrative Records System (74 FR 12834). No comments were received by Commerce, but that notice was not published as final because a careful review of the proposed changes revealed that two technical changes were needed and two other program-related changes were needed because of work associated with the Statistical Administrative System (StARS).

The first proposed technical change is the insertion of a reference to 13 U.S.C. 8(b) after "* * * in accordance with Title 13, United States Codes (U.S.C.) * * *" under the Supplementary Information heading to more thoroughly reflect the authorities under which the Census Bureau collects data including our reimbursable work for other agencies and the authority for the release of summary tabulations. The second proposed change is the insertion of the phrase "* * * in accordance with the Department's rules which appear in 15 CFR part 4 subpart B and * * *" after "This exemption is made" under the section entitled "Exemptions Claimed for System." This change is being made to more accurately convey that the Census Bureau, as part of the Department of Commerce, is subject to Commerce Department rules.

The first of the two changes made to program-related provisions of the March 25, 2009 notice is to language that attempted to clearly describe the strict limitations to be placed on access to records containing direct identifiers by sworn Census Bureau staff. In that notice, the Census Bureau proposed a change to the access limitation provision from "a limited number" to "fewer than ten" under the heading "Categories of Records in the System; Retrievability". This change was proposed to describe the proposed

enhanced control of data that contain direct identifiers. However, after review of the proposed language, the Census Bureau concluded that this restriction is not operationally feasible and cannot be implemented. Thus, the most accurate description of the limitation on access to direct identifiers is the original description of "a limited number" as reflected in the January 20, 2000 published version of the SORN. The second proposed change is being made to establish that the list of categories of sources of records is representative of the types of agencies that the Census Bureau receives records from, but that it is not an exhaustive list. Thus the phrase "relevant to those programs from agencies including," has been inserted after "In order to * * * the Census Bureau will acquire administrative record files" under the heading "Categories of Individuals Covered by the System." This change clarifies that the Census Bureau will acquire administrative record files from other agencies that maintain files relevant to Census Bureau statistical programs, including those that are listed.

The Census Bureau invites comments on the changes proposed above. If no comments are submitted, the Census Bureau will finalize the above proposed changes, as well as those changes proposed in the March 25, 2009 notice that were not modified herein.

The StARS supports the Census Bureau's core mission of producing economic and demographic statistics in accordance with Title 13, United States Code (U.S.C.) 8(b), 41, 61, 81, 91, 101, 102, 131, 141, 181, 182, 193 and Title 15, U.S.C. 1525. Further, to the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics required, the Census Bureau is mandated by Title 13, U.S.C. 6 to acquire information from public and private sources to ensure the efficient and economical conduct of its censuses and surveys by using that information instead of conducting direct inquiries.

To provide the information on which the American public, businesses, policymakers, and analysts rely, the StARS organizes data from a variety of sources, thereby eliminating the need to collect information again. Avoiding new collections precludes duplication, enhances efficiency, significantly reduces the burden on respondents, and lowers the cost to taxpayers. Doing so also increases the quality, timeliness, and relevance of the information available to those making policy decisions that impact the public and private sectors. The information that StARS organizes comes from Federal and State administrative record systems, private entities, current demographic and economic surveys, quinquennial Economic Censuses, and decennial Censuses of Population and Housing. The amended system also expands protections on access, storage, and use of personally identifiable data. The StARS is a statistical information system whose uses will not directly affect any individual. In order to protect personally identifiable information, the StARS is logically organized into three components. The first component houses data sets with personal identifiers (Social Security Numbers and names) in a secure environment, with access restricted to a limited number of sworn Census Bureau staff. The sole purpose of this component is to provide a controlled environment to remove and replace the identifying information (names and Social Security Numbers) contained in source files with unique non-identifying codes. No data containing Social Security Numbers are released from this environment. The second component consists of data sets that contain the unique non-identifying codes, with the personal identifiers removed. Records from them are extracted or combined as needed, based on the unique non-identifying codes, to prepare numerous statistical products. These extracts are only provided in conjunction with approved Census Bureau projects and programs. Each proposed use is reviewed by an in-house Project Review Board to ensure the data are used only for authorized purposes. Furthermore, individuals cannot access the extracts until their managers have assured that they have taken all required security and data stewardship training. The third component of StARS houses two types of data sets that contain the unique non-identifying codes that replaced the Social Security Numbers, but retain some name information. The first type contains business information including the names of businesses, some of which are the same as the name of the owner—"John Doe Consulting," for example. The second type is used solely for the purpose of providing contact information for respondents involved in the Census Bureau's surveys and censuses. The same safeguards on the use of these data sets as described for the second component apply here as well.

COMMERCE/CENSUS–8

SYSTEM NAME:

Delete and replace with the following language:

"Statistical Administrative Records System."

SECURITY CLASSIFICATION:

None

SYSTEM LOCATION:

Delete and replace with the following language:

"Bowie Computer Center, Bureau of the Census, 17101 Melford Blvd., Bowie, Maryland 20715."

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Delete and replace with the following language:

"This system covers the population of the United States. In order to approximate coverage of the population in support of its statistical programs, the Census Bureau will acquire administrative record files relevant to those programs from agencies including, the Departments of Agriculture, Education, Health and Human Services, Homeland Security, Housing and Urban Development, Labor, Treasury, Veterans Affairs, and from the Office of Personnel Management, the Social Security Administration, the Selective Service System, and the U.S. Postal Service. Comparable data may also be sought from State agencies and commercial sources."

CATEGORIES OF RECORDS IN THE SYSTEM:

Delete and replace with the following language:

"The first category contains records with personal identifiers (names and Social Security Numbers), with access restricted to a limited number of sworn Census Bureau staff. The records are maintained in a secure restricted-access environment. They are used solely during a brief period while the personal identifiers are replaced with unique non-identifying codes.

The second category contains records that are maintained on unique data sets that are extracted or combined on an as-needed basis using the unique non-identifying codes but with the original identifiers removed. These records may contain: Demographic information—date of birth, sex, race, ethnicity, household and family characteristics, education, marital status, Tribal affiliation, and veteran's status; Geographical information—address and geographic codes; Mortality information—cause of death and hospitalization information; Health information—type of provider, services provided, cost of services, and quality indicators; Economic information—housing characteristics, income, occupation, employment and unemployment information, health

insurance coverage, Federal program participation, assets, and wealth.

The third category contains two types of records that are maintained on unique data sets that are extracted or combined on an as-needed basis using the unique non-identifying codes but with some name information retained. One type of records contain: Business information—business name, revenues, number of employees, and industry codes in support of economic statistical products. The other type contains: Respondent contact information—name, address, telephone number, age, and sex in support of survey and census data collection efforts."

AUTHORITIES FOR MAINTENANCE OF THE SYSTEM:

Delete and replace with the following language:

"Title 13 U.S.C. 6."

PURPOSE(S):

Delete and replace with the following language:

"The purpose of this system is to centralize and control the use of personally identifiable information by providing a secure repository that supports statistical operations through the removal of personal identifiers (Social Security Numbers and names), prior to delivery to other Census Bureau operating units. By combining current demographic and economic survey and census data with administrative record data from other agencies, and data procured from commercial sources on an as-needed basis, the Census Bureau will improve the quality and usefulness of its statistics and reduce the respondent burden associated with direct data collection efforts. The system will also be used to plan, evaluate, and enhance survey operations; improve questionnaire design and selected survey data products; and produce research and statistical products such as estimates of the demographic, social, and economic characteristics of the population."

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Delete and replace with the following language:

"None. The StARS will be used only for statistical purposes. No disclosures which permit the identification of individual respondents, and no determinations affecting individual respondents will be made."

Add the following language:

"**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

None."

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Delete and replace with the following language:

"Records will be stored in a secure computerized system and on magnetic media; output data will be either electronic or paper copies. Source data sets containing personal identifiers will be maintained in a secure restricted-access environment."

RETRIEVABILITY:

Delete and replace with the following language:

"Staff producing statistical products will have access only to data sets from which Social Security Numbers have been deleted and replaced by unique non-identifying codes internal to the Census Bureau. Only a limited number of sworn Census Bureau staff, who work within a secure restricted-access environment, will be permitted to retrieve records containing Social Security Numbers."

SAFEGUARDS:

Delete and replace with the following language:

"Each project must be approved by an in-house Project Review Board to ensure that data relating to the project will be used only for authorized purposes. All uses of the data will be only for statistical purposes, which by definition means that uses will not directly affect any individual. Once the Project Review Board has approved a project, construction of statistical extracts with information from one or more of the source data sets may occur. Extract data sets will be based on unique non-identifying codes and will only be released to designated sworn Census Bureau staff with a need-to-know. The data in the extracts for these projects will not be made publicly available. Any publications based on the StARS will be cleared for release under the direction of the Census Bureau's Disclosure Review Board, which will confirm that all the required disclosure protection procedures have been implemented. No information will be released that identifies any individual. All employees are subject to the restrictions, penalties, and prohibitions of 13 U.S.C. 9 and 214; 5 U.S.C. 552a(b)(4); 18 U.S.C. 1905; 26 U.S.C. 7213; and 42 U.S.C. 1306. When confidentiality or penalty provisions differ, the most stringent provisions apply to protect the data. Employees are regularly advised of the regulations issued pursuant to 13 U.S.C 9 and 214 and other relevant statutes governing confidentiality of the data. For example, 13 U.S.C. 214 provides for penalties of up to five years in prison, and applicable criminal statutes could impose fines up to $250,000, for any releases of confidential data. The restricted-access environment has been established to limit the number of Census Bureau employees with direct access to the personal identifiers in this system, so as to protect the confidentiality of the data and to prevent unauthorized use or access. These safeguards provide a level and scope of security that meet the level and scope of security established by the Office of Management and Budget in OMB Circular No. A–130, Appendix III, Security of Federal Automated Information Resources. Furthermore, the use of unsecured telecommunications to transmit individually identifiable information is prohibited."

RETENTION AND DISPOSAL:

Delete and replace with the following language:

"Records are to be retained in accordance with the unit's Records Control Schedule, which is based on separate agreements with each source entity. Retention is not to exceed 10 years, unless, by agreement with the source entity, it is determined that a longer period is necessary for statistical purposes. At the end of the retention period or upon demand, all original data sets, extracts, and paper copies, from each source entity will be returned or destroyed as mandated by the agreements."

SYSTEM MANAGER AND ADDRESS:

Delete and replace with the following language:

"Associate Director for Demographic Programs, U.S. Census Bureau, 4600 Silver Hill Road, Washington, DC 20233–8000."

NOTIFICATION PROCEDURE:

Delete and replace with the following language:

"For the Census Bureau's records, information may be obtained from: Assistant Division Chief for Data Management, Data Integration Division, Demographic Directorate, U.S. Census Bureau, 4600 Silver Hill Road, Washington, DC 20233–8100."

Add the following information:

"**RECORD ACCESS PROCEDURES:**

See "Record Notification Procedure" above."

Add the following information:

"**CONTESTING RECORD PROCEDURES:**

None."

RECORD SOURCE CATEGORIES:

Delete and replace with the following language:

"Individuals covered by selected administrative record systems and Census Bureau censuses and surveys."

EXEMPTIONS CLAIMED FOR SYSTEM:

Delete and replace with the following language:

"Pursuant to 5 U.S.C., Section 552a(k)(4), this system of records is exempted from the notification, access, and contest requirements of the agency procedures (under 5 U.S.C., 552a(c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f)). This exemption is applicable as the data are maintained by the Bureau of the Census solely as statistical records, as required under Title 13 U.S.C., and are not used in whole or in part in making any determination about an identifiable individual. This exemption is made in accordance with the Department's rules which appear in 15 CFR part 4 subpart B and in accordance with agency rules published in the rules section of this **Federal Register**."

Dated: October 21, 2010.

Brenda Dolan,

Department of Commerce, Freedom of Information/Privacy Act Officer.

[FR Doc. 2010–27216 Filed 10–26–10; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Availability of Seats for Olympic Coast National Marine Sanctuary Advisory Council

AGENCY: Office of National Marine Sanctuaries (ONMS), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice and request for applications.

SUMMARY: The ONMS is seeking applications for the following vacant seats on the Olympic Coast National Marine Sanctuary Advisory Council: Marine Business and Industry, and Citizen-at Large. Both a primary and alternate member will be selected for each of the two seats. Applicants are chosen based upon their particular expertise and experience in relation to the seat for which they are applying; community and professional affiliations; philosophy regarding the protection and management of marine resources; and possibly the length of residence in the area affected by the sanctuary. Applicants who are chosen as members should expect to serve three-year terms, pursuant to the council's charter.

DATES: Applications are due by November 19, 2010.

ADDRESSES: Application kits may be obtained from Norma Klein, Olympic Coast National Marine Sanctuary, 115 East Railroad Ave., Suite 301, Port Angeles, WA 98362 (*norma.klein@noaa.gov*). Completed applications should be sent via mail or e-mail to the same address.

FOR FURTHER INFORMATION CONTACT: Carol Bernthal, OCNMS Superintendent, 115 East Railroad Ave., Suite 301, Port Angeles, WA 98362, 360.457.6622 x11, *carol.bernthal@noaa.gov.*

SUPPLEMENTARY INFORMATION: Sanctuary Advisory Council members and alternates serve three-year terms, unless the member and alternate are selected to fill unexpired terms. In that case, the member and alternate will serve out the remaining time on the unexpired term. The Advisory Council meets bi-monthly in public sessions in communities in and around Olympic Coast National Marine Sanctuary.

The Olympic Coast National Marine Sanctuary Advisory Council was established in December 1998 to assure continued public participation in the management of the sanctuary. Serving in a volunteer capacity, the advisory council's 15 voting members represent a variety of local user groups, as well as the general public. In addition, five Federal government agencies and one Federally funded program serve as non-voting, ex officio members. Since its establishment, the advisory council has played a vital role in advising OCNMS and NOAA on critical issues. In addition to providing advice on management issues facing the Sanctuary, council members serve as a communication bridge between constituents and OCNMS staff.

Authority: 16 U.S.C. 1431, *et seq.*

(Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program)

Dated: October 15, 2010.

Daniel J. Basta,

Director, Office of National Marine Sanctuaries, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. 2010–27088 Filed 10–26–10; 8:45 am]

BILLING CODE 3510–NK–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Extension of Application Period for Seats for the Stellwagen Bank National Marine Sanctuary Advisory Council

AGENCY: Office of National Marine Sanctuaries (ONMS), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice of extension for application period and request for applications.

SUMMARY: The ONMS is extending the deadline and seeking applications for the following vacant seats on the Stellwagen Bank National Marine Sanctuary Advisory Council: Advisory Council: For member and alternate seats for Conservation; and alternates seats for Whalewatching, Education, At-Large and Mobile Gear Commercial Fishing. Applicants are chosen based upon their particular expertise and experience in relation to the seat for which they are applying; community and professional affiliations; philosophy regarding the protection and management of marine resources; and possibly the length of residence in the area affected by the sanctuary. Applicants who are chosen as members should expect to serve two- to three-year terms, pursuant to the council's Charter.

DATES: Applications are due by 19 November 2010 (COB: close of business day).

ADDRESSES: Application kits may be obtained at *http://www.stellwagen.noaa.gov/sac/news.html.* Completed applications should be sent to *Elizasbeth.Stokes@noaa.gov* or faxed to 781–545–8036.

FOR FURTHER INFORMATION CONTACT: Nathalie Ward, Stellwagen Bank National Marine Sanctuary, 175 Edward Foster Road, Scituate, MA 02066, 781–545–8026 X206, *nathalie.ward@noaa.gov.*

SUPPLEMENTARY INFORMATION: The Stellwagen Bank National Marine Sanctuary Advisory Council was established in March 2001 to assure continued public participation in the management of the Sanctuary. The Advisory Council's 17 voting members represent a variety of local user groups, as well as the general public, plus 6 local, State and Federal government agencies. Since its establishment, the Council has played a vital role in advising the Sanctuary and NOAA on critical issues.

The Stellwagen Bank National Marine Sanctuary encompasses 842 square miles of ocean, stretching between Cape Ann and Cape Cod. Renowned for its scenic beauty and remarkable productivity, the sanctuary supports a rich diversity of marine life including 22 species of marine mammals, more than 30 species of seabirds, over 60 species of fishes, and hundreds of marine invertebrates and plants.

Authority: 16 U.S.C. 1431, *et seq.*

(Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program)

Dated: October 14, 2010.

Daniel J. Basta,

Director, Office of National Marine Sanctuaries, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. 2010–27089 Filed 10–26–10; 8:45 am]

BILLING CODE 3510–NK–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XX25

Small Takes of Marine Mammals Incidental to Specified Activities; Exploratorium Relocation Project in San Francisco, CA

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

ACTION: Notice; issuance of an incidental take authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA) regulations, notification is hereby given that NMFS has issued an Incidental Harassment Authorization (IHA) to the Exploratorium, allowing the take of small numbers of marine mammals, by Level B harassment only, incidental to pile driving associated with the Exploratorium's relocation project.

DATES: Effective October 25, 2010, through October 24, 2011.

ADDRESSES: A copy of the IHA, the application, and the Environmental Assessment are available by writing to P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225 or by telephoning the contact listed here (*see* **FOR FURTHER INFORMATION CONTACT**), or visiting the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.* Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Michelle Magliocca or Jaclyn Daly, Office of Protected Resources, NMFS, 301–713–2289.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specific geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is published in the **Federal Register** and provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined "negligible impact" in 50 CFR 216.103 as "* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) establishes a 45-day time limit for NMFS review of an application followed by publication of notice of the proposal to issue an IHA in the **Federal Register** and a 30-day public comment period. Within 45 days of the close of the comment period, NMFS must either issue or deny the authorization.

Except with respect to certain activities not pertinent here, the MMPA defines "harassment" as:

> Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Summary of Request

On April 28, 2010, NMFS received an application from the Exploratorium—a nature, science, art, and technology museum—requesting an IHA for the take, by Level B harassment, of small numbers of marine mammals incidental to relocation of the Exploratorium museum. The Exploratorium is relocating from the Palace of Fine Arts to Piers 15 and 17, along San Francisco's waterfront, to allow for expansion of the museum's facility. Pile driving during the project may result in harassment of Pacific harbor seals (*Phoca vitulina richardii*), California sea lions (*Zalophus californianus*), harbor porpoises (*Phocoena phocoena*), and gray whales (*Eschrichtius robustus*) within the action area. In accordance with MMPA implementing regulations, NMFS issued a notice in the **Federal Register** on July 22, 2010 (75 FR 42691), requesting comments from the public on the proposed IHA.

Description of the Specified Activity

A complete description of the specified activity may be found in NMFS' proposed IHA notice in the **Federal Register** (75 FR 42691, July 22, 2010) and a summary is provided here.

To make room for the new Exploratorium, a maximum of 69 various sized steel piles (thirty 72-inch, twenty-six 24-inch, and thirteen 20-inch diameter piles) will be installed around Piers 15 and 17 using a vibratory hammer (Table 1). Between two and five steel piles (average of three piles) will be installed daily, depending on their size and the amount of time necessary to install them. Each pile will take approximately 30 minutes to install followed by at least one hour break, the minimum amount of time needed to reset the hammer and next pile. In total, the Exploratorium anticipates conducting 28 hours of pile driving over the course of their authorization; however, this may be increased due to encountering difficulty in driving piles, construction extensions, *etc.* All piles will be installed with an ICE 14122 (or similar) vibratory hammer; however, it may be necessary to seat a pile using an impact hammer. Based on the ground sediments and the depth of pile driving needed, the use of an impact hammer is not anticipated for the smaller 20-inch and 24-inch piles but may be needed for the large diameter 72-inch piles. Should an impact hammer be necessary, the Exploratorium will use a steam or

diesel-powered hammer delivering between 80,000 and 110,000 ft-lbs per blow. For 20, 24, and 72-inch piles, the amount of strikes per pile will be limited to 120, 25, and 5, respectively. A sound attenuation device (*e.g.,* wood block, bubble curtain) will be used during all impact hammering. In addition, impact hammering will not occur between June 1 and November 30 to prevent injury to listed salmonids.

In addition to pile driving, the Exploratorium will repair or remove existing piles (Table 1) and remove existing wharf decking. Existing concrete piles will be removed by cutting them with a hydraulic shear. The shear operates like a knife gate, with hydraulic rams pushing a shear plate through the piling. The cutting shear will be suspended from a crane on deck. In-water noise from this work will be negligible. Pile repair will include installing a fiberglass shell around damaged pile and filling the shell with concrete. The work will be completed by divers using hand tools and does not involve loud noise. Deck removal and expansion will occur outside of habitat for marine mammals. Finally, there will be two to ten barges or floats at any given time in the water to support construction activities; however, these will be concentrated in the direct vicinity of Piers 15/17. Because pile repair, pile removal, and use of barges do not release loud sounds into the environment, marine mammal harassment from these activities is not anticipated.

TABLE 1—SUMMARY OF PILE ACTIVITIES DURING THE EXPLORATORIUM RELOCATION ACTIVITY

Activity	Maximum number of piles	Location
Installation of new piles	69 steel piles (30 72-inch diameter steel piles, 26 24-inch steel piles, and 13 20-inch steel piles).	Marginal Wharf; South Apron.
Repair of existing piles	1,026	Pier 15; Valley Infill Area; Marginal Wharf; North Apron.
Extension of existing piles	120	Valley Infill Area.
Removal of existing piles—cut at mudline	837	Marginal Wharf; Valley Removal Area; South Apron; Pier 15.
Removal of existing piles—cut above mean lower low water (MLLW).	306	Valley Removal Area; Marginal Wharf.

During the San Francisco-Oakland Bay Bridge Project (SFOBB), the California Department of Transportation (Caltrans), measured vibratory driving sound levels from various pile types, sizes, and locations around San Francisco Bay (Caltrans, 2007). Because no pile driving noise data specific to the Exploratorium project exists, NMFS has determined that hydroacoustic data from the Caltrans SFOBB project are appropriate to use to estimate sound levels from the specified activity. For background, sound is a physical phenomenon consisting of minute vibrations that travel through a medium, such as air or water, and is generally characterized by several variables. Frequency describes the sound's pitch and is measured in hertz (Hz) or kilohertz (kHz), while sound level describes the sound's loudness and is measured in decibels (dB). Sound level increases or decreases exponentially with each dB of change. For example, 10 dB yields a sound level 10 times more intense than 1 dB, while a 20 dB level equates to 100 times more intense, and a 30 dB level is 1,000 times more intense. Sound levels are compared to a reference sound pressure (micro-Pascal) to identify the medium. For air and water, these reference pressures are "re: 20 microPa" and "re: 1 microPa," respectively. In this document, all sound pressure levels (SPLs) will be referenced to 1 microPa unless otherwise noted.

In 2007, Caltrans released a report summarizing typical and maximum sound pressure levels (SPLs) measured during vibratory pile driving in San Francisco Bay (Table 2). In summary, Caltrans found that SPLs measured 5 m from the vibratory hammer did not exceed 180 dB root mean square (rms) and were typically around 170 dB rms. Most of the energy during vibratory pile driving was below 600 Hz. NMFS notes that the vibratory hammers Caltrans used to install the 72-inch pile were the King Kong and Super Kong Driver (Model 600). The hammer the Exploratorium will be using is 40 percent of the energy of the King Kong hammer; therefore, source levels will be lower for the relocation project as hammer noise levels are proportional to blow energy. Vibratory pile driving measurements taken by Caltrans approximately 11–13 kilometers (km) northeast of the Exploratorium in similar depth water indicate that peak sound pressures drop off at a rate of about 7 dB per doubling of distance. For comparison, spherical spreading (20 log R) is characterized by a drop-off rate of 6 dB per doubling of distance.

TABLE 2—MEASURED SOUND PRESSURE LEVELS DURING VIBRATORY PILE DRIVING IN SAN FRANCISCO BAY

[Caltrans, 2007]

Pile type/size	Relative water depth	SPL at 10 m (rms)
72-inch steel pile	5 meters	Average = 170 dB. Loudest = 180 dB.
34-inch steel pile	5 meters	Average = 170 dB. Loudest = 175 dB.
24-inch steel pile	5 meters	Average = 160 dB. Loudest = 165 dB.
12-inch steel pile	5 meters	Average = 155 dB.

Caltrans also conducted hydroacoustic surveys within San Francisco Bay during impact pile driving of similar size piles proposed for use by the Exploratorium (Table 3). Bubble curtains can provide between 5–20 dB reduction in source level; however, this is highly directional and a function of current and device effectiveness (Caltrans, 2009). Therefore, distances to the Level A and Level B harassment isopleths are based on estimated unattenuated source levels. These distances are likely an overestimate of sound levels produced by pile driving using a bubble curtain or wood cap.

TABLE 3—MEASURED UNATTENUATED SOUND PRESSURE LEVELS IN THE NEAR FIELD (10 M) DURING IMPACT PILE DRIVING IN SAN FRANCISCO BAY

[Caltrans, 2009]

Pile type/size	Relative water depth	SPL at 10 m (rms)
96-inch steel pile	10 meters	205 dB.
60-inch steel pile	<5 meters	195 dB.
36-inch steel pile	<5 meters	190 dB.
24-inch steel pile	5 meters	190 dB.
14-inch steel pile	15 meters	184 dB.

Comments and Responses

A notice of receipt and request for public comment on the application and proposed authorization was published on July 22, 2010 (75 FR 42691). During the 30-day public comment period, the Marine Mammal Commission (Commission) provided the only comments.

Comment 1: The Commission recommends that NMFS issue the requested authorization, provided that observations be made during all soft-starts of pile driving activities in order to gather the data needed to analyze and report on its effectiveness as a mitigation measure.

Response: NMFS disagrees that the Exploratorium needs to monitor for marine mammals during all soft-starts. PSOs will be on-site and monitoring for marine mammals at least 30 minutes prior to, during, and after all impact hammer (including during soft-starts) and at least two full days per week during all vibratory pile hammering. NMFS believes that monitoring for at least two pile driving days per week will allow for adequate interpretation of how marine mammals are behaving in response to pile hammering, including during soft-starts.

Comment 2: The Commission recommends that NMFS issue the requested authorization, provided that the Exploratorium be required to monitor the presence and behavior of marine mammals during all impact and vibratory pile driving activities.

Response: As stated in the proposed IHA, marine mammal monitoring will occur 30 minutes before, during, and 30 minutes after all impact pile driving activities. In addition, at least one PSO will conduct behavioral monitoring at least two days per week during vibratory pile driving for the duration of the project to estimate take and evaluate the behavioral impacts that pile driving has on marine mammals out to the Level B harassment isopleth (1,900) m. NMFS believes this is an adequate effort of monitoring because vibratory pile driving will not produce source SPLs exceeding 180 dB rms (Level A harassment threshold) and therefore, the activity will not require shut-down in order to prevent Level A harassment. Monitoring by Caltrans is also being conducted in the area, and given the limited number of pile driving hours and Exploratorium resources, this amount of monitoring is expected to be adequate to verify that the specified activity is having a negligible impact on the affected species and stocks.

Description of Marine Mammals in the Area of the Specified Activity

Marine mammals with confirmed occurrences in San Francisco Bay are the Pacific harbor seal, California sea lion, harbor porpoise, gray whale, humpback whale (*Megaptera noveangliae*), and sea otter (*Enhydra lutris*). However, humpback whales are considered extremely rare in San Francisco Bay and are highly unlikely to be present in the project vicinity during pile driving. Sea otters are managed by the U.S. Fish and Wildlife Service. Information on Pacific harbor seals, California sea lions, harbor porpoises, and gray whales was provided in the July 22, 2010 (75 FR 42691) **Federal Register** notice.

Potential Effects on Marine Mammals

Pile driving at the Exploratorium's new location may temporarily impact marine mammal behavior within the action area due to elevated in-water noise levels. A detailed description of potential impacts to marine mammals can be found in NMFS' July 22, 2010 **Federal Register** notice (75 FR 42691) and are summarized here.

Marine mammals produce sounds in various contexts and use sound for various biological functions including, but not limited to, (1) Social interactions; (2) foraging; (3) orientation; and (4) predator detection. Interference with producing or receiving these sounds may result in adverse impacts. Audible distance, or received levels (RLs) will depend on the nature of the sound source, ambient noise conditions, and the sensitivity of the receptor to the sound (Richardson *et al.,* 1995). Type and significance of marine mammal reactions to noise are likely to dependent on a variety of factors including, but not limited to, the behavioral state (*e.g.,* feeding, traveling, *etc.*) of the animal at the time it receives the stimulus, frequency of the sound, distance from the source, and the level of the sound relative to ambient conditions (Southall *et al.,* 2007).

Hearing Impairment

Temporary or permanent hearing impairment is possible when marine mammals are exposed to very loud sounds. Hearing impairment is measured in two forms: Temporary threshold shift (TTS) and permanent threshold shift (PTS). There are no empirical data for onset of PTS in any marine mammal; therefore, PTS-onset must be estimated from TTS-onset measurements and from the rate of TTS growth with increasing exposure levels above the level eliciting TTS-onset. PTS is presumed to be likely if the hearing threshold is reduced by ≥40 dB (*i.e.,* 40 dB of TTS). Due to proposed mitigation measures and source levels, NMFS does not expect that marine mammals will be exposed to levels that could elicit PTS.

Temporary Threshold Shift (TTS)

TTS is the mildest form of hearing impairment that can occur during exposure to a loud sound (Kryter, 1985).

While experiencing TTS, the hearing threshold rises and a sound must be louder in order to be heard. TTS can last from minutes or hours to, in cases of strong TTS, days. For sound exposures at or somewhat above the TTS-onset threshold, hearing sensitivity recovers rapidly after exposure to the noise ends. Few data on sound levels and durations necessary to elicit mild TTS have been obtained for marine mammals. Southall *et al.* (2007) considers a 6 dB TTS (*i.e.,* baseline thresholds are elevated by 6 dB) sufficient to be recognized as an unequivocal deviation and thus a sufficient definition of TTS-onset. Because it is non-injurious, NMFS considers TTS as Level B harassment that is mediated by physiological effects on the auditory system; however, NMFS does not consider onset TTS to be the lowest level at which Level B harassment may occur.

Southall *et al.* (2007) summarizes underwater pinniped TTS data from Kastak *et al.* (2005), indicating that a tested harbor seal showed a TTS of around 6 dB when exposed to a nonpulse noise at SPL 152 dB re: 1 µPa for 25 minutes. In contrast, a tested sea lion exhibited TTS-onset at 174 dB re: 1 µPa under the same conditions as the harbor seal. Data from a single study on underwater pulses found no signs of TTS-onset in sea lions at exposures up to 183 dB re: 1 µPa (peak-to-peak) (Finneran *et al.,* 2003). There is no information on species-specific TTS for harbor porpoises exposed to non-pulse sound or for gray whales. Based on studies summarized in Southall *et al.* (2007), NMFS anticipates that vibratory pile driving will not induce TTS since SPLs generated from the activity are low and, contrary to animals confined to a tank, animals in the wild will likely not remain in the area long enough to be exposed for an extended period of time. Similarly, if impact pile driving is required, it will only be temporary (5–25 strikes) and will be delayed if animals are seen approaching the Level A harassment isopleth. As such, impact pile driving is not likely to induce TTS.

No known data exists for sound levels resulting from the type of vibratory hammer and pile sizes that would be used at the Exploratorium; however, measured sound levels for the "King Kong" vibratory hammer used in Richmond, California ranged between 163 and 180 dB rms (Illingworth and Rodkin, 2007). Sound levels at the Exploratorium are expected to be substantially lower because the vibratory hammer being used is approximately 40 percent of the energetic capacity of the "King Kong" hammer and will not be used at full capacity. In addition, San Francisco Bay is highly industrialized and masking of the pile driver by other vessels and anthropogenic noise within the action area may, especially in the nearby shipping channel, may also make construction sounds difficult to hear at greater distances. Underwater ambient noise levels along the San Francisco waterfront may be around 133 dB rms, based on measurements from the nearby Oakland Outer Harbor (Caltrans, 2009).

Any impacts to marine mammal behavior are expected to be temporary. First, animals may avoid the area around the hammer; thereby reducing exposure. Second, pile driving does not occur continuously throughout the day. As described above, the vibratory hammer only operates for about 30 minutes followed by at least a one hour break. Two to five pilings are anticipated to be driven per day, resulting in a total of 1–2.5 hours of pile driving within any given 24 hour period. Limiting pile driving to less than three hours per day will allow for minimal disruption of foraging or dispersal throughout the habitat. Any disturbance to marine mammals is likely to be in the form of temporary avoidance or alteration of opportunistic foraging behavior near the pile driving location. In addition, because pile driving is anticipated to be accomplished using only a vibratory hammer, marine mammal injury or mortality is not anticipated. If an impact hammer is used, a protected species observer (PSO) will be on watch to implement pile driver shut down, a mitigation measure designed to prevent animals from being exposed to injurious level sounds. For these reasons, any changes to marine mammal behavior are expected to be temporary and result in a negligible impact to affected species and stocks.

Anticipated Effects on Habitat

Marine mammal habitat will be temporarily disturbed due to pile driving activities. Installation of new piles will be permanent; however, overall site conditions are anticipated to be substantively unchanged from existing conditions for marine mammals following project implementation. NMFS Southwest Regional Office determined that the proposed construction activities would adversely affect Essential Fish Habitat (EFH); however, adequate measures are in place to avoid, minimize, mitigate, or otherwise offset the adverse effects to EFH.

Mitigation Measures

In order to issue an IHA under Section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses. The latter does not apply here, as no subsistence hunting takes place in California. The following summarizes mitigation and monitoring measures set forth in the IHA.

Limited Use of an Impact Hammer

All piles will be installed using a vibratory pile driver unless sufficient depth cannot be reached, at which point an impact hammer may be used. In the event that an impact hammer is necessary, a bubble curtain, wood block, or both will be used as an attenuation device to reduce hydroacoustic sound levels to avoid the potential for injury.

Establishment of a Safety Zone

For all in-water impact pile driving, the Exploratorium will establish a preliminary marine mammal safety zone of 500 m (1,640 ft) around each pile before pile driving commences. Once impact pile driving commences, the Exploratorium may establish a new safety zone where sound levels do not exceed 180 dB rms and 190 dB rms (for cetaceans and pinnipeds, respectively) based on acoustical monitoring data collected during pile driving. No safety zone for vibratory pile driving is necessary, as source levels will not exceed the Level A harassment threshold.

Pile Driving Shut Down and Delay Procedures

If a PSO observes a marine mammal within or approaching the safety zone prior to start of impact pile driving, the PSO will notify the Resident Engineer (or other authorized individual) who will then be required to delay pile driving until the marine mammal has moved outside of the safety zone or if the animal has not been resighted within 15 minutes. If a marine mammal is sighted within or on a path toward the safety zone during pile driving, pile driving will cease until that animal has cleared and is on a path away from the safety zone or 15 minutes has lapsed since the last sighting. In addition, if a marine mammal not authorized to be taken under the IHA (*e.g.,* humpback whale) is observed within the Level B

harassment zone (1,900 m), pile driving will be delayed until that animal has cleared and is on a path away from the safety zone or 15 minutes has lapsed since the last sighting.

Soft-start Procedures

A "soft-start" technique will be used at the beginning of each pile installation to allow any marine mammal that may be in the immediate area to leave before the pile hammer reaches full energy. For vibratory pile driving, the soft-start procedure requires contractors to initiate noise from the vibratory hammer for 15 seconds at 40–60 percent reduced energy followed by a 1-minute waiting period. The procedure will be repeated two additional times before full energy may be achieved. For impact hammering, contractors will be required to provide an initial set of three strikes from the impact hammer at 40 percent energy, followed by a 1-minute waiting period, then two subsequent three-strike sets. The soft-start procedure will be conducted prior to driving each pile if vibratory hammering ceases for more than 30 minutes.

Visual Monitoring and Reporting

The Exploratorium must designate at least one biologically-trained, on-site individual, approved in advance by NMFS, to monitor the area for marine mammals 30 minutes before, during, and 30 minutes after all impact pile driving activities and call for shut down if any marine mammal is observed within or approaching the designated Level A harassment zone (preliminarily set at 500 m). In addition, at least one NMFS-approved PSO will conduct behavioral monitoring in and around the Exploratorium at least two days per week for the duration of vibratory pile driving activities to estimate take and evaluate the behavioral impacts vibratory pile driving has on marine mammals out to the Level B harassment isopleth (1,900 m). Should a non-authorized marine mammal (*i.e.* humpback whale) be observed at any time in this zone, the aforementioned shut down and delay procedures will be followed.

PSOs will be provided with the equipment necessary to effectively monitor for marine mammals (*e.g.*, high-quality binoculars, compass, and range-finder) in order to determine if animals have entered into the harassment isopleths and to record species, behaviors, and responses to pile driving. PSOs will be required to submit a report to NMFS within 120 days of expiration of the IHA or completion of pile driving, whichever comes first. The report should include data from marine mammal sightings (*e.g.*, species, group size, behavior), any observed reactions to construction, distance to operating pile hammer, and construction activities occurring at time of sighting.

Estimated Take by Incidental Harassment

Except with respect to certain activities not pertinent here, the MMPA defines "harassment" as:

> Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Based on the Exploratorium's application and subsequent analysis, the impact of the described pile driving operations may result in, at most, short-term modification of behavior by small numbers of marine mammals who are within the action area. Marine mammals may avoid the area or temporarily halt any behaviors (*e.g.,* foraging) at time of exposure. Due to the short duration of pile driving per day, animals are not anticipated to be exposed multiple times per day.

Current NMFS practice regarding exposure of marine mammals to anthropogenic noise is that in order to avoid the potential for injury of marine mammals (*e.g.*, PTS), cetaceans and pinnipeds should not be exposed to impulsive sounds of 180 and 190 dB rms or above, respectively. This level is considered precautionary as it is likely that more intense sounds would be required before injury would actually occur (Southall *et al.*, 2007). Potential for behavioral harassment (Level B) is considered to have occurred when marine mammals are exposed to sounds at or above 160 dB rms for impulse sounds (*e.g.*, impact pile driving) and 120 dB rms for non-pulse noise (*e.g.*, vibratory pile driving), but below the aforementioned thresholds. These levels are also considered precautionary.

Based on empirical measurements taken by Caltrans (which are presented in the *Description of Specified Activities* section above), estimated distances to NMFS current threshold sound levels from pile driving during the Exploratorium's relocation project are presented in Table 4. These estimates are based on the worst case scenario of driving the 72-inch steel piles but would be carried over for all pile driving. Note that despite short distances to the Level A harassment isopleth, the Exploratorium has proposed to implement a preliminary 500-m marine mammal safety zone until empirical pile driving measurements can be made and distances to this threshold isopleth can be verified.

TABLE 4—MODELED UNDERWATER DISTANCES TO NMFS' MARINE MAMMAL HARASSMENT THRESHOLD LEVELS

	Level A (190/180 dB)	Level B harassment (160 dB)	Level B harassment (120 dB)
Impact hammering	20 m (w/o sound attenuation device)	100 m	n/a
Vibratory hammering	n/a	n/a	1900 m

The estimated number of potential marine mammal takes was based on marine mammal monitoring reports prepared by Caltrans during similar activities in San Francisco Bay and on discussions with the NMFS Southwest Regional Office. Caltrans' SFOBB marine mammal monitoring reports were used to estimate the number of pinnipeds near the Exploratorium project area as the SFOBB site and Exploratorium are relatively close to each other and are similar in bathymetric features (*e.g.,* water depth, substrate). However, monitoring conducted for the SFOBB project has been in close proximity to a haul out area, while the Exploratorium project is in an area of high commercial boat activity with no haul out sites. Therefore, the Caltrans data likely overestimates marine mammal abundance for the Exploratorium project area. Based on consultation with the NMFS Southwest Regional Office and review of Caltrans monitoring reports for pile driving activities in San Francisco Bay, the Exploratorium requested a total take of two Pacific harbor seals, one California sea lion, and

one gray whale per day of pile driving. Upon further consultation with NMFS Southwest Regional Office, NMFS is proposing to include harbor porpoise as a species potentially taken by pile driving, due to the recorded, albeit infrequent, sightings of harbor porpoises within San Francisco Bay.

The Exploratorium estimates an average of three piles would be driven in a single day. Given 69 piles in total, pile driving would occur for approximately 23 days over the life of the project. Therefore, NMFS is proposing to authorize annual take, by Level B harassment only, of 38 Pacific harbor seals, 19 California sea lions incidental to the Exploratorium's pile driving activities. Due to the infrequent, but potential presence of harbor porpoise and gray whales in the area, NMFS is also proposing to authorize the take of 28 harbor porpoise and five gray whales, annually, based on consultation with the NMFS Southwest Regional Office, NMFS. These numbers are conservative and indicate the maximum number of animals expected to occur within the Level B harassment isopleth (1,900 m). Estimated and proposed level of take of each species is less than one percent of the affected stock population and therefore is considered small in relation to the population numbers previously set forth. The most recent harbor seal counts estimate the California stock of Pacific harbor seals at 34,233 individuals and the population appears to be stabilizing at what may be their carrying capacity. The abundance of the U.S. stock of California sea lions is estimated to be 238,000 individuals and the stock is approaching carrying capacity. Any harbor porpoises encountered during the Exploratorium relocation project would likely be part of the San Francisco-Russian River stock which has an estimated abundance of 9,189 animals and has steadily increased since 1993 (although the increase is not statistically significant). Lastly, the most recent 2008 stock assessment report estimated the Eastern North Pacific gray whale stock to be approximately 18,813 individuals with an increasing population trend over the past several decades.

Negligible Impact and Small Numbers Analysis and Determination

NMFS has defined "negligible impact" in 50 CFR 216.103 as "* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."

NMFS has determined that the impact of pile driving within the Exploratorium's action area, as described in this notice and the IHA application, may result in the temporary modification in behavior (Level B harassment) of small numbers of marine mammals. Further, this activity is expected to result in a negligible impact on the affected species or stocks of marine mammals. The provision requiring that the activity not have an unmitigable impact on the availability of the affected species or stock of marine mammals for subsistence use is not implicated for this action.

For reasons stated previously in this document, the specified activities associated with relocation of the Exploratorium are not likely to cause TTS, PTS, or other non-auditory injury, serious injury, or death to affected marine mammals because of the following:

(1) The fact that sound pressure levels from vibratory pile driving in San Francisco Bay will not exceed 180 dB rms;

(2) The limited use of an impact hammer during pile driving;

(3) The use of sound attenuation devices (*e.g.*, wood block, bubble curtain) during all impact hammering;

(4) The monitoring requirements during all impact pile driving and during vibratory pile driving two full days per week; and

(5) The incorporation of other required mitigation measures (*i.e.*, shut-down, soft-starts).

As a result, no take by injury, serious injury, or death is anticipated or authorized, and the potential for temporary or permanent hearing impairment is very low and will be avoided through the incorporation of the required monitoring and mitigation measures.

While the number of marine mammals potentially incidentally harassed will depend on the distribution and abundance of marine mammals in the vicinity of the pile driving activities, the number of potential Level B incidental harassment takings is estimated to be small (less than one percent) relative to the estimated population sizes and has been mitigated to the lowest level practicable through incorporation of the monitoring and mitigation measures previously addressed in this document. No known foraging sites occur around Piers 15/17 and the closest pinniped haul out area is 3 km away.

Impact on Availability of Affected Species for Taking for Subsistence Uses

There are no relevant subsistence uses of marine mammals implicated by this action.

Endangered Species Act (ESA)

No marine mammal species listed under the ESA are anticipated to occur within the action area; therefore, ESA consultation on issuance of the proposed IHA was not required. However, other ESA-listed species under NMFS' jurisdiction do occur within the action area. On May 28, 2010, the NMFS Southwest Regional Office concluded Section 7 and EFH consultation with the U.S. Army Corps of Engineers (Corps) on issuance of a Corps permit to the Exploratorium. Both parties concurred that adequate measures are in place to avoid, minimize, mitigate, or otherwise offset adverse effects to EFH.

National Environmental Policy Act (NEPA)

On October 15, 2010, NMFS released an Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) for the Exploratorium relocation project. NMFS determined that issuance of the IHA would not significantly impact the quality of the human environment and that preparation of an Environmental Impact Statement was not required.

Dated: October 14, 2010.

James H. Lecky,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2010–27178 Filed 10–26–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XZ46

Magnuson-Stevens Act Provisions; General Provisions for Domestic Fisheries; Application for Exempted Fishing Permit (EFP)

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

ACTION: Notification of a proposal for an EFP to conduct experimental fishing; request for comments.

SUMMARY: The Assistant Regional Administrator for Sustainable Fisheries, Northeast Region, NMFS (Assistant Regional Administrator), is soliciting public comment on an EFP application submitted by Wallace & Associates on behalf of Truex Enterprises. The proposed EFP would extend a previously authorized EFP for an additional year to continue testing the

safety and efficacy of harvesting surfclams and ocean quahogs from the Atlantic surfclam and ocean quahog Georges Bank (GB) Closure Area using a sampling protocol developed by State and Federal regulatory agencies and endorsed by the U.S. Food and Drug Administration (FDA). The Assistant Regional Administrator has also made a preliminary determination that the activities authorized under the EFP would be consistent with the goals and objectives of the Atlantic Surfclam and Ocean Quahog regulations and Fishery Management Plan (FMP). However, further review and consultation may be necessary before a final determination is made to issue the EFP. The subject EFP would allow one commercial fishing vessel to conduct fishing operations that are otherwise restricted by the regulations governing the fisheries of the Northeastern United States. The EFP would allow for an exemption from the Atlantic surfclam and ocean quahog GB Closure Area. 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 EFPs.

DATES: Comments must be received on or before November 12, 2010.

ADDRESSES: Comments on this notice may be submitted by e-mail. The mailbox address for providing e-mail comments is *NERO.EFP@noaa.gov.* Include in the subject line of the e-mail comment the following document identifier: "Comments on 2011 GB PSP Closed Area Exemption." Written comments should be sent to Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope "Comments on 2011 GB PSP Closed Area Exemption." Comments may also be sent via facsimile (fax) to (978) 281–9135.

FOR FURTHER INFORMATION CONTACT: Anna Macan, Fishery Management Specialist, phone 978–281–9165. Copies of supporting documents referenced in this notice are available from Anna Macan, Fishery Management Specialist, National Marine Fisheries Service, 55 Great Republic Drive, Gloucester, MA 01930, and are available via the Internet at *http://www.nero.noaa.gov/sfd/clams.*

SUPPLEMENTARY INFORMATION: The applicant, Wallace & Associates, of Cambridge, MD, requests on behalf of Truex Enterprises, a renewal of their current EFP, which is due to expire on December 31, 2010, to allow the catch and retention for sale of Atlantic surfclams from within the Atlantic surfclam and ocean quahog GB Closure Area. The GB Closure Area is located east of 69°00′ W. long. and south of 42°20′ N. lat and has been closed since May 25, 1990, due to the presence of a toxin (saxotoxins) that cause Paralytic Shellfish Poisoning (PSP). Due, in part, to the inability to test and monitor this area for the presence of PSP, this closure was made permanent through Amendment 12 to the FMP in 1999.

The primary goal of the proposed study is to test the efficacy of the sampling protocol that was developed by State and Federal regulatory agencies to test for presence of saxotoxins in shellfish, and thus has been in a trial period through previous EFPs since 2006. This protocol would facilitate the harvest of shellfish from waters susceptible to Harmful Algal Blooms, which produce the saxotoxins, but that are not currently under rigorous water quality monitoring programs by either State or Federal management agencies. A copy of the protocol is available from the NMFS Northeast Region Web site: *http://www.nero.noaa.gov/sfd/clams.*

The proposed project would continue to conduct a trial for the sampling protocol in an exemption zone within the larger 1990 GB Closure Area with one fishing vessel. The exemption zone would not include any Northeast multispecies or essential fish habitat year-round closure areas. This proposed exempted fishing activity would occur during the 2011 calendar year, using surfclam quota allocated to Truex Enterprises under the Federal individual transferable quota program. The applicant has estimated a harvest of 200,000 bushels (1,606,250 L) of surfclams from the exemption area. The exemption area has been tested in cooperation with the FDA from 2006 to the present.

The applicant has obtained endorsements for the EFP and the sampling protocol from the States of Rhode Island, New Jersey, and Delaware, the States in which it intends to land and process the product harvested under the EFP. Each State is responsible for regulating the molluscan shellfish industry within its jurisdiction and ensuring the safety of shellfish harvested within or entering its borders. The sampling protocol and the pilot project that would be authorized by this EFP have also since been endorsed by the executive board of the Interstate Shellfish Sanitation Conference.

The applicants may request minor modifications and extensions to the EFP throughout the course of research. EFP modifications and extensions may be granted without further public notice if they are deemed essential to facilitate completion of the proposed research and result in only a minimal change in the scope or impacts of the initially approved EFP request.

In accordance with NOAA Administrative Order (NAO) 216–6, a Categorical Exclusion or other appropriate National Environmental Policy Act document would be completed prior to the issuance of the EFP. Further review and consultation may be necessary before a final determination is made to issue the EFP. After publication of this document in the **Federal Register**, the EFP, if approved, may become effective following the public comment period.

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

Dated: October 22, 2010.

Emily H. Menashes,

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

[FR Doc. 2010–27174 Filed 10–26–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA005

North Pacific Fishery Management Council; Public Meetings

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

ACTION: Notice of public meetings.

SUMMARY: The North Pacific Fishery Management Council's (NPFMC) Gulf of Alaska (GOA) and Bering Sea/Aleutian Islands (BS/AI) Groundfish plan teams will meet in Seattle, WA.

DATES: The meetings will be held November 15–19, 2010. The meetings will begin at 9 a.m. on Monday, November 15, and continue through Friday November 19.

ADDRESSES: The meetings will be held at the Alaska Fisheries Science Center, 7600 Sand Point Way NE., Building 4, Observer Training Room (GOA Plan Team) and Traynor Room (BS/AI Plan Team), Seattle, WA.

Council address: North Pacific Fishery Management Council, 605 W. 4th Ave., Suite 306, Anchorage, AK 99501–2252.

FOR FURTHER INFORMATION CONTACT: Jane DiCosimo or Diana Stram, NPFMC; telephone: (907) 271–2809.

SUPPLEMENTARY INFORMATION: The plan teams will prepare and review the stock

assessments for groundfish fisheries in the BSAI and GOA and recommend catch specifications for 2011/12. Agenda posted on Web site at: *http://www.alaskafisheries.noaa.gov/npfmc/.*

Although non-emergency issues not contained in this agenda may come before these groups for discussion, those issues may not be the subject of formal action during these meetings. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Gail Bendixen, (907) 271–2809, at least 5 working days prior to the meeting date.

Dated: October 21, 2010.

Tracey L. Thompson,

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

[FR Doc. 2010–27100 Filed 10–26–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA004

New England Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Research Steering Committee (Committee), in November, 2010, to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: The meeting will be held on Friday, November 12, 2010 at 10 a.m.

ADDRESSES: The meeting will be held at the Courtyard by Marriott, 225 McClellan Highway, East Boston, MA 02128, telephone: (617) 569–5250; fax: (617) 561–0971.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION: The Council's Research Steering Committee will meet to review its mission, processes and products, as well as receive an update from NMFS' Northeast Cooperative Research Program concerning their recent activities.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

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

Dated: October 21, 2010.

Tracey L. Thompson,

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

[FR Doc. 2010–27099 Filed 10–26–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA003

Mid-Atlantic Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council's (MAFMC) Summer Flounder Monitoring Committee, Scup Monitoring Committee, Black Sea Bass Monitoring Committee, and the Mid-Atlantic Fishery Council's and the Atlantic States Marine Fisheries Commission's Sumer Flounder, Scup, and Black Sea Bass Advisors will hold public meetings.

DATES: The meeting will be held on Thursday, November 18, 2010 beginning at 8:30 a.m. with the Monitoring Committees. The Advisory Panels will begin meeting at 1 p.m. See **SUPPLEMENTARY INFORMATION** for meeting agenda.

ADDRESSES: The meeting will be held at the Holiday Inn BWI Airport Hotel, 890 Elkridge Landing Road, Linthicum, MD 21090; telephone: (410) 859–8400.

Council address: Mid-Atlantic Fishery Management Council, 800 N. State Street, Suite 201, Dover, DE 19901; telephone: (302) 674–2331.

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore, PhD, Executive Director, Mid-Atlantic Fishery Management Council, 800 N. State Street, Suite 201, Dover, DE 19901; telephone: (302) 526–5255.

SUPPLEMENTARY INFORMATION: The purpose of these meetings is to recommend the 2011 recreational management measures for the summer flounder, scup, and black sea bass fisheries.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to M. Jan Saunders at the Mid-Atlantic Council Office, (302) 526–5251, at least 5 days prior to the meeting date.

Dated: October 21, 2010.

Tracey L. Thompson,

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

[FR Doc. 2010–27098 Filed 10–26–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA02

Marine Mammals; Issuance of Permits

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

ACTION: Notice; issuance of permits.

SUMMARY: Notice is hereby given that individuals and institutions have been issued Letters of Confirmation for activities conducted under the General Authorization for Scientific Research on marine mammals. See **SUPPLEMENTARY INFORMATION** for a list of names and addresses of recipients.

ADDRESSES: The Letters of Confirmation and related documents are available for review upon written request or by appointment in the following office:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 713–2289; fax (301) 713–0376.

FOR FURTHER INFORMATION CONTACT: Office of Protected Resources, Permits Division, (301) 713–2289.

SUPPLEMENTARY INFORMATION: The requested Letters of Confirmation (LOC) have been issued under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), and the regulations governing the taking and importing of marine mammals (50 CFR part 216). The General Authorization allows for bona fide scientific research that may result only in taking by level B harassment of marine mammals. The following Letters of Confirmation were issued in Fiscal Year 2010.

File No. 14579: Issued to Dr. Susan Shaw, Marine Environmental Research Institute, Blue Hill, ME on October 28, 2009, for aerial and vessel surveys to census harbor seals (*Phoca vitulina*) and gray seals (*Halichoerus grypus*) in and around pinniped haulouts in the Blue Hill Bay area of the Gulf of Maine. Harp seals (*Pagophilus groenlandica*) and hooded seals (*Cystophora cristata*) may be harassed incidental to these surveys. The authorization is valid through October 31, 2014.

File No. 14903: Issued to Lisa Sette, Provincetown Center for Coastal Studies, Provincetown, MA, on March 3, 2010, authorizes vessel and land based surveys, photo-identification and behavioral observations of gray seals and harbor seals along the coast of Cape Cod, MA. The purpose of the research is to provide information on the haul-out structure and possible distribution shifts around New England. The research will provide a foundation for long-term studies of pinniped populations in the study area as well as aid in the development of a photo-ID catalogue. The LOC expires on March 1, 2015.

File No. 15141: Issued to Petra Bertilsson-Friedman, Montauk, NY, on March 3, 2010, authorizes behavioral observations and photo-identification of harbor seals, gray seals, and harp seals hauled out in Montauk, NY. The objective of the research is to examine the abundance and structure of two different seal haul out sites [Montauk Point State Park (rocky coast) and Shagwong Point (sandy beach)] to determine how habitat features and anthropogenic disturbance influences haul out choice. The researcher will also provide photo-ID data to Ms. Sette (File No. 14903) to include in the photo-ID catalogue. The LOC expires on March 1, 2015.

File No. 15369: Issued to Mari Smultea, Issaquah, WA, on April 23, 2010, authorizes aerial surveys, photo-identification, video, and behavioral observations of 21 cetacean species and three pinniped species in the U.S. Navy's Southern California Range Complex (SOCAL) in the Pacific Ocean. The purpose of the research is to collect baseline data on the abundance and distribution of cetaceans and pinnipeds within the SOCAL. The surveys are supported by the Navy as part of their Marine Species Monitoring Plan. The LOC expires on December 15, 2014.

File No. 13729–01: Issued to The Wild Dolphin Project, Jupiter, FL, on June 8, 2010, authorizes close approach, photo-identification, and behavioral observations of cetaceans within the Intracoastal Waterway from southern Martin County to the Florida Keys, and in the adjacent Atlantic Ocean from the coast to 20 miles into the Gulf Stream. This amendment expands the study to include Atlantic spotted dolphins (*Stenella frontalis*) inhabiting Atlantic waters along the Florida Keys and authorizes surveys year-round. The purpose of the research is to study the abundance, distribution, and residency of cetaceans in the Intracoastal Waterway (ICW) as well as offshore of Palm Beach County, Florida, down to the Florida Keys. The LOC expires on February 28, 2014, and supersedes LOC No. 13729, issued on February 13, 2009.

File No. 15409: Issued to Dr. David Johnston, Duke University, Beaufort, NC, on June 8, 2010, authorizes vessel surveys, photo-identification and behavioral observations of seven dolphin species and nine whale species in the nearshore waters of the Hawaiian Islands and American Samoa. The purpose of the research is to collect baseline data on the stock structure and population dynamics of cetaceans within the Pacific Islands Region. The LOC expires on June 15, 2015.

File No. 15459: Issued to Jennifer Lewis, Florida International University, Miami, FL, on June 18, 2010, authorizes photo-identification and behavioral surveys of bottlenose dolphins (*Tursiops truncatus*) within the borders of the Lower Florida Keys, Florida Keys National Marine Sanctuary, and Everglades National Park. The purpose of the research is to study factors influencing habitat use, ranging patterns, behavioral variation, and population structure of bottlenose dolphins in southern Florida waters. The LOC expires on July 1, 2015.

File No. 14646: Issued to Dr. Laela Sayigh, Woods Hole Oceanographic Institution, Woods Hole, MA on June 29, 2010, for close approach, photo-identification, passive acoustic recordings, behavioral observations, and focal follows of seven marine mammal species, including long-finned pilot whales (*Globicephala melas*), Atlantic white-sided dolphins (*Lagenorhynchus acutus*), and common dolphins (*Delphinus delphis*). The primary study area is Cape Cod Bay, but research efforts may also occur in the Gulf of Maine (including Massachusetts Bay) and the Stellwagen Bank National Marine Sanctuary. The purpose of the research is to investigate the phenomenon of mass strandings and try to improve the ability to predict such events. The LOC expires on July 1, 2015.

File No. 15512: Issued to Dr. Shannon Gowans, Eckerd College, St. Petersburg, FL on July 9, 2010, authorizes vessel surveys for close approach, photo-identification, passive acoustic recordings, and behavioral observations of bottlenose dolphins in the Gulf of Mexico from Clearwater to Tampa Bay, Florida. The purpose of the research is to monitor this population of bottlenose dolphins, estimate abundance, investigate trends in population size, spatial distribution, and changes in distribution over time. The LOC expires on July 15, 2015.

File No. 15477: Issued to Isidore Szczepaniak, Pacifica, CA on July 16, 2010, authorizes vessel surveys for close approach, photo-identification, and behavioral observations of the San Francisco-Russian River Stock of harbor porpoise (*Phocoena phocoena*) and bottlenose dolphins in the waters of San Francisco Bay and adjacent Pacific

Ocean coastal waters in Northern California, between Bodega Bay in the north and Half Moon Bay in the south. The purpose of the research is to document the harbor porpoise's range reestablishment and the likely causes of its reappearance in San Francisco Bay, and to document interactions between harbor porpoise and bottlenose dolphins. The LOC expires on July 31, 2015.

File No. 919–1797: Issued to Dr. Donald Baltz, Louisiana State University, Baton Rouge, LA on July 7, 2005 was extended on July 27, 2010. The purpose of the research is to estimate abundance and conduct behavioral observations and photo-identification of bottlenose dolphins in the bays and coastal waters of Louisiana and Mississippi. The LOC was extended from July 31, 2010 until July 31, 2011.

File No. 15631: Issued to Marilyn Mazzoil, Harbor Branch Oceanographic Institute, Fort Pierce, FL on August 24, 2010, authorizes photo-identification and behavioral surveys of bottlenose dolphins in the Indian River Lagoon Estuary, Florida and adjacent Atlantic Ocean coastal waters from Ponce Inlet to Jupiter Inlet out to 3 km offshore. The purpose of the research is to investigate the abundance, distribution, and stock structure of Western North Atlantic coastal and offshore bottlenose dolphins. The LOC expires on August 31, 2015.

File No. 808–1798–02: Issued to Dr. Andrew Read, Duke University Marine Laboratory, Beaufort, NC on September 27, 2010, authorizes vessel and aerial surveys, close approach, photo-identification, observation of dolphin/fishery interactions, focal animal sampling, and passive acoustics of 19 cetacean species. Research activities may occur year-round from the North Carolina/Virginia border, south to 29° N (Florida), in coastal waters and out to 100 nm offshore. The purpose of the amendment is to extend the duration of the study from September 30, 2010 to March 30, 2011. This amended GA LOC supersedes version 808–1798–01, issued on May 1, 2009.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), a final determination has been made that the activities are categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Dated: October 21, 2010.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2010–27176 Filed 10–26–10; 8:45 am]

BILLING CODE 3510–22–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

TIME AND DATE: 11 a.m., Friday, November 26, 2010.

PLACE: 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance and enforcement matters.

CONTACT PERSON FOR MORE INFORMATION: Sauntia S. Warfield, 202–418–5084.

Sauntia S. Warfield,

Assistant Secretary of the Commission.

[FR Doc. 2010–27324 Filed 10–25–10; 4:15 pm]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

TIME AND DATE: 11 a.m., Friday, November 5, 2010.

PLACE: 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance and Enforcement Matters.

CONTACT PERSON FOR MORE INFORMATION: Sauntia S. Warfield, 202–418–5084.

Sauntia S. Warfield,

Assistant Secretary of the Commission.

[FR Doc. 2010–27329 Filed 10–25–10; 4:15 pm]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

TIME AND DATE: 11 a.m., Friday, November 12, 2010.

PLACE: 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance and Enforcement Matters.

CONTACT PERSON FOR MORE INFORMATION: Sauntia S. Warfield, 202–418–5084.

Sauntia S. Warfield,

Assistant Secretary of the Commission.

[FR Doc. 2010–27327 Filed 10–25–10; 4:15 pm]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

TIME AND DATE: 11 a.m., Friday, November 19, 2010.

PLACE: 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance and enforcement matters.

CONTACT PERSON FOR MORE INFORMATION: Sauntia S. Warfield, 202–418–5084.

Sauntia S. Warfield,

Assistant Secretary of the Commission.

[FR Doc. 2010–27326 Filed 10–25–10; 4:15 pm]

BILLING CODE 6351–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Paducah

AGENCY: Department of Energy (DOE).

ACTION: Notice of Open Meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Paducah. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Thursday, November 18, 2010, 6 p.m.

ADDRESSES: Barkley Centre, 111 Memorial Drive, Paducah, Kentucky 42001.

FOR FURTHER INFORMATION CONTACT: Reinhard Knerr, Deputy Designated Federal Officer, Department of Energy Paducah Site Office, Post Office Box 1410, MS–103, Paducah, Kentucky 42001, (270) 441–6825.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management and related activities.

Tentative Agenda

- Call to Order, Introductions, Review of Agenda.

• Deputy Designated Federal Officer's Comments.
• Federal Coordinator's Comments.
• Liaisons' Comments.
• Administrative Issues.
• Presentations.
• Subcommittee Chairs' Comments.
• Public Comments.
• Final Comments.
• Adjourn.

Breaks Taken as Appropriate.

Public Participation: The EM SSAB, Paducah, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Reinhard Knerr at least seven days in advance of the meeting at the telephone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Reinhard Knerr at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Reinhard Knerr at the address and phone number listed above. Minutes will also be available at the following Web site: *http://www.pgdpcab.org/meetings.html*.

Issued at Washington, DC, on October 22, 2010.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. 2010–27157 Filed 10–26–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

October 20, 2010.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1756–001.

Applicants: California Independent System Operator Corporation.

Description: California Independent System Operator Corporation submits tariff filing per 35: 2010–10–12 Non Generator Resource Compliance Filing to be effective 9/10/2010.

Filed Date: 10/12/2010.

Accession Number: 20101012–5018.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 02, 2010.

Docket Numbers: ER11–1830–000.

Applicants: California Independent System Operator Corporation.

Description: California Independent System Operator Corporation submits tariff filing per 35.13(a)(2)(iii: 2010–10–19 CAISO Generator Interconnection Procedures Amendment to be effective 12/19/2010.

Filed Date: 10/19/2010.

Accession Number: 20101019–5133.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 09, 2010.

Docket Numbers: ER11–1831–000.

Applicants: Columbus Southern Power Company.

Description: Columbus Southern Power Company submits tariff filing per 35.12: Baseline MBR Concurrence to be effective 10/8/2010.

Filed Date: 10/19/2010.

Accession Number: 20101019–5152.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 09, 2010.

Docket Numbers: ER11–1832–000.

Applicants: Nevada Power Company.

Description: Nevada Power Company submits tariff filing per 35: Cost-Based Rate Schedule No. 114—Compliance Filing to be effective 10/1/2010.

Filed Date: 10/19/2010.

Accession Number: 20101019–5153.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 09, 2010.

Docket Numbers: ER11–1833–000.

Applicants: Indiana Michigan Power Company.

Description: Indiana Michigan Power Company submits tariff filing per 35.12: Baseline MBR Concurrence to be effective 10/8/2010.

Filed Date: 10/19/2010.

Accession Number: 20101019–5155.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 09, 2010.

Docket Numbers: ER11–1834–000.

Applicants: Kentucky Power Company.

Description: Kentucky Power Company submits tariff filing per 35.12: Baseline MBR Concurrence to be effective 10/8/2010.

Filed Date: 10/19/2010.

Accession Number: 20101019–5156.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 09, 2010.

Docket Numbers: ER11–1835–000.

Applicants: Kingsport Power Company.

Description: Kingsport Power Company submits tariff filing per 35.12: Baseline MBR Concurrence to be effective 10/8/2010.

Filed Date: 10/19/2010.

Accession Number: 20101019–5157.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 09, 2010.

Docket Numbers: ER11–1836–000.

Applicants: Sierra Pacific Power Company.

Description: Sierra Pacific Power Company submits tariff filing per 35: Cost-Based Rate Schedule No. 57—Compliance Filing to be effective 10/1/2010.

Filed Date: 10/19/2010.

Accession Number: 20101019–5159.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 09, 2010.

Docket Numbers: ER11–1837–000.

Applicants: Ohio Power Company.

Description: Ohio Power Company submits tariff filing per 35.12: Baseline MBR Concurrence to be effective 10/8/2010.

Filed Date: 10/19/2010.

Accession Number: 20101019–5163.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 09, 2010.

Docket Numbers: ER11–1838–000.

Applicants: Wheeling Power Company.

Description: Wheeling Power Company submits tariff filing per 35.12: Baseline MBR Concurrence to be effective 10/8/2010.

Filed Date: 10/19/2010.

Accession Number: 20101019–5168.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 09, 2010.

Docket Numbers: ER11–1839–000.

Applicants: Avista Corporation.

Description: Avista Corporation submits their Compliance Filing of its Open Access Transmission Tariff to remove the price cap regarding the assignment of Avista transmission pursuant to Order 739, to be effective 10/20/2010.

Filed Date: 10/20/2010.

Accession Number: 20101020–5000.

Comment Date: 5 p.m. Eastern Time on Wednesday, November 10, 2010.

Docket Numbers: ER11–1840–000.

Applicants: Arizona Public Service Company.

Description: Arizona Public Service Company submits tariff filing per 35: Compliance filing pursuant to Order No. 739 to be effective 9/24/2010.

Filed Date: 10/20/2010.

Accession Number: 20101020–5039.

Comment Date: 5 p.m. Eastern Time on Wednesday, November 10, 2010.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of

Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

As it relates to any qualifying facility filings, the notices of self-certification [or self-recertification] listed above, do not institute a proceeding regarding qualifying facility status. A notice of self-certification [or self-recertification] simply provides notification that the entity making the filing has determined the facility named in the notice meets the applicable criteria to be a qualifying facility. Intervention and/or protest do not lie in dockets that are qualifying facility self-certifications or self-recertifications. Any person seeking to challenge such qualifying facility status may do so by filing a motion pursuant to 18 CFR 292.207(d)(iii). Intervention and protests may be filed in response to notices of qualifying facility dockets other than self-certifications and self-recertifications.

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 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–27133 Filed 10–26–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

October 20, 2010.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP10–1018–003.

Applicants: Paiute Pipeline Company.

Description: Paiute Pipeline Company resubmits First Revised Sheet No. 2 *et al.,* Third Revised Volume No 1–A, to be effective 11/1/2010.

Filed Date: 10/20/2010.

Accession Number: 20101020–5004.

Comment Date: 5 p.m. Eastern Time on Monday, October 25, 2010.

Docket Numbers: RP10–1274–001.

Applicants: MIGC LLC.

Description: MIGC LLC submits tariff filing per 154.203: MIGC LLC Revised Order 587–U Compliance Filing to be effective 11/1/2010.

Filed Date: 10/20/2010.

Accession Number: 20101020–5052.

Comment Date: 5 p.m. Eastern Time on Monday, November 1, 2010.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing 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. Such protests must be filed on or before 5 p.m. Eastern Time on the specified comment date. Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests 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 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 e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–27131 Filed 10–26–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

October 20, 2010.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP11–1416–000.

Applicants: Texas Gas Transmission, LLC.

Description: Texas Gas Transmission, LLC submits its TVA Non-conforming Agreement 11/1/10, to be effective 11/1/2010.

Filed Date: 10/20/2010.

Accession Number: 20101020–5023.

Comment Date: 5 p.m. Eastern Time on Monday, November 01, 2010.

Docket Numbers: RP11–1417–000.

Applicants: High Island Offshore System, LLC.

Description: High Island Offshore System, LLC submits tariff filing per 154.203: NAESB V1.9 Correction to be effective 11/1/2010.

Filed Date: 10/20/2010.

Accession Number: 20101020–5042.

Comment Date: 5 p.m. Eastern Time on Monday, November 01, 2010.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference

to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–27130 Filed 10–26–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR10–15–002]

Bay Gas Storage Company Ltd.; Notice of Compliance Filing

October 20, 2010.

Take notice that on October 13, 2010, Bay Gas Storage Company Ltd. (Bay Gas) filed its Refund Report pursuant to its August 30, 2010 Settlement Agreement approved by a September 9, 2010, Letter Order.

Any person desiring to participate in this rate filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 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 e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern time on Wednesday, October 27, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–27118 Filed 10–26–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12555–004–PA]

Mahoning Creek Hydroelectric Company, LLC; Notice of Availability of Supplemental Environmental Assessment

October 20, 2010.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission (Commission) regulations, 18 CFR part 380 (Order No. 486, 52 FR 47879), the Office of Energy Projects has reviewed the application for an original license for the Mahoning Creek Hydroelectric Project, to be located on Mahoning Creek in Armstrong County, Pennsylvania, and has prepared an Environmental Assessment (EA) to supplement the EA issued on March 23, 2010. In this supplemental EA, Commission staff analyze the potential environmental effects of licensing the project and conclude that issuing a license for the project, with appropriate environmental measures, would not constitute a major federal action significantly affecting the quality of the human environment.

A copy of the supplemental EA is on file with the Commission and is available for public inspection. The supplemental EA may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Any comments should be filed within 30 days from the issuance date of this notice, and should be addressed to the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Room 1–A, Washington, DC 20426. Please affix "Mahoning Creek Project No. 12555–004" to all comments. Comments may be filed electronically via Internet in lieu of paper. The Commission strongly encourages electronic filings. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "eFiling" link. For further information, contact Steve Kartalia at (202) 502–6131.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–27120 Filed 10–26–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Western Area Power Administration

Draft Environmental Impact Statement/ Staff Assessment for the Solar Reserve LLC Rice Solar Energy Project, Riverside County, CA (DOE/ EIS–0439) and Possible California Desert Conservation Area Plan Amendment

AGENCY: Western Area Power Administration, DOE.

ACTION: Notice of Availability of Draft Environmental Impact Statement/Staff Assessment.

SUMMARY: In accordance with the National Environmental Policy Act (NEPA) of 1969, as amended, and the Federal Land Policy and Management Act (FLPMA) of 1976, as amended, the Department of Energy (DOE), which includes the Western Area Power Administration (Western) and the Loan Guarantee Program (LGP), the California Energy Commission (CEC), and the Bureau of Land Management (BLM), have prepared a Draft Environmental Impact Statement (EIS) and Staff Assessment (SA), which may require a California Desert Conservation Area (CDCA) Plan Amendment, as a joint environmental analysis document for the proposed Rice Solar Energy Project (Project), in Riverside County, California, and by this notice are announcing the opening of the comment period. Western, on behalf of DOE, and CEC are joint lead agencies for purposes of satisfying the requirements of NEPA and the California Environmental Quality Act (CEQA), with the BLM acting as a cooperating agency. The Draft EIS/SA is available on the Internet at: *http://www.energy.ca.gov/sitingcases/ricesolar/index.html.*

DATES: The public is invited to submit comments on this Draft EIS/SA and possible CDCA Plan Amendment during the public comment period. To ensure that comments will be considered, Western must receive written comments on the Draft EIS/SA within 90 days following the date the Environmental Protection Agency publishes its Notice of Availability in the **Federal Register**. Oral comments will be taken at a public hearing that will be announced at least 15 days in advance through public notices, media releases, and/or mailings.

ADDRESSES: Written comments on the Draft EIS/SA may be sent to Ms. Liana Reilly, NEPA Document Manager, Western Area Power Administration, P.O. Box 281213, Lakewood, CO 80228–8213 or sent by e-mail to *RiceSolar@wapa.gov.*

Your entire comment, including your personal information such as name and address, may be publicly available at any time. While you can ask us in your comment to withhold your personal information from public review, we cannot guarantee that we will be able to do so.

FOR FURTHER INFORMATION CONTACT: For information on the proposed Project, the EIS and general information about Western's transmission system, contact Ms. Liana Reilly, Western NEPA Document Manager, at (800) 336–7288 or the address provided above. Parties wishing to be placed on the Project mailing list for future information and to receive copies of the document should also contact Ms. Reilly. For general information on the DOE NEPA process, please contact Ms. Carol M. Borgstrom, Director, Office of NEPA Policy and Compliance (GC–54), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, telephone (202) 586–4600 or (800) 472–2756.

For information on the DOE Loan Guarantee Program's involvement in the Project, contact Ms. Angela Colamaria, NEPA Document Manager, DOE Loan Guarantee Program, 1000 Independence Ave. SW., LP–10, Washington, DC 20585, telephone (202) 287–5387, or e-mail *angela.colamaria@hq.doe.gov*. For information on BLM's role with the Project or the possible CDCA Plan Amendment, contact Ms. Allison Shaffer, BLM Project Manager, Palm Springs South Coast Field Office, Bureau of Land Management, 1201 Bird Center Drive, Palm Springs, CA, 92262, telephone (760) 833–7100 or e-mail *CAPSSolarRice@blm.gov*.

For information on the California Energy Commission process, contact Mr. John Kessler, Project Manager, Siting, Transmission and Environmental Protection Division, California Energy Commission, 1516 Ninth Street, MS–15, Sacramento, CA 95814, telephone (916) 654–4679 or e-mail *jkessler@energy.state.ca.us.* Information on the California Energy Process may be also found online at *http://www.energy.ca.gov/sitingcases/ricesolar/index.html*.

SUPPLEMENTARY INFORMATION: Western and BLM filed a Notice of Intent (NOI) to Prepare an EIS/SA and possible Land Use Plan Amendment for the proposed Project which was published in the **Federal Register** on March 29, 2010 (75 FR 15427).[1] Western and the BLM held public scoping meetings in Big River, CA, on March 31, 2010, and in Palm Desert, CA, on April 1, 2009. The formal scoping period ended April 28, 2010. Comments received during the scoping period were considered in preparing the Draft EIS/SA.

Proposed Project: The proposed Project is a 150 megawatt (MW) solar electric power plant that would use concentrating solar "power tower" technology to capture the sun's heat to make steam, which would power traditional steam turbine generators. The solar generation facility, located on privately owned land, would contain the power block, a central receiver or tower, a solar field consisting of mirrors or heliostats to reflect the sun's energy to the central tower, a thermal energy storage system, technical and non-technical buildings, a storm water system, water supply and treatment system, a wastewater system, evaporation ponds, construction parking and laydown areas, and other supporting facilities. The proposed Project would use an air cooled condenser (*i.e.,* dry cooling technology) for power plant cooling. Water for the Project (up to 180 acre-feet per year) would be obtained from two new on-site wells. Rice Solar Energy, LLC (RSE) has applied to Western to interconnect the proposed Project to Western's transmission system. A new 10-mile long 161-kV/230-kV generator tie-line would extend from the southern boundary of the solar facility boundary to a new substation to be constructed adjacent to Western's existing Parker-Blythe transmission line. The substation would be owned and operated by Western and would be approximately three acres in size.

RSE has submitted a right-of-way (ROW) application to the BLM for the Project components (the generator tie-line, substation, access road, and fiber optic line) to be constructed on a total of approximately 12 acres of land managed by the BLM. The Project site is in an undeveloped area of the Sonoran Desert in eastern Riverside County, California, near State Route 62, approximately 40 miles northwest of Blythe, California, and 15 miles west of Vidal Junction, California, on lands managed by the BLM.

RSE also submitted an application to the DOE LGP seeking a guarantee for the proposed Project. The LGP invited RSE to enter into the due diligence process on June 25, 2010, and then initiated NEPA review. The LGP is participating in the preparation of the Draft EIS/SA to

[1] Western has authority to prepare and approve EISs for integrating transmission facilities with its system pursuant to an October 4, 1999 Delegation Order from the DOE Assistant Secretary for Environment, Health and Safety.

ensure that analyses needed to satisfy its NEPA obligations for its loan guarantee decision are included.

Agency Purpose and Need: Western's purpose and need for the RSEP is to respond to RSE's requested interconnection in accordance with Western's Open Access Transmission Tariff. LGP's purpose and need for the RSEP is to determine whether RSE's project is eligible for a guarantee under EPAct 2005. DOE is using the NEPA process to assist in determining whether to issue a loan guarantee to RSE to support the proposed project. The BLM's purpose and need for the RSEP is to respond to RSE's application under Title V of FLPMA (43 U.S.C. 1761) for a ROW grant to construct the 161-kV/230-kV transmission line, substation, access road, and fiber optic line on public lands in compliance with FLPMA, BLM ROW regulations, and other applicable Federal laws. The BLM will respond to RSE's ROW application by approving, approving with modifications, or denying RSE'S application.

Proposed Agency Actions: Western's proposed action is to interconnect the proposed Project to Western's existing Parker-Blythe transmission line and to replace an overhead ground wire on its existing Parker-Blythe transmission with a fiber optic ground wire to allow communication from the new plant to the existing system. The LGP's proposed action is to issue a loan guarantee to RSE. The BLM's proposed action is to authorize a ROW in favor of a 161-kV/230-kV transmission line, access road, and fiber optic line. The BLM would also amend the CDCA Plan to include this project. The CDCA Plan (1980, as amended), states that new electric transmission facilities on lands designated as Multiple-Use Class M may be allowed only within designated corridors. If the BLM decides to grant a ROW for this Project, the CDCA Plan would be amended to designate a new utility corridor in support of the 161-kV/230-kV electrical transmission towers and cables.

Western, LGP, BLM, and the CEC have agreed to conduct a joint environmental review of the proposed Project in a single combined NEPA/CEQA process and document. For purposes of NEPA compliance, Western, on behalf of DOE, is serving as the lead Federal agency with the BLM acting as a cooperating agency. The Draft EIS/SA analyzes site-specific impacts on air quality, biological resources, recreation, cultural resources, water resources, geological resources and hazards, hazardous materials handling, land use, noise, paleontological resources, wilderness characteristics, public health, socioeconomics, soils, traffic and transportation, visual resources, waste management, worker safety and fire protection, as well as facility design engineering, efficiency, reliability, transmission system engineering, and transmission line safety and nuisance.

As required under NEPA, the draft EIS/SA analyzes a no action alternative that would not require a CDCA Plan amendment. The draft EIS/SA also analyzes two no-project alternatives that reject the proposed Project but amend the CDCA Plan to (1) designate the project area as available to future solar energy power generation projects or (2) designate the project area as unavailable to future solar energy power generation projects.

Dated: October 8, 2010.

Timothy J. Meeks,

Administrator.

[FR Doc. 2010–27154 Filed 10–26–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL09–24–000]

National Grid USA; Notice of Filing

October 20, 2010.

Take notice that on October 15, 2010, pursuant to Rule 215 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (Commission), National Grid USA filed an amended petition supplementing and clarifying its request, originally filed on May 19, 2010, for waiver of certain of the affiliate pricing rules as established by the Commission's Order Nos. 707 and 707–A.[1]

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 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 e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on November 5, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–27128 Filed 10–26–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13586–000]

Bishop Tungsten Development, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

October 20, 2010.

On November 9, 2009, Bishop Tungsten Development, LLC filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Lower Pine Creek Mine Canyon Hydroelectric Project to be located near the town of Bishop, in Inyo County, California. 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.

An existing network of penstocks collect and convey the existing Pine Creek Mine discharge water above the

[1] *Cross-Subsidization Restrictions on Affiliate Transactions,* Order No. 707, 73 FR 11013 (Feb. 29, 2008), FERC Stats. & Regs. ¶ 31,264, at P 4–5, *order on rehearing,* Order No. 707–A, 73 FR 43072 (Jul. 24, 2008), FERC Stats. & Regs. ¶ 31,272 (2008).

project area. The mine discharge averages up to 14 cfs. The proposed project would utilize a single, approximately 20-inch-in-diameter conduit within the project area that would convey the discharge water to the turbine where the pressure would be reduced. The applicant proposes to interconnect with an existing 56-kilovolt transmission line, maintained by Southern California Edison, which runs the length of the canyon. The estimated annual generation of the project would be 26,300,000 kilowatt-hours.

Applicant Contact: Douglas A. Hicks, Bishop Tungsten Development, LLC, 725 9050 Pine Creek Road, Bishop, CA 93514; phone: (706) 387–2080.

FERC Contact: Shana Murray (202) 502–8333.

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. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven 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–13586–000) in the docket number field to access the document. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–27121 Filed 10–26–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13686–000]

KC Hydro LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

October 20, 2010.

On March 23, 2010, and supplemented on May 27, 2010, KC Hydro LLC filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Cline Falls Hydro Project located on the Deschutes River in Deschutes County, Oregon. 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 will consist of the following: (1) A 5-foot-high, 300-foot-long diversion structure; (2) a pond with a storage capacity of 1 to 2 acre-feet; (3) a canal and box flume, connected to a 96-inch-diameter, 45-foot-long steel penstock; (4) a powerhouse containing a 750-kW Francis turbine/generator; (5) a tailrace leading from a rock chamber located under the turbine to the River; and (6) appurtenant facilities. Annual energy production is estimated to be 807 megawatt-hours.

Applicant Contact: Kelly W. Sackheim, Managing Member, 5096 Cocoa Palm Way, Fair Oaks, CA 95628; phone: (916) 962–2271.

FERC Contact: Kelly Wolcott (202) 502–6480.

The deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications has been extended 60 days from the issuance of this notice to December 20, 2010. Entities that have already filed comments, motions to intervene, competing applications, or notices of intent to file competing applications do not need to re-file. 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 website *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. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven 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–13686) in the docket number field to access the document. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–27123 Filed 10–26–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13804–000]

White River Hydro, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

October 20, 2010.

On July 1, 2010, and supplemented July 15, 20101, White River Hydro, LLC filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the White River Hydroelectric Project, located on the White River in Pierce County, Washington. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of the following: (1) A 352-foot-long, 11-foot-high timber constructed dam with a 7-foot-high aluminum flashboard; (2) a fish recovery pond containing a 5-foot-

wide, 50-foot-long channel and nine screen bays; (3) a 200-foot-long, 17-foot-high fish screen facility, which returns fish to the White River; (4) a 1,000-foot-long trapezoidal concrete channel; (5) two 5.5- to 10-foot-diameter, 11,200-foot-long pipelines; (6) a valve house to convey the water to an approximately 1.5-mile-long riprapped channel; (7) Lake Tapps, which has a surface area of 2,700 acres and a storage capacity of 48,258 acre-feet at elevation 543 feet above mean sea level; (8) a tunnel intake structure; (9) a 12-foot-diameter, 2,842-foot-long concrete tunnel; (10) a 73-foot-deep forebay; (11) three 5.4- to 6-foot-diameter, 3,000-foot-long penstocks; (12) an 85-foot-wide, 255-foot-long, and 55-foot-high powerhouse containing two 10-megawatt (MW) turbine/generator units, one 15-MW turbine/generator unit, and one 28-MW turbine/generator unit, for a total generating capacity of 63 MW; (13) an approximately 34-foot-wide, 2,200-foot-long tailrace discharging to White River; (14) a 4,181-foot-long, 115-kilovolt transmission line; and (15) appurtenant facilities. The proposed White River Project will have an average annual generation of 100 gigawatt-hours.

Applicant Contact: Mr. Thom A. Fischer, White River Hydro, LLC, 3633 Alderwood Ave., Bellingham, WA 98225; phone: (360) 739–9777.

FERC Contact: Jennifer Harper, (202) 502–6136.

The deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications has been extended 60 days from the issuance of this notice to December 20, 2010. 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. Entities that have already filed comments, motions to intervene, competing applications, or notices of intent to file competing applications do not need to refile. *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. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven 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–13804) in the docket number field to access the document. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–27125 Filed 10–26–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13823–000]

Natural Currents Energy Services, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

October 20, 2010.

On August 5, 2010, Natural Currents Energy Services, LLC filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Killisnoo Tidal Energy Project (Killisnoo Project), located in Kootznahoo Inlet northeast of Killisnoo Island, near the City of Angoon in the Skagway-Hoonah-Angoon Census Area of southeastern Alaska. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed Killisnoo Project would consist of: (1) A moored test platform or dock, or underwater tethering device, pending evaluation of specific site conditions; (2) ten 25-kilowatt (kW) Red Hawk in-stream turbine modules for a total generating capacity of 250 kW; (3) an approximately 650-foot-long, 480-volt underwater transmission line connecting the Red Hawk modules to an existing above-ground local distribution system; and (4) appurtenant facilities. The project would have an estimated average annual generation of 1,000 megawatt-hours.

Applicant Contact: Roger Bason, President, Natural Currents Energy Services, LLC, 24 Roxanne Boulevard, Highland, NY 12528; phone: (845) 691-4008.

FERC Contact: Jennifer Harper, (202) 502–6136.

The deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications has been extended 60 days from the issuance of this notice to December 20, 2010. 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. Entities that have already filed comments, motions to intervene, competing applications, or notices of intent to file competing applications do not need to refile. *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. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven 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–13823) in the docket number field to access the document. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–27127 Filed 10–26–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13622–000]

Bishop Tungsten Development, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

October 20, 2010.

On November 9, 2009, Bishop Tungsten Development, LLC filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Pine Creek Mine Water Discharge System Site 3 Project to be located near the town of Bishop, in Inyo County, California. 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.

An existing network of penstocks collect and convey the existing Pine Creek Mine discharge water above the project area. The mine discharge averages up to 14 cfs. The proposed project would utilize a single, approximately 20-inch-in-diameter conduit within the project area that would convey the discharge water to the turbine where the pressure would be reduced. The applicant proposes to interconnect with an existing 56-kilovolt transmission line, maintained by Southern California Edison, which runs the length of the canyon. The estimated annual generation of the project would be 6,850,000 kilowatt-hours.

Applicant Contact: Douglas A. Hicks, Bishop Tungsten Development, LLC, 725 9050 Pine Creek Road, Bishop, CA 93514; phone: (706) 387–2080.

FERC Contact: Shana Murray (202) 502–8333.

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. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven 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–13622–000) in the docket number field to access the document. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–27122 Filed 10–26–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13821–000]

ORPC Alaska 2, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

October 20, 2010.

On August 2, 2010, and supplemented on September 27, 2010, and October 7, 2010, ORPC Alaska 2, LLC filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the East Foreland Tidal Energy Project (East Foreland project) to be located in Cook Inlet in the vicinity of Nikiski, Alaska, in the Municipality of Anchorage and Matanuksa-Susitna Borough, Alaska. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project will consist of the following: (1) A series of 150-kilowatt (kW) TideGen and/or 150-kW OCGen turbine-generator modules with a combined capacity between 5 megawatts (MW) and 100 MW; (2) a 1- to 8-mile-long, 13.5-kilovolt (kV) direct current underwater transmission cable from the module site to a shore station on the west coast of the Kenai Peninsula; (3) an approximately 0.25-mile-long, 4.16– to 34.5–kV alternating current terrestrial transmission line connecting the shore station to a substation site located on the Kenai Peninsula; and (4) appurtenant facilities. The estimated annual generation of the East Foreland project would be between 13,000 and 340,000 megawatt-hours.

Applicant Contact: Monty Worthington, Director of Project Development, ORPC Alaska, LLC, 725 Christensen Drive, Suite A, Anchorage, AK 99501; phone: (907) 339–7939.

FERC Contact: Jennifer Harper (202) 502–6136.

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. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven 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–13821–000) in the docket number field to access the document. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–27126 Filed 10–26–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13723–000]

Iron Mask Hydro, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

October 20, 2010.

On May 6, 2010, and supplemented on July 15, 2010, Iron Mask Hydro, LLC filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Iron Mask Pumped Storage Project to be located near the U.S. Bureau of Reclamation's Canyon Ferry Lake in the vicinity of Townsend, Montana, in Broadwater County, Montana. 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 will consist of the following: (1) A 225-foot-high, 1,795-foot-long upper dam made of either zoned earth and rockfill or concrete-face earth and rockfill; (2) a 50-foot-high, 950-foot-long earth-filled upper saddle dike A; (3) a 20-foot-high, 400-foot-long earth-filled upper saddle dike B; (4) a 40-foot-high, 6,559-foot-long lower embankment made of zoned earth or rockfill; (5) an upper reservoir with a storage capacity of 4,888 acre-feet; (6) a lower reservoir with a storage capacity of 4,888 acre-feet; (7) a 1,626-foot-long, 12.9-foot-diameter unlined upper low-pressure tunnel; (8) a 4,809-foot-long, 12.9-foot-diameter unlined, concrete-lined, and steel-lined pressure shaft; (9) a 200-foot-long, 12.9-foot-diameter concrete-lined and steel-lined high pressure tunnel; (10) four 6.5-foot-diameter steel-lined penstocks (length to be determined); (11) a 5,073-foot-long, 15.5-foot-diameter concrete-lined or unlined tailrace; (12) a 260-foot-long, 65-foot-wide, 120-foot-high underground powerhouse located at a depth of 1,000 feet; (13) one 150-megawatt (MW), one 100–MW, and one 50–MW reversible pump-turbines totaling 300 MW of generating capacity, with up to 100 MW of additional pumping capacity, for a total of 400 MW pumping capacity; (14) an approximately 3,000-footlong, 24-foot-high main access tunnel leading from the ground level to the powerhouse; and (15) a new single-circuit 230-kilovolt, 4.9-mile-long transmission line with a 150-foot right of way. Annual energy production is estimated to be 919,800 megawatt-hours.

Applicant Contact: Matthew Shapiro, CEO, Gridflex Energy, LLC, 1210 W. Franklin Street, Ste. 2, Boise, ID 83702; phone: (208) 246–9925.

FERC Contact: Kelly Wolcott (202) 502–6480.

The deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications has been extended 60 days from the issuance of this notice to December 20, 2010. Entities that have already filed comments, motions to intervene, competing applications, or notices of intent to file competing applications do not need to re-file. 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. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven 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–13723) in the docket number field to access the document. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–27124 Filed 10–26–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL11–2–000]

Michigan Electric Transmission Company, LLC; Notice of Petition for Declaratory Order

October 20, 2010.

Take notice that on October 18, 2010, Michigan Electric Transmission Company, LLC (METC) filed a Petition for Declaratory Order requesting that the Federal Energy Regulatory Commission (Commission): (1) Find that due to the operation of the Commission's no loss policy with regard to time-value repayments, METC only owes time-value repayments to Consumers Energy Company (Consumers) under the proposed Agency Agreement,[1] (2) find the Midland Cogeneration Venture Limited Partnership (Midland) owes METC in unpaid amounts for services that METC rendered to Midland, and (3) find that the METC's late filing of the proposed Agency Agreement does not render the service provided under it null and void.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 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

[1] METC filed a proposed Agency Agreement with the Commission on October 18, 2010, in Docket No. ER11–136–000.

Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on November 17, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–27119 Filed 10–26–10; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2010–0793; FRL–8847–3; EPA ICR No. 2415.01; OMB Control No. 2070–New]

Agency Information Collection Activities; Proposed Collection; Comment Request; Pesticide Environmental Stewardship Program Annual Measures Reporting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit a request for a new Information Collection Request (ICR) to the Office of Management and Budget (OMB). This ICR is entitled: "Pesticide Environmental Stewardship Program Annual Measures Reporting" and identified by EPA ICR No. 2415.01 and OMB Control No. 2070–New. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection.

DATES: Comments must be received on or before December 27, 2010.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2010–0793, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery:* OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2010–0793. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Cameo G. Smoot, Field and External Affairs Division (7506P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; *telephone number:* (703) 305–5454; *fax number:* (703) 305–5884; *e-mail address: smoot.cameo@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. What information is EPA particularly interested in?

Pursuant to section 3506(c)(2)(A) of PRA, EPA specifically solicits comments and information to enable it to:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility.

2. Evaluate the accuracy of the Agency's estimates of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.

3. Enhance the quality, utility, and clarity of the information to be collected.

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. In particular, EPA is requesting comments from very small businesses (those that employ less than 25) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

II. What should I consider when I prepare my comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible and provide specific examples.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

5. Provide specific examples to illustrate your concerns.

6. Offer alternative ways to improve the collection activity.

7. Make sure to submit your comments by the deadline identified under **DATES**.

8. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

III. What information collection activity or ICR does this action apply to?

Affected entities: Entities potentially affected as identified by their North American Industrial Classification System (NAICS) codes for this ICR are: Agriculture, forestry, fishing, and hunting (NAICS code 11); crop production (NAICS code 111); nursery and floriculture production (NAICS code 11142); nursery and tree production (NAICS code 111421); forestry and logging (NAICS code 113); utilities (NAICS code 22); electric power generation, transmission, and distribution (NAICS code 2211); services to buildings and dwellings (NAICS code 5617); exterminating and pest control services (NAICS code 56171); janitorial services (NAICS code 56172); landscaping services (NAICS code 56173); elementary and secondary schools (NAICS code 6111); junior colleges (NAICS code 6112); colleges, universities, and professional schools (NAICS code 6113); hospitals (NAICS code 622); child day care services (NAICS code 6244); golf courses and country clubs (NAICS code 71391); and environment, conservation and wildlife organizations (NAICS code 813312).

Title: Pesticide Environmental Stewardship Program Annual Measures Reporting.

ICR numbers: EPA ICR No. 2415.01, OMB Control No. 2070–new.

ICR status: This ICR is for a new information collection activity. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the Code of Federal Regulations (CFR), after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers for certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: This new information collection request provides EPA with program information on membership application and stewardship strategy development, as well as annual reporting activities which allow the Agency to assess performance measures information, for use by the Pesticide Environmental Stewardship Program (PESP). Implemented through the Office of Pesticide Programs, PESP is an EPA voluntary program that forms partnerships with the pesticide user community in order to promote the reduction of risks from pests and pesticides through use of integrated pest management (IPM). IPM is an approach that involves making best choices from among a series of pest management practices, and allows for managing pests economically, with the least possible hazard to people, property, and the environment. By fostering IPM, PESP provides a non-regulatory approach that assists the Agency in meeting the goals of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), the Pollution Prevention Act, and Food Quality Protection Act (FQPA) by reducing pesticide use and risks in agricultural and non-agricultural settings.

Burden statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average in a range from 37 to 112 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The ICR provides a detailed explanation of this estimate, which is only briefly summarized here:

Estimated total number of potential respondents: 219.

Frequency of response: Annual.

Estimated total average number of responses for each respondent: One.

Estimated total annual burden hours: 19,298 hours.

Estimated total annual burden costs: $1,345,686. No capital investment or maintenance and operational costs are projected for this collection.

IV. What is the next step in the process for this ICR?

EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. EPA will issue another **Federal Register** notice pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

List of Subjects

Environmental protection, Reporting and recordkeeping requirements.

Dated: October 20, 2010.

Stephen A. Owens,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2010–27169 Filed 10–26–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2010–0723; FRL–8847–8; EPA ICR No. 0155.09; OMB Control No. 2070–0029]

Agency Information Collection Activities; Proposed Collection; Comment Request; Certification of Pesticide Applicators

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit a request to renew an existing approved Information Collection Request (ICR) to the Office of Management and Budget (OMB). This ICR, entitled: "Certification of Pesticide Applicators" and identified by EPA ICR No. 0155.09 and OMB Control No. 2070–0029, is scheduled to expire on July 31, 2011. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection.

DATES: Comments must be received on or before December 27, 2010.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2010–0723, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P),

Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery:* OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2010–0723. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Niva Kramek, Field and External Affairs Division (7506P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 605–1193; fax number: (703) 305–5884; e-mail address: *kramek.niva@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. What information is EPA particularly interested in?

Pursuant to section 3506(c)(2)(A) of PRA, EPA specifically solicits comments and information to enable it to:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility.

2. Evaluate the accuracy of the Agency's estimates of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.

3. Enhance the quality, utility, and clarity of the information to be collected.

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. In particular, EPA is requesting comments from very small businesses (those that employ less than 25) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

II. What should I consider when I prepare my comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible and provide specific examples.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

5. Provide specific examples to illustrate your concerns.

6. Offer alternative ways to improve the collection activity.

7. Make sure to submit your comments by the deadline identified under **DATES**.

8. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

III. What information collection activity or ICR does this action apply to?

Affected entities: As identified by their North American Industrial Classification System (NAICS) code, entities potentially affected by this ICR are: Applicators on farms (crop production, NAICS code 111; animal production, NAICS code 112); commercial services applicators (exterminating and pest control services, NAICS code 561710); administration of certification programs by States/Tribal lead agencies (environmental protection program administration, NAICS code 924110; pest control programs, agricultural, governmental, NAICS code 926140); pesticide dealers (only for EPA-administered programs) (retail nursery, lawn, and garden supply stores, NAICS code 444220; agricultural chemicals merchant wholesalers, NAICS code 424910); pesticide and other agricultural chemical manufacturing (individuals or entities engaged in activities related to the registration of a pesticide product, NAICS code 32532).

Title: Certification of Pesticide Applicators.

ICR numbers: EPA ICR No. 0155.09, OMB Control No. 2070–0029.

ICR status: This ICR is currently scheduled to expire on July 31, 2011. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the Code of Federal Regulations (CFR), after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers for certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: In accordance with section 11 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA

administers and oversees training and certification programs for pesticide applicators. FIFRA allows EPA to classify a pesticide as "restricted use" if the pesticide meets certain toxicity or risk criteria. This ICR addresses the paperwork activities performed by various EPA-authorized agencies of States and Indian Tribal governments as well as Federal agencies (collectively referred to in this document as "authorized agencies") and activities performed by firms in the course of training and certifying persons who apply restricted use pesticides. Because of their potential to harm human health or the environment, restricted use pesticides may be purchased and applied only by a certified applicator or by a person under the direct supervision of a certified applicator. A person must meet certain standards of competency to become a certified applicator; these standards are met through completion of a certification program or test. Authorized agencies administer certified applicator programs within their jurisdictions, but each agency's certification plan must be approved by EPA before it can be implemented. In areas where no authorized agency has jurisdiction, EPA administers the certification program directly, called a Federal program.

This ICR also addresses how registrants of certain pesticide products are expected to perform specific, special paperwork activities, such as training and recordkeeping, in order to comply with the terms and conditions of the pesticide registration (*e.g.*, registrants of anthrax-related pesticide products that assert claims to inactivate *bacillus anthracis* (anthrax) spores). Paperwork activities associated with the use of such products are conveyed specifically as a condition of the registration.

No information of a sensitive or private nature is requested in conjunction with this collection activity. Further, this information collection activity complies with the provisions of the Privacy Act of 1974 and OMB Circular A–108.

Burden statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average from 0.17 hours (ten minutes) to 77.35 hours per response, with a burden on most respondents of 3.1 hours. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The ICR provides a detailed explanation of this estimate, which is only briefly summarized here:

Estimated total number of potential respondents: 427,131.

Frequency of response: Annual.

Estimated total average number of responses for each respondent: One.

Estimated total annual burden hours: 1,320,669 hours.

Estimated total annual costs: $42,134,484. No capital investment or maintenance and operational costs are expected for this information collection.

IV. Are there changes in the estimates from the last approval?

There is an increase of 10,918 hours in the total estimated respondent burden compared with that identified in the ICR currently approved by OMB. This increase reflects a program change: The expansion of the Federal certified applicator program from Navajo country to all of Indian country, nationally. Burden hours per respondent have not changed.

V. What is the next step in the process for this ICR?

EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. EPA will issue another **Federal Register** notice pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

List of Subjects

Environmental protection, Reporting and recordkeeping requirements.

Dated: October 20, 2010.

Stephen A. Owens,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2010–27168 Filed 10–26–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2010–0801; FRL–8848–6; EPA ICR No. 1710.06; OMB Control No. 2070–0151]

Agency Information Collection Activities; Proposed Collection; Comment Request; Residential Lead-Based Paint Hazard Disclosure Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit a request to renew an existing approved Information Collection Request (ICR) to the Office of Management and Budget (OMB). This ICR, entitled: "Residential Lead-Based Paint Hazard Disclosure Requirements" and identified by EPA ICR No. 1710.06 and OMB Control No. 2070–0151, is scheduled to expire on March 31, 2011. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection.

DATES: Comments must be received on or before December 27, 2010.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2010–0801, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Hand Delivery:* OPPT Document Control Office (DCO), EPA East, Rm. 6428, 1201 Constitution Ave., NW., Washington, DC. Attention: Docket ID Number EPA–HQ–OPPT–2010–0801. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564–8930. Such deliveries are only accepted during the DCO's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to docket ID number EPA–HQ–OPPT–201–0801. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov,* including any

personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available electronically at *http://www.regulations.gov,* or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

FOR FURTHER INFORMATION CONTACT: *For technical information contact:* Michelle Price, National Program Chemicals Division (7404T), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; *telephone number:* (202) 566–0744; *fax number:* (202) 566–0741; *e-mail address: price.michelle@epa.gov.*

For general information contact: The TSCA–Hotline, ABVI–Goodwill, 422 South Clinton Ave., Rochester, NY 14620; *telephone number:* (202) 554–1404; *e-mail address: TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. What information is EPA particularly interested in?

Pursuant to section 3506(c)(2)(A) of PRA, EPA specifically solicits comments and information to enable it to:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility.

2. Evaluate the accuracy of the Agency's estimates of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.

3. Enhance the quality, utility, and clarity of the information to be collected.

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. In particular, EPA is requesting comments from very small businesses (those that employ less than 25) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

II. What should I consider when I prepare my comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible and provide specific examples.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

5. Provide specific examples to illustrate your concerns.

6. Offer alternative ways to improve the collection activity.

7. Make sure to submit your comments by the deadline identified under **DATES**.

8. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

III. What information collection activity or ICR does this action apply to?

Affected entities: Entities potentially affected by this ICR are persons engaged in selling, purchasing, or leasing certain residential dwellings built before 1978, or who are real estate agents representing such parties.

Title: Residential Lead-Based Paint Hazard Disclosure Requirements.

ICR numbers: EPA ICR No. 1710.06, OMB Control No. 2070–0151.

ICR status: This ICR is currently scheduled to expire on March 31, 2011. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the Code of Federal Regulations (CFR), after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers for certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: Section 1018 of the Residential Lead Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4852d) requires that sellers and lessors of most residential housing built before 1978 disclose known information on the presence of lead based paint and lead based paint hazards, and provide an EPA approved pamphlet to purchasers and renters before selling or leasing the housing. Sellers of pre-1978 housing are also required to provide prospective purchasers with ten days to conduct an inspection or risk assessment for lead based paint hazards before obligating purchasers under contracts to purchase the property. The rule does not apply to rental housing that has been found to be free of lead-based paint, zero-bedroom dwellings, housing for the elderly, housing for the handicapped, or short term leases. The affected parties and the information collection-related requirements related to each are described below:

1. Sellers of pre-1978 housing must attach certain notification and

disclosure language to their sales/leasing contracts. The attachment lists the information disclosed and acknowledges compliance by the seller, purchaser, and any agents involved in the transaction.

2. Lessors of pre-1978 housing must attach notification and disclosure language to their leasing contracts. The attachment, which lists the information disclosed and acknowledges compliance with all elements of the rule, must be signed by the lessor, lessee and any agents acting on their behalf. Agents and lessors must retain the information for three years from the completion of the transaction.

3. Agents acting on behalf of sellers or lessors are specifically required by section 1018 to comply with the disclosure regulations described in this paragraph.

Responses to the collection of information are mandatory (*see* 40 CFR part 745, subpart F, and 24 CFR part 35, subpart H). Respondents may claim all or part of a notice confidential. EPA will disclose information that is covered by a claim of confidentiality only to the extent permitted by, and in accordance with, the procedures in TSCA section 14 and 40 CFR part 2.

Burden statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average about 0.18 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The ICR provides a detailed explanation of this estimate, which is only briefly summarized here:

Estimated total number of potential respondents: 39,124,000.

Frequency of response: On occasion.

Estimated total average number of responses for each respondent: 1.0.

Estimated total annual burden hours: 6,937,330 hours.

Estimated total annual costs: $126,120,374. This includes an estimated burden cost of $126,120,374 and an estimated cost of $0 for capital investment or maintenance and operational costs.

IV. Are there changes in the estimates from the last approval?

There is a decrease of 807,286 hours in the total estimated respondent burden compared with that identified in the ICR currently approved by OMB. This decrease reflects changes in the housing market, namely a gradual reduction in the annual number of real estate sales and residential property rentals involving target housing subject to the rule's requirements. This change is an adjustment.

V. What is the next step in the process for this ICR?

EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. EPA will issue another **Federal Register** notice pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

List of Subjects

Environmental protection, Reporting and recordkeeping requirements.

Dated: October 20, 2010.

Stephen A. Owens,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2010–27170 Filed 10–26–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9218–1]

Clean Air Act Advisory Committee; Notice of Charter Renewal

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Charter Renewal.

The charter for the Environmental Protection Agency's Clean Air Act Advisory Committee (CAAAC) will be renewed for an additional two-year period, as a necessary committee which is in the public interest, in accordance with the provisions of the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2. The purpose of CAAAC is to provide advice and recommendations to the EPA Administrator on issues associated with policy and other issues associated with implementation of the Clean Air Act.

It is determined that CAAAC is in the public interest in connection with the performance of duties imposed on the Agency by law.

Inquiries may be directed to Pat Childers, CAAAC Designated Federal Officer, U.S. EPA, Mail Code 6102A, 1200 Pennsylvania Ave., NW., Washington, DC 20460, or by e-mail *childers.pat@epa.gov.*

Dated: July 9, 2010.

Gina McCarthy,

Principal Deputy Assistant Administrator, Office of Air and Radiation.

[FR Doc. 2010–27165 Filed 10–26–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2010–0772; FRL–8848–2]

FIFRA Scientific Advisory Panel; Notice of Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: There will be a 2-day meeting of the Federal Insecticide, Fungicide, and Rodenticide Act Scientific Advisory Panel (FIFRA SAP) to consider and review scientific issues associated with Insect Resistance Management for SmartStax™ Refuge-in-the-Bag, a Plant-Incorporated Protectant (PIP) Corn Seed Blend.

DATES: The meeting will be held on December 8–9, 2010, from 9 a.m. to approximately 5:30 p.m.

Comments. The Agency encourages that written comments be submitted by November 29, 2010, and requests for oral comments be submitted by December 3, 2010. However, written comments and requests to make oral comments may be submitted until the date of the meeting, but anyone submitting written comments after November 29, 2010, should contact the Designated Federal Official (DFO) listed under **FOR FURTHER INFORMATION CONTACT**. For additional instructions, see Unit I.C. of the **SUPPLEMENTARY INFORMATION**.

Nominations. Nominations of candidates to serve as ad hoc members of FIFRA SAP for this meeting should be provided on or before November 12, 2010.

Webcast. This meeting may be webcast. Please refer to the FIFRA SAP's Web site, *http://www.epa.gov/scipoly/*

SAP for information on how to access the webcast. Please note that the webcast is a supplementary public process provided only for convenience. If difficulties arise resulting in webcasting outages, the meeting will continue as planned.

Special accommodations. For information on access or services for individuals with disabilities, and to request accommodation of a disability, please contact the DFO listed under **FOR FURTHER INFORMATION CONTACT** at least 10 days prior to the meeting to give EPA as much time as possible to process your request.

ADDRESSES: The meeting will be held at the Environmental Protection Agency, Conference Center, Lobby Level, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA 22202.

Comments. Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2010–0772, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery:* OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions. Direct your comments to docket ID number EPA–HQ–OPP–2010–0772. If your comments contain any information that you consider to be CBI or otherwise protected, please contact the DFO listed under **FOR FURTHER INFORMATION CONTACT** to obtain special instructions before submitting your comments. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

Nominations, requests to present oral comments, and requests for special accommodations. Submit nominations to serve as ad hoc members of FIFRA SAP, requests for special seating accommodations, or requests to present oral comments to the DFO listed under **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT: Sharlene Matten, DFO, Office of Science Coordination and Policy (7201M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 564–0130; fax number: (202) 564–8382; e-mail address: *matten.sharlene@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general. This action may, however, be of interest to persons who are or may be required to conduct testing of chemical substances under the Federal Food, Drug, and Cosmetic Act (FFDCA), FIFRA, and the Food Quality Protection Act of 1996 (FQPA). Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the DFO listed under **FOR FURTHER INFORMATION CONTACT**.

B. What should I consider as I prepare my comments for EPA?

When submitting comments, remember to:

1. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).
2. 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.
3. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
4. Describe any assumptions and provide any technical information and/or data that you used.
5. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
6. Provide specific examples to illustrate your concerns and suggest alternatives.
7. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
8. Make sure to submit your comments by the comment period deadline identified.

C. How may I participate in this meeting?

You may participate in this meeting by following the instructions in this unit. To ensure proper receipt by EPA, it is imperative that you identify docket ID number EPA–HQ–OPP–2010–0772 in the subject line on the first page of your request.

1. *Written comments.* The Agency encourages that written comments be submitted, using the instructions in **ADDRESSES,** no later than November 29, 2010, to provide FIFRA SAP the time necessary to consider and review the written comments. Written comments

are accepted until the date of the meeting, but anyone submitting written comments after November 29, 2010, should contact the DFO listed under **FOR FURTHER INFORMATION CONTACT**. Anyone submitting written comments at the meeting should bring 30 copies for distribution to FIFRA SAP.

2. *Oral comments.* The Agency encourages that each individual or group wishing to make brief oral comments to FIFRA SAP submit their request to the DFO listed under **FOR FURTHER INFORMATION CONTACT** no later than December 3, 2010, in order to be included on the meeting agenda. Requests to present oral comments will be accepted until the date of the meeting and, to the extent that time permits, the Chair of FIFRA SAP may permit the presentation of oral comments at the meeting by interested persons who have not previously requested time. The request should identify the name of the individual making the presentation, the organization (if any) the individual will represent, and any requirements for audiovisual equipment (*e.g.,* overhead projector, 35 mm projector, chalkboard). Oral comments before FIFRA SAP are limited to approximately 5 minutes unless prior arrangements have been made. In addition, each speaker should bring 30 copies of his or her comments and presentation slides for distribution to the FIFRA SAP at the meeting.

3. *Seating at the meeting.* Seating at the meeting will be open and on a first-come basis.

4. *Request for nominations to serve as ad hoc members of FIFRA SAP for this meeting.* As part of a broader process for developing a pool of candidates for each meeting, FIFRA SAP staff routinely solicits the stakeholder community for nominations of prospective candidates for service as ad hoc members of FIFRA SAP. Any interested person or organization may nominate qualified individuals to be considered as prospective candidates for a specific meeting. Individuals nominated for this meeting should have expertise in one or more of the following areas: Corn pest entomology (biology and ecology), population genetics, insect resistance to pesticides, simulation modeling.

Nominees should be scientists who have sufficient professional qualifications, including training and experience, to be capable of providing expert comments on the scientific issues for this meeting. Nominees should be identified by name, occupation, position, address, and telephone number. Nominations should be provided to the DFO listed under **FOR FURTHER INFORMATION CONTACT** on or before November 12, 2010. The Agency will consider all nominations of prospective candidates for this meeting that are received on or before this date. However, final selection of ad hoc members for this meeting is a discretionary function of the Agency.

The selection of scientists to serve on FIFRA SAP is based on the function of the panel and the expertise needed to address the Agency's charge to the panel. No interested scientists shall be ineligible to serve by reason of their membership on any other advisory committee to a Federal department or agency or their employment by a Federal department or agency except EPA. Other factors considered during the selection process include availability of the potential panel member to fully participate in the panel's reviews, absence of any conflicts of interest or appearance of lack of impartiality, independence with respect to the matters under review, and lack of bias. Although financial conflicts of interest, the appearance of lack of impartiality, lack of independence, and bias may result in disqualification, the absence of such concerns does not assure that a candidate will be selected to serve on FIFRA SAP. Numerous qualified candidates are identified for each panel. Therefore, selection decisions involve carefully weighing a number of factors including the candidates' areas of expertise and professional qualifications and achieving an overall balance of different scientific perspectives on the panel. In order to have the collective breadth of experience needed to address the Agency's charge for this meeting, the Agency anticipates selecting approximately 10–12 ad hoc scientists.

FIFRA SAP members are subject to the provisions of 5 CFR part 2634, Executive Branch Financial Disclosure, as supplemented by EPA in 5 CFR part 6401. In anticipation of this requirement, prospective candidates for service on the FIFRA SAP will be asked to submit confidential financial information which shall fully disclose, among other financial interests, the candidate's employment, stocks and bonds, and where applicable, sources of research support. EPA will evaluate the candidates financial disclosure form to assess whether there are financial conflicts of interest, appearance of a lack of impartiality or any prior involvement with the development of the documents under consideration (including previous scientific peer review) before the candidate is considered further for service on FIFRA SAP. Those who are selected from the pool of prospective candidates will be asked to attend the public meetings and to participate in the discussion of key issues and assumptions at these meetings. In addition, they will be asked to review and to help finalize the meeting minutes. The list of FIFRA SAP members participating at this meeting will be posted on the FIFRA SAP Web site at *http://epa.gov/scipoly/sap* or may be obtained from the OPP Regulatory Public Docket at *http://www.regulations.gov.*

II. Background

A. Purpose of FIFRA SAP

FIFRA SAP serves as the primary scientific peer review mechanism of EPA's Office of Chemical Safety and Pollution Prevention (OCSPP) and is structured to provide scientific advice, information and recommendations to the EPA Administrator on pesticides and pesticide-related issues as to the impact of regulatory actions on health and the environment. FIFRA SAP is a Federal advisory committee established in 1975 under FIFRA that operates in accordance with requirements of the Federal Advisory Committee Act. FIFRA SAP is composed of a permanent panel consisting of seven members who are appointed by the EPA Administrator from nominees provided by the National Institutes of Health and the National Science Foundation. FIFRA, as amended by FQPA, established a Science Review Board consisting of at least 60 scientists who are available to the SAP on an ad hoc basis to assist in reviews conducted by the SAP. As a peer review mechanism, FIFRA SAP provides comments, evaluations and recommendations to improve the effectiveness and quality of analyses made by Agency scientists. Members of FIFRA SAP are scientists who have sufficient professional qualifications, including training and experience, to provide expert advice and recommendation to the Agency.

B. Public Meeting

The Agency is currently evaluating the SmartStax$_{TM}$ Refuge-in-the-Bag (RIB) product, a multi-trait plant-incorporated protectant (PIP) corn seed blend consisting of a mixture of 95% *Bacillus thuringiensis (Bt)* corn seed and 5% refuge corn seed for insect resistance management (IRM) of European corn borer (ECB), other lepidopteran corn pests, and corn rootworm. SmartStax$_{TM}$ RIB was developed jointly by the Monsanto Company and Dow AgroSciences, LLC. The focus of this FIFRA SAP will be on the SmartStax$_{TM}$ RIB IRM concept for ECB and other lepidopteran corn pests rather than on the rootworm. IRM considerations

associated with a *Bt* PIP corn seed blend targeting rootworm (a Pioneer Hi-Bred International, Inc. product) were previously addressed in the February 2009 FIFRA SAP meeting (*http://www.epa.gov/scipoly/sap/meetings/2009/february/232009finalreport.pdf*).

During a February 1998 FIFRA SAP meeting *(see http://www.epa.gov/scipoly/sap/meetings/1998/february/finalfeb.pdf*), the Panel concluded that seed mixes should not be considered as a viable IRM refuge option for ECB and corn earworm in *Bt* corn. The concern was that ECB larvae can move from plant to plant within corn fields (including from refuge plants to *Bt* plants and vice-versa) which could reduce the effectiveness of the seed blend at preventing pest resistance. Subsequent to the 1998 SAP, new biological data and simulation modeling were developed to support the potential use of a seed blend IRM strategy in *Bt* corn. EPA's Office of Pesticide Programs has considered these data and has utilized the Office of Research and Development (ORD) POPGEN model to evaluate the risk of ECB resistance developing in a seed blend environment. The Agency is requesting the FIFRA SAP to address scientific issues associated with the SmartStax$_{TM}$ RIB IRM strategy relative to the effectiveness of block refuges currently required for lepidopteran pests of *Bt* corn.

C. FIFRA SAP Documents and Meeting Minutes

EPA's background paper, related supporting materials, charge/questions to FIFRA SAP, FIFRA SAP composition (*i.e.,* members and ad hoc members for this meeting), and the meeting agenda will be available by late November 2010. In addition, the Agency may provide additional background documents as the materials become available. You may obtain electronic copies of these documents, and certain other related documents that might be available electronically, at *http://www.regulations.gov* and the FIFRA SAP homepage at *http://www.epa.gov/scipoly/sap.*

FIFRA SAP will prepare meeting minutes summarizing its recommendations to the Agency approximately 90 days after the meeting. The meeting minutes will be posted on the FIFRA SAP Web site or may be obtained from the OPP Regulatory Public Docket at *http://www.regulations.gov.*

List of Subjects

Environmental protection, Pesticides and pests.

Dated: October 7, 2010.

Frank Sanders,

Director, Office of Science Coordination and Policy.

[FR Doc. 2010–26722 Filed 10–26–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL –9218–2]

Notice of Public Meeting of the Interagency Steering Committee on Radiation Standards

AGENCY: Environmental Protection Agency.

ACTION: Notice of public meeting.

SUMMARY: The Environmental Protection Agency (EPA) will host a meeting of the Interagency Steering Committee on Radiation Standards (ISCORS) on November 9, 2010, in Washington, DC. The purpose of ISCORS is to foster early resolution and coordination of regulatory issues associated with radiation standards. Agencies represented as members of ISCORS include the following: EPA; Nuclear Regulatory Commission; Department of Energy; Department of Defense; Department of Transportation; Department of Homeland Security; Department of Labor's Occupational Safety and Health Administration; and the Department of Health and Human Services. ISCORS meeting observer agencies include the Office of Science and Technology Policy, Office of Management and Budget, Defense Nuclear Facilities Safety Board, as well as representatives from both the States of Illinois and Pennsylvania. ISCORS maintains several objectives: (1) Facilitate a consensus on allowable levels of radiation risk to the public and workers; (2) promote consistent and scientifically sound risk assessment and risk management approaches in setting and implementing standards for occupational and public protection from ionizing radiation; (3) promote completeness and coherence of Federal standards for radiation protection; and (4) identify interagency radiation protection issues and coordinate their resolution. ISCORS meetings include presentations by the chairs of the subcommittees and discussions of current radiation protection issues. Committee meetings normally involve pre-decisional intra-governmental discussions and, as such, are normally not open for observation by members of the public or media. This is the one ISCORS meeting out of four held each year that is open to all interested members of the public. There will be time on the agenda for members of the public to provide comments. Summaries of previous ISCORS meetings are available at the ISCORS Web site, *http://www.iscors.org.* The final agenda for the November 9th meeting will be posted on the Web site shortly before the meeting.

DATES: The meeting will be held on November 9, 2010, from 1 p.m. to 4 p.m.

ADDRESSES: The ISCORS meeting will be held in Room 152 at the EPA building located at 1310 L Street, NW., in Washington, DC. Attendees are required to present a photo ID such as a government agency photo identification badge or valid driver's license. Visitors and their belongings will be screened by EPA security guards. Visitors must sign the visitors log at the security desk and will be issued a visitors badge by the security guards to gain access to the meeting.

FOR FURTHER INFORMATION CONTACT: Marisa Savoy, Radiation Protection Division, Office of Radiation and Indoor Air, Mailcode 6608J, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone 202–343–9237; fax 202–343–2302; e-mail address *savoy.marisa@epa.gov.*

SUPPLEMENTARY INFORMATION: Pay parking is available for visitors at the Colonial parking lot next door in the garage of the Franklin Square building. Visitors can also ride metro to the McPherson Square (Blue and Orange Line) station and leave the station via the 14th Street exit. Walk two blocks north on 14th Street to L Street. Turn right at the corner of 14th and L Streets. EPA's 1310 L Street building is on the right towards the end of the block. Visit the ISCORS Web site, http://www.iscors.org for more detailed information.

Dated: October 14, 2010.

Michael P. Flynn,

Director, Office of Radiation and Indoor Air.

[FR Doc. 2010–27175 Filed 10–26–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2010–0012; FRL–8848–3]

Notice of Receipt of Several Pesticide Petitions Filed for Residues of Pesticide Chemicals in or on Various Commodities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the Agency's receipt of several initial filings of pesticide petitions proposing the establishment or modification of regulations for residues of pesticide chemicals in or on various commodities.

DATES: Comments must be received on or before November 26, 2010.

ADDRESSES: Submit your comments, identified by docket identification (ID) number and the pesticide petition number (PP) of interest as shown in the body of this document, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery:* OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to the docket ID number and the pesticide petition number of interest as shown in the body of this document. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: A contact person, with telephone number and e-mail address, is listed at the end of each pesticide petition summary. You may also reach each contact person by mail at Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

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

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed at the end of the pesticide petition summary of interest.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on

any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

II. What action is the agency taking?

EPA is announcing its receipt of several pesticide petitions filed under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, proposing the establishment or modification of regulations in 40 CFR part 174 or part 180 for residues of pesticide chemicals in or on various food commodities. EPA has determined that the pesticide petitions described in this notice contain the data or information prescribed in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the pesticide petitions. Additional data may be needed before EPA can make a final determination on these pesticide petitions.

Pursuant to 40 CFR 180.7(f), a summary of each of the petitions that are the subject of this notice, prepared by the petitioner, is included in a docket EPA has created for each rulemaking. The docket for each of the petitions is available online at *http://www.regulations.gov.*

As specified in FFDCA section 408(d)(3), (21 U.S.C. 346a(d)(3)), EPA is publishing notice of the petition so that the public has an opportunity to comment on this request for the establishment or modification of regulations for residues of pesticides in or on food commodities. Further information on the petition may be obtained through the petition summary referenced in this unit.

New Tolerances

1. *PP* 0E7748. (EPA–HQ–OPP–2010–0637). IR–4 Project Headquarters, Rutgers, the State University of New Jersey, 500 College Road East, Suite 201 W, Princeton, NJ 08540, proposes to establish tolerances in 40 CFR part 180 for residues of the dessicant, defoliant, and herbicide paraquat dichloride, (1,1′-dimethyl-4,4′-bipyridinium-ion) derived from application of either the bis(methyl sulfate) or the dichloride salt (both calculated as the cation), in or on the following perennial tropical and subtropical fruit trees: Sugar apple, cherimoya, atemoya, custard apple, ilama, soursop, biriba, lychee, longan, Spanish lime, rambutan, pulasan, star apple, black sapote, mango, sapodilla, canistel, mamey sapote, feijoa, jaboticaba, wax jambu, starfruit (carambola), pawpaw, pomegranate, and white sapote at 0.05 parts per million (ppm). An adequate analytical method (spectrometric method) has been accepted and published in the Pesticide Analytical Manual (PAM Vol. II) for the enforcement of tolerances in plant commodities. Contact: Andrew Ertman, (703) 308–9367, e-mail address: *ertman.andrew@epa.gov.*

2. *PP* 0F7751. (EPA–HQ–OPP–2010–0760). BASF Corporation, P.O. 13528, Research Triangle Park, NC 27709, proposes to establish a tolerance in 40 CFR part 180 for residues of the fungicide dimethomorph, [(E,Z)4-[3-(4-chlorophenyl)-3-(3,4-dimethoxyphenyl)-1-oxo-2-propenyl]-morpholine], in or on grape at 3.5 ppm. A reliable method for the determination of dimethomorph residues in grapes exists; this method is the Food and Drug Administration (FDA) Multi-Residue Method, Protocol D, as published in the PAM Vol. I. Contact: Shaunta Hill, (703) 347–8961, e-mail address: *hill.shaunta@epa.gov.*

3. *PP* 0F7765. (EPA–HQ–OPP–2010–0780). BASF Corporation, 26 Davis Drive, Research Triangle Park, NC 27709, proposes to establish a tolerance in 40 CFR part 180 for residues of the fungicide prohexadione calcium, (calcium 3-oxido-5-oxo-4-propionylcyclohex-3-enecarboxylate), in or on cherry, sweet at 0.5 ppm. The method of analysis included extraction and liquid chromatography (LC)/MS/MS quantitation. The limit of quantitation (LOQ) is 0.01 ppm. Contact: Rose Mary Kearns, (703) 305–5611, e-mail address: *kearns.rosemary@epa.gov.*

4. *PP* 9F7661. (EPA–HQ–OPP–2010–0349). Mitsui Chemicals Agro, Inc., c/o Landis International, Inc., P.O. Box 5126, Valdosta, GA 31603–5126, proposes to establish a tolerance in 40 CFR part 180 for residues of the fungicide penthiopyrad, (RS)-*N*-[2-(1,3-dimethylbutyl)-3-thienyl]-1-methyl-3-(trifluoromethyl)-pyrazole-4-carboxamide, in or on fruit, pome, group 11 at 0.4 ppm; apple, wet pomace at 1.0 ppm; fruit, stone, group 12 at 4.0 ppm; low growing berry, subgroup 13-07G at 3.0 ppm; vegetable, bulb, group 3 at 4.0 ppm; vegetable, *Brassica* head and stem, subgroup 5A at 8.0 ppm; vegetable, *Brassica* leafy, subgroup 5B at 45 ppm; vegetable, fruiting, group 8 at 2.5 ppm; tomato, paste at 5.0 ppm; vegetable, cucurbit, group 9 at 1.0 ppm; vegetable, leafy, except *Brassica,* group 4 at 20 ppm; vegetable, root, subgroup 1A at 2.5 ppm; vegetable, tuberous and corm, subgroup 1C at 0.06 ppm; vegetables, leaves of root and tuber, group 2 at 55 ppm; vegetable, edible-podded legume, subgroup 6A at 2.5 ppm; vegetable, succulent, shelled peas and beans, subgroup 6B at 0.4 ppm; vegetable, pea and bean, dried shelled, except soybean, subgroup 6C at 0.3 ppm; soybean, seed at 0.3 ppm; soybean, hulls at 1.0 ppm; peanut, nutmeat at 0.04 ppm; grain, cereal (except corn, millet, sorghum) at 0.2 ppm; corn, field, sweet, pop at 0.01 ppm; corn, refined oil at 0.03 ppm; cereal grain, millet at 0.9 ppm; cereal grain, sorghum at 0.9 ppm; nut, tree, group 14 (including pistachios) at 0.05 ppm; almond, hulls at 6.0 ppm; canola at 1.0 ppm; sunflower at 0.8 ppm; cotton, seed at 0.35 ppm; cotton, gin byproducts at 10 ppm; alfalfa, forage at 10 ppm; alfalfa, hay at 25 ppm; foliage of legume vegetables, group 7, hay at 80 ppm; foliage of legume vegetables, group 7, vines/forage at 30 ppm; peanut, hay at 50 ppm; grain, cereal, group 16, hay at 90; grain, cereal, group 16, forage at 25 ppm; grain, cereal, group 16, straw at 2 ppm; grain, cereal, stover at 11 ppm and establishing tolerances for residues of penthiopyrad, (RS)-*N*-[2-(1,3-dimethylbutyl)-3-thienyl]-1-methyl-3-(trifluoromethyl)-pyrazole-4-carboxamide and its major metabolite PAM (1-methyl-3-trifluoromethyl-1*H*-pyrazole-4-carboxamide) in animal commodities: Hog, meat at 0.01 ppm; hog, fat at 0.01 ppm; hog, liver at 0.01 ppm; hog, kidney at 0.01 ppm; hog, meat byproducts at 0.01 ppm; cattle, meat at 0.05; cattle, fat at 0.05 ppm; cattle, liver at 0.2 ppm; cattle, kidney at 0.1 ppm; cattle, meat byproducts at 0.2 ppm; sheep, meat at 0.01 ppm; sheep, fat at 0.02 ppm; sheep, liver at 0.05 ppm; sheep, kidney at 0.02 ppm; sheep, meat byproducts at 0.05 ppm; milk at 0.05 ppm; milk, fat at 0.01 ppm; poultry, meat at 0.01 ppm; poultry, fat at 0.01 ppm; poultry, liver at 0.01 ppm; poultry, meat byproducts at 0.01 ppm; poultry, eggs at 0.01 ppm. Adequate enforcement methods are available to enforce the proposed tolerances. Samples of plant matrices from field residue trials were analyzed for penthiopyrad and its metabolites using a validated residue method, which involves the extraction of analytes from crops, hydrolysis of conjugates, partition of analytes, followed by LC/MS/MS detection. The limit of quantification (LOQ) is 0.01 milligrams/kilograms (mg/kg) for most matrices except for very dry matrices, *e.g.,* pea hay, for which the LOQ is 0.05 mg/kg. An LC/MS/MS residue method has been used in the animal feeding studies and is proposed for enforcement purposes. The method involves the extraction of

analytes from animal matrices and LC/MS/MS detection. This method has been validated for the determination of penthiopyrad and its metabolites in chicken tissues, eggs, ruminant tissues and milk. The limit of quantification is 0.01 mg/kg for all animal matrix groups. Contact: Tawanda Maignan, (703) 308–8050, e-mail address: *maignan.tawanda@epa.gov.*

5. *PP* 9G7677. (EPA–HQ–OPP–2010–0346). State of Florida, Department of Citrus, 605 East Main Street, P.O. Box 9010, Bartow, FL 33831–9010, proposes to establish temporary tolerances in 40 CFR part 180 for residues of the fungicide 5-chloro-3-methyl-4-nitro-1*H*-pyrazole (CMNP) and its metabolite (5-chloro-4-nitro-1*H*-pyrazol-3-yl)-methanol (CHNP), in or on orange at 0.80 ppm; and its processed commodities: Orange, juice at 0.025 ppm; orange, oil at 0.070 ppm; orange, dried pulp (also referred to as dried pomace) at 1.80 ppm. In all plant matrices, the residue of concern, parent CMNP and CHNP/CHNP glucoside, can be determined using HPLC/MS/MS following sample extraction, hydrolysis (to convert CHNP-glucoside to its aglycone, CHNP) and solid-phase cleanup. Contact: Tawanda Maignan, (703) 308–8050, e-mail address: *maignan.tawanda@epa.gov.*

Amended Tolerance

PP 0F7776. (EPA–HQ–OPP–2009–0012 Dow AgroSciences LLC, 9330 Zionsville Road, Indianapolis, IN 46268, proposes to reestablish the time-limited tolerances in 40 CFR 180.544 for indirect or inadvertent combined residues of the insecticide methoxyfenozide, (benzoic acid, 3-methoxy-2-methyl-, 2-(3,5-dimethylbenzoyl)-2-(1,1-dimethylethyl) hydrazide) and its metabolites RH-117,236 free phenol of methoxyfenozide; 3,5-dimethylbenzoic acid *N*-tert-butyl-*N*′-(3-hydroxy-2-methylbenzoyl) hydrazide, RH-151,055 glucose conjugate of RH-117,236; 3,5-dimethylbenzoic acid *N*-tert-butyl-*N*-[3 (β-D-glucopyranosyloxy)-2-methylbenzoyl]-hydrazide) and RH-152,072 the malonylglycosyl conjugate of RH-117,236, in or on the raw agricultural commodities: Vegetable, root and tuber, group 1 at 0.1 ppm; vegetable, leaves of root and tuber, group 2 at 0.2 ppm; vegetable, bulb, group 3 at 0.2 ppm; vegetable, legume, group 6 at 0.1 ppm; vegetable, foliage of legume, group 7 at 10 ppm; grain, cereal, forage, fodder, and straw, group 16 at 10 ppm; grass, forage, fodder and hay, group 17 at 10 ppm; animal feed, non-grass, group 18 at 10 ppm; and herb and spice, group 19 at 10 ppm. Rohm and Haas Company, requested these tolerances under the Federal Food, Drug and Cosmetic Act, as amended by the Food Quality Protection Act of 1996. A Notice of Filing was submitted and published in the **Federal Register** of March 19, 2001 (66 FR 15443) (FRL 6766–7). Based on the data submitted by Rohm and Haas Company, the Agency determined that only time-limited tolerances for these residues could be established. The Final Rule was published in the **Federal Register** of September 20, 2002 (67 FR 59193) (FRL–7198–5) with time-limited tolerances expiring on September 30, 2007. To enable establishment of permanent tolerances, 24 additional rotational crop trials were requested. The data were submitted to the Agency on March 3, and June 17, 2003. A Final Rule extending these time-limited tolerances to September 30, 2010, was subsequently published in the **Federal Register** of March 5, 2008 (73 FR 11820) (FRL–8352–2). A further extension of the tolerances set to expire September 30, 2013, is needed to allow for conclusion of the Agency review of the additional rotational crop data. Adequate enforcement methods are available for determination of methoxyfenozide residues in plant commodities, based on the Rohm and Haas Company Technical Report No. 34–98–87, "Tolerance Enforcement Method for Parent RH-2485 in Pome Fruit". The available Analytical Enforcement Methodology was previously reviewed in the **Federal Register** of September 20, 2002 (67 FR 59193) (FRL–7198–5). Contact: Clayton Myers, (703) 347–8874, e-mail address: *myers.clayton@epa.gov.*

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: October 14, 2010.

G. Jeffrey Herndon,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2010–26731 Filed 10–26–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2010–0008; FRL–8847–4]

Pesticide Products; Registration Applications

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces receipt of applications to register new uses for pesticide products containing currently registered active ingredients, pursuant to the provisions of section 3(c) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended. EPA is publishing this Notice of such applications, pursuant to section 3(c)(4) of FIFRA.

DATES: Comments must be received on or before November 26, 2010.

ADDRESSES: Submit your comments, identified by the docket identification (ID) number for the pesticide of interest, specified within Unit II., by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery:* OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to the docket ID number specified for the pesticide of interest as shown in the registration application summaries. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an

electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: A contact person is listed at the end of each registration application summary and may be contacted by telephone or e-mail. The mailing address for each contact person listed is: Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food pesticide manufacturer. Potentially affected entities may include, but are not limited to:

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

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number). If you are commenting in a docket that addresses multiple products, please indicate to which registration number(s) your comment applies.

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Registration Applications

EPA received applications as follows to register pesticide products containing currently registered active ingredients pursuant to the provisions of section 3(c) of FIFRA. Notice of receipt of these applications does not imply a decision by the Agency on these applications.

1. *Registration number:* 7969–274. *Docket number:* EPA–HQ–OPP–2010–0616. *Company name and address:* BASF Corporation, 26 Davis Drive, Research Triangle Park, NC 27709–3528. *Active ingredients:* Boscalid and Pyraclostrobin. *Proposed use(s):* Seed treatment on rapeseed (cultivars, varieties, and/or hybrids, including canola and crambe). *Contact:* Heather Garvie, (703) 308–0034; *garvie.heather@epa.gov.*

2. *Registration number:* 7969–275. *Docket number:* EPA–HQ–OPP–2010–0755. *Company name and address:* BASF Corporation, 26 Davis Drive, Research Triangle Park, NC 27709–3528. *Active ingredient:* Saflufenacil. *Proposed use(s):* For the manufacture of herbicides for use as a harvest aid/desiccant in dry edible beans, dry peas, soybean, oilseeds canola/rapeseed subgroup 20A, oilseeds sunflower subgroup 20B, and oilseeds cottonseed subgroup 20C. *Contact:* Susan Stanton, (703) 305–5218; *stanton.susan@epa.gov.*

3. *Registration number:* 7969–278. *Docket number:* EPA–HQ–OPP–2010–0755. *Company name and address:* BASF Corporation, 26 Davis Drive, Research Triangle Park, NC 27709–3528. *Active ingredient:* Saflufenacil. *Proposed use(s):* As a harvest aid/desiccant in dry edible beans, dry peas, soybean, oilseeds canola/rapeseed subgroup 20A, oilseeds sunflower subgroup 20B, and oilseeds cottonseed subgroup 20C. *Contact:* Susan Stanton, (703) 305–5218, *stanton.susan@epa.gov.*

4. *File symbol:* 56799–U. *Docket number:* EPA–HQ–OPP–2010–0707. *Company name and address:* Productos Quimicos y Alimenticios OSKU S.A. El Guanaco 5212, Huechuraba, Santiago, Chile. *Active ingredient:* Sulfur Dioxide (from Sodium metabisulfite). *Proposed use(s):* Blueberries. *Contact:* Rosemary Kearns, (703) 305–5611, *kearns.rosemary@epa.gov.*

5. *Registration numbers:* 66330–64, 66330–65. *Docket number:* EPA–OPP–2010–0725. *Company name and address:* Arysta LifeScience North America Corporation, 15401 Weston Parkway, Suite 150, Cary, NC 27513. *Active ingredient:* Fluoxastrobin. *Proposed use(s):* Squash/cucumber subgroup 9B. *Contact:* Heather Garvie, (703) 308–0034; *garvie.heather@epa.gov.*

6. *File symbol:* 72500–EN. *Docket number:* EPA–HQ–OPP–2010–0769. *Company name and address:* Scimetrics, 9974 NE Frontage Rd., Wellington, CO 80549. *Active ingredients:* Warfarin and Imidacloprid. *Proposed use(s):* Rangeland and non-crop areas to control black-tailed and white-tailed prairie dogs and their fleas. *Contact:* Daniel Peacock, (703) 305–5407, *peacock.dan@epa.gov.*

7. *File symbol:* 82052–T. *Docket number:* EPA–HQ–OPP–2010–0767. *Company name and address:* Cutting Edge Formulation, Inc., 3057 Summer Oak Place, Buford, GA 30518. *Active ingredient:* D-limonene. *Proposed use(s):* Bacterial disease control by suppression of citrus canker. *Contact:* Rita Kumar, (703) 308–8291, *kumar.rita@epa.gov.*

List of Subjects

Environmental protection, Pesticides and pest.

Dated: October 15, 2010.

Daniel J. Rosenblatt,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2010–26886 Filed 10–26–10; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Submitted for Review and Approval to the Office of Management and Budget (OMB), Comments Requested

October 25, 2010.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. 3501—3520. Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information collection burdens on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid OMB control number.

DATES: Submit written Paperwork Reduction Act (PRA) comments on or before November 26, 2010. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Submit all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via fax at 202–395–5167 or the Internet at *Nicholas_A._Fraser@omb.eop.gov;* and to *Judith-B. Herman@fcc.gov,* Federal Communications Commission. Send your PRA comments by e-mail to *PRA@fcc.gov.* To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the Web page *http://reginfo.gov/public/do/PRAMain,* (2) look for the section of the Web page called "Currently Under Review", (3) click on the downward-pointing arrow in the "Select Agency" box below the "Currently Under Review" heading, (4) select "Federal Communications Commission" from the list of agencies presented in the "Select Agency" box, (5) click the "Submit" button to the right of the "Select Agency" box, and (6) when the list of FCC ICRs currently under review appears, look for the title of this ICR (or its OMB Control Number, if there is one) and then click on the ICR Reference Number to view detailed information about this ICR.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Judith B. Herman at 202–418–0214 or via the Internet at *Judith-B.Herman@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0999.

Title: Hearing Aid Compatibility Status Report and Section 20.19, Hearing Aid-Compatible Mobile Handsets (Hearing Aid Compatibility Act).

Form No.: FCC Form 655—electronic only.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents: 925 respondents; 925 responses.

Estimated Time per Response: 1 hour—2.5 hours.

Frequency of Response: On occasion and annual reporting requirements and third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 151, 154(i), 157, 160, 201, 202, 208, 214, 301, 303, 308, 309(j), 310 and 610.

Total Annual Burden: 12,063 hours.

Total Annual Cost: N/A.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: Information in the reports may include confidential information. However, covered entities would be allowed to request that such materials submitted to the Commission be withheld from public inspection under 47 CFR 0.459 of the Commission's rules.

Needs and Uses: The Commission will submit this revised information collection (IC) to the Office of Management and Budget (OMB) during this comment period to obtain the full three-year clearance from them. The Commission is reporting no change in the burden estimates as previously approved by the OMB.

On August 5, 2010, the Commission adopted final rules in a *Second Report and Order,* FCC 10–145, that, among other things, updated disclosure requirements for manufacturers and service providers. Manufacturers and service providers are now required to adequately inform consumers about the functionality and the limitations of their handsets in two specific situations. First, for handsets that meet hearing aid compatibility requirements over all air interfaces and frequency bands for which technical standards have been established, but that are also capable of supporting voice operations in new frequency bands and air interfaces for which standards do not exist, the following mandatory disclosure language must be clearly and effectively conveyed to consumers wherever the hearing aid compatibility rating for the handset is provided, including the point of sale and on company Web sites:

"This phone has been tested and rated for use with hearing aids for some of the wireless technologies that it uses. However, there may be some newer wireless technologies used in this phone that have not been tested yet for use with hearing aids. It is important to try the different features of this phone thoroughly and in different locations, using your hearing aid or cochlear implant, to determine if you hear any interfering noise. Consult with your

service provider or the manufacturer of this phone for information on hearing aid compatibility. If you have questions about return or exchange policies, consult your service provider or phone retailer."

Second, the Commission is allowing companies offering one or two handset models over the GSM air interface, if they would have been eligible for the amended *de minimis* exception rule but for their size, to satisfy their obligation to offer one hearing aid-compatible handset over the GSM air interface by offering a handset that lets the consumer reduce maximum transmit power for GSM operations in the 1900 MHz band by up to 2.5 decibels. The Commission grants this exception subject to certain conditions, one of which is that companies that choose to use this exception must adequately inform consumers of the need to select the power reduction option to achieve hearing aid compatibility and of the consequences of doing so. Specifically, wherever a manufacturer or service provider provides the hearing aid compatibility rating for such a handset, it shall indicate that user activation of a special mode is necessary to meet the hearing aid compatibility standard. In addition, the handset manual or a product insert must explain how to activate the special mode and that doing so may result in a diminution of coverage.

Beyond the updated disclosure requirements noted above, one additional change is being made to the current collection. Two fields will be changed on FCC Form 655 in order to clarify information previously gathered in this collection and bring the collection into conformance with the amended rules. Specifically, manufacturers and service providers will be asked to provide the brand names under which they are offering digital commercial mobile radio services (if a service provider) or handsets (if a device manufacturer), in order to avoid confusion by identifying products offered under more than one brand name. In addition, the question concerning handsets capable of Wi-Fi voice operation will be expanded to include handsets capable of voice communication over any air interface or frequency band for which hearing aid compatibility technical standards do not exist without changes to the hardware in the handset. As a result, the Commission is requesting a revision of this currently approved collection due to the new disclosure requirements under Section 20.19(f) of the Commission's rules as well as the two fields changed on FCC Form 655.

The updated disclosures will create no additional burden for manufacturers and service providers, but will ensure that consumers and the Commission are provided with consistent and sufficient information about the functionality and the limitations of offered handsets. These actions are taken to ensure that consumers who use hearing aids and cochlear implants have access to a variety of phones and are adequately informed about the functionality and the limitations of the handsets, while preserving competitive opportunities for small companies as well as opportunities for innovations and investment. Similarly, the additional fields on the FCC Form 655 will clarify the responses already required by the form, helping the Commission compile data and monitor compliance with the hearing aid compatibility rules.

Federal Communications Commission.

Bulah P. Wheeler,

Deputy Manager.

[FR Doc. 2010–27208 Filed 10–26–10; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Radio Broadcasting Services; AM or FM Proposals To Change the Community of License

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: The following applicants filed AM or FM proposals to change the community of license: GRACE PUBLIC RADIO, Station KFKB, Facility ID 174471, BMPED–20100803AAM, From GIRARD, KS, To LA HARPE, KS; LORENZ E. PROIETTI, Station KMQS, Facility ID 166044, BPH–20100104AAK, From WHEATLAND, WY, To THE BUTTES, WY; NETWORK OF GLORY, INC., Station WJGS, Facility ID 172173, BMPED–20101012ACO, From THOMSON, GA, To NORWOOD, GA; NORTH AMERICAN BROADCASTING COMPANY, INC., Station WTDA, Facility ID 60099, BPH–20101004ACN, From WESTERVILLE, OH, To RIVERLEA, OH; SAN JOAQUIN BROADCASTING CO., Station KLVS, Facility ID 69685, BPH–20100915ABK, From STOCKTON, CA, To LIVERMORE, CA; SIERRA RADIO, INC., Station KVXX, Facility ID 31618, BPH–20101004ACX, From QUINCY, CA, To MAGALIA, CA; WIRELESS FIDELITY OF NORTH AMERICA, INC., Station WGUY, Facility ID 160465, BMP–20100927AAA, From ELLSWORTH, ME, To VEAZIE, ME.

DATES: Comments may be filed through December 27, 2010.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Tung Bui, 202–418–2700.

SUPPLEMENTARY INFORMATION: The full text of these applications is available for inspection and copying during normal business hours in the Commission's Reference Center, 445 12th Street, SW., Washington, DC 20554 or electronically via the Media Bureau's Consolidated Data Base System, *http://svartifoss2.fcc.gov/prod/cdbs/pubacc/prod/cdbs_pa.htm.* A copy of this application may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com.*

Federal Communications Commission.

James D. Bradshaw,

Deputy Chief, Audio Division, Media Bureau.

[FR Doc. 2010–27209 Filed 10–26–10; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on the agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of the agreements are available through the Commission's Web site (*http://www.fmc.gov*) or by contacting the Office of Agreements at (202) 523–5793 or *tradeanalysis@fmc.gov.*

Agreement No.: 008493–027.

Title: Trans-Pacific American Flag Berth Operators Agreement.

Parties: American President Lines, Ltd., A.P. Moller Maersk A/S; and Maersk Line Limited.

Filing Party: Howard A. Levy, Esq.; 80 Wall Street, Suite 1117; New York, NY 10005–3602.

Synopsis: The amendment updates APL's corporate address.

Agreement No.: 010714–044.

Title: Trans-Atlantic American Flag Liner Operators Agreement.

Parties: A.P. Moller Maersk A/S; American President Lines, Ltd.; American Roll-On Roll-Off Carrier, LLC; Hapag-Lloyd USA, LLC.; and Maersk Line Limited.

Filing Party: Howard A. Levy, Esq.; 80 Wall Street, Suite 1117; New York, NY 10005.

Synopsis: The amendment updates APL's corporate address.

Agreement No.: 011223–046.

Title: Transpacific Stabilization Agreement.

Parties: American President Lines, Ltd. and APL Co. PTE Ltd.; (operating as a single carrier); A.P. Moller-Maersk A/S trading as Maersk Line; China Shipping Container Lines (Hong Kong) Company Limited and China Shipping Container Lines Company Limited (operating as a single carrier); CMA CGM, S.A.; COSCO Container Lines Company Ltd; Evergreen Line Joint Service Agreement; Hanjin Shipping Co., Ltd.; Hapag-Lloyd AG; Hyundai Merchant Marine Co., Ltd.; Kawasaki Kisen Kaisha Ltd.; Mediterranean Shipping Company; Nippon Yusen Kaisha; Orient Overseas Container Line Limited; Yangming Marine Transport Corp.; and Zim Integrated Shipping Services, Ltd.

Filing Party: David F. Smith, Esq.; Cozen O'Connor; 6271 I Street, NW.; Suite 1100; Washington, DC 20006.

Synopsis: The amendment updates the corporate addresses of APL and Hyundai.

Agreement No.: 011325–039.

Title: Westbound Transpacific Stabilization Agreement.

Parties: American President Lines, Ltd./APL Co. Pte Ltd.; COSCO Container Lines Company Limited; Evergreen Line Joint Service Agreement; Hanjin Shipping Co., Ltd.; Hapag-Lloyd AG; Hyundai Merchant Marine Co. Ltd.; Kawasaki Kisen Kaisha, Ltd.; Nippon Yusen Kaisha Line; Orient Overseas Container Line Limited; and Yangming Marine Transport Corp.

Filing Party: David F. Smith, Esq.; Cozen O'Connor; 627 I Street, NW.; Suite 1100; Washington, DC 20006.

Synopsis: This amendment would enhance the market research capability of WTSA, authorize additional discussions and information exchanges with the shipper community, and update the corporate addresses of American President Lines and Hyundai. The parties have requested expedited review.

Agreement No.: 011346–021.

Title: Israel Trade Conference Agreement.

Parties: A.P. Moller-Maersk A/S; American President Lines, Ltd.; Maersk Line Limited; and Zim Integrated Shipping Services, Ltd.

Filing Party: Howard A. Levy, Esq.; Chairman; Israel Trade Conference; 80 Wall Street, Suite 1117; New York, NY 10005–3602.

Synopsis: The amendment updates APL's corporate address.

Agreement No.: 012067–003.

Title: U.S. Supplemental Agreement to HLC Agreement.

Parties: BBC Chartering & Logistics GmbH & Co. KG; Beluga Chartering GmbH; Chipolbrok; Clipper Project Ltd.; Hyndai Merchant Marine Co., Ltd.; Industrial Maritime Carriers, L.L.C.; Nordana Line A/S; and Rickmers-Linie GmbH & Cie. KG.

Filing Party: Wade S. Hooker, Esq.; 211 Central Park W; New York, NY 10024.

Synopsis: The amendment would add MACS Maritime Carrier Shipping GmbH & Co. as a party to the HLC Agreement.

Agreement No.: 012107.

Title: HLAG/HMM Trans-Atlantic Space Charter Agreement.

Parties: Hapag-Lloyd AG and Hyundai Merchant Marine Co., Ltd.

Filing Parties: Wayne R. Rohde, Esq.; Cozen O'Connor; 1627 I Street, NW., Suite 1100; Washington, DC 20006.

Synopsis: The agreement authorizes Hapag-Lloyd to charter space to Hyundai in the trade between New York and Antwerp, Belgium.

Agreement No.: 012108.

Title: The World Liner Data Agreement.

Parties: A.P. Moller-Maersk A/S; CMA CGM S.A.; Hamburg-Sud; Hapag-Lloyd AG; United Arab Shipping Company S.A.G.

Filing Party: Wayne Rohde, Esq.; Cozen O'Connor; 627 I Street, NW.; Suite 1100; Washington, DC 20006.

Synopsis: The agreement authorizes the parties to gather, compile, aggregate, exchange and disseminate demand and supply forecasts, a volume database, and a price index relating to trades worldwide. The agreement will replace the Container Trade Statistics Agreement, which will be terminated.

By Order of the Federal Maritime Commission.

Dated: October 22, 2010.

Rachel E. Dickon,

Assistant Secretary.

[FR Doc. 2010–27203 Filed 10–26–10; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission an application for a license as a Non-Vessel-Operating Common Carrier (NVO) and/or Ocean Freight Forwarder (OFF)—Ocean Transportation Intermediary (OTI) pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. chapter 409 and 46 CFR part 515). Notice is also hereby given of the filing of applications to amend an existing OTI license or the Qualifying Individual (QI) for a license.

Interested persons may contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573.

AMC Transportation Inc. (NVO & OFF), 8054 E. Garvey Avenue, Suite 102, Rosemead, CA 91770, Officers: Kuan C. Lee, CFO (Qualifying Individual), Pei Lee, President/Secretary, Application Type: New NVO & OFF.

American Freight Logistics, Inc. (NVO), 17890 Castleton Street, Suite 398, City of Industry, CA 91748, Officers: Jennifer X. McCormick, President (Qualifying Individual), Mark R. McCormick, Secretary/Treasurer, Application Type: QI Change.

British American Shipping, LLC (NVO), 10564 Progress Way, Suite E, Cypress, CA 90630, Officers: Paul D. Snell, CEO (Qualifying Individual), Robert P. Clarke, COO, Application Type: New NVO License.

Cargo America, Inc. (NVO & OFF), 332 S. Wayside Drive, Houston, TX 77011, Officer: Ali Jabr, President (Qualifying Individual), Application Type: QI Change.

Concert Group Logistics, Inc. (NVO & OFF), 1430 Branding Avenue, #150, Downers Grove, IL 60515, Officers: Kevin J. Koerner, Vice President Operations (Qualifying Individual), Daniel Para, CEO, Application Type: QI Change.

De Well Logistics LLC dba De Well Logistics, dba De Well (NVO & OFF), 2310 E. Gladwick Street, Rancho Dominguez, CA 90220, Officers: Kevin L. Higgins, Executive Vice President of Operations (Qualifying Individual), Fang Cheng, Member, Application Type: New NVO & OFF License.

Everplus Logistics Inc (NVO & OFF), 3 University Plaza, Hackensack, NJ 07601, Officers: Danny Shin, Secretary/Treasurer (Qualifying Individual), Yun S. Kang, President, Application Type: New NVO & OFF License.

Fair Deal Shipping, Inc. (NVO), 150–40 183rd Street, Suite 107, Springfield Gardens, NY 11413, Officers: Mohammed Refaz Siddiquee, President/Treasurer (Qualifying Individual), Badrul Haq, Vice President/Secretary, Application Type: New NVO License.

First America Metal Corporation (OFF), 113 Industrial Drive, Minooka, IL

60447, Officers: Sean Xu, General Manager (Qualifying Individual), Jian Li, President, Application Type: New OFF License.

Hanjin Transportation Company Limited (NVO), 118, Namdaemunro 2–GA, Jung-Gu, 21st Fl., Marine Center, Seoul, Korea South, Officers: Jade Lee, Secretary (Qualifying Individual), Bryce Dalziel, CEO, Application Type: QI Change.

Heneways U.S.A. Inc. (NVO & OFF), 1400 Mittel Blvd., Suite C, Wood Dale, IL 30191, Officers: Richard Tilford, Vice President (Qualifying Individual), John Buchel, Director, Application Type: QI Change.

Miami Boat Export Corp. (NVO & OFF), 9590 NW. 27th Ct., Coral Springs, FL 33065, Officers: Nelson Munive, President/Secretary (Qualifying Individual), Marcia Z. Munive, Vice President/Treasurer, Application Type: New NVO & OFF.

MIQ Global, LLC dba MIQ Logistics (NVO & OFF), 5200 W. 110th Street, Overland Park, IL 66211, Officers: Tina Jansen, Vice President-Compliance & Import Service (Qualifying Individual), Joseph L. Carnes, Chairman and CEO, Application Type: Name Change.

NDO America, Inc. (NVO & OFF), 22351 S. Wilmington Avenue, Carson, CA 90745, Officers: Theresa A. Fulton, Assistant Secretary (Qualifying Individual), John E. Ferguson, President, Application Type: Name Change.

Outer Seaways, Inc. (NVO), 1315 Walnut Street, #1708A, Philadelphia, PA 19107, Officers: Brian L. Cassidy, Vice President (Qualifying Individual), John J. O'Donnell, President, Application Type: New NVO License.

Pegasus Worldwide Logistics, Inc. (NVO & OFF), 2660 East Del Amo Blvd., Carson, CA 90221, Officers: Raymond Choy, Secretary/Treasurer/Vice President/Director (Qualifying Individual), Cooper Chao, President/Director, Application Type: New NVO & OFF License.

Peravia Shipping Company (NVO & OFF), 44 First Street, Passaic, NJ 07055, Officers: Mirna Marte, Secretary (Qualifying Individual), Franklin Ozuna, President, Application Type: New NVO & OFF License.

Reindeer Forwarding, Inc. (OFF), 5100 Charles Court, Zionsville, IN 46077, Officers: Alan J. Waugh, Vice President of International Operations (Qualifying Individual), Tim R. Donnar, Chairman/President/Treasurer, Application Type: New NVO License.

Sombut Kunkang dba Duchess Logistics (OFF), 17903 Holmes Avenue, Cerritos, CA 90703, Officer: Sombut Kunkang, Sole Proprietor (Qualifying Individual), Application Type: New OFF License.

Sun Fine Systems, Inc. dba Marquis Logistics (NVO), 13460 Brooks Drive, Baldwin Park, CA 91706, Officers: David Sun, CEO (Qualifying Individual), Jie Chen, CFO, Application Type: Trade Name Change.

T. A. Provence and Company, Incorporated, 154 State Street, Mobile, AL 36603, Officers: Cheryl C. Sloan, President (Qualifying Individual), Mary S. Cleveland, Secretary/Treasurer, Application Type: QI Change.

Dated: October 22, 2010.

Rachel E. Dickon,

Assistant Secretary.

[FR Doc. 2010–27201 Filed 10–26–10; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Reissuance

Notice is hereby given that the following Ocean Transportation Intermediary license has been reissued by the Federal Maritime Commission pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. chapter 409) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR part 515.

License No.	Name/address	Date reissued
022143F 2010	DTI Group Inc., 10913 NW. 30th Street, Suite 107, Miami, FL 33172.	September 16, 2010.

Sandra L. Kusumoto,

Director,

Bureau of Certification and Licensing.

[FR Doc. 2010–27207 Filed 10–26–10; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Revocations

The Federal Maritime Commission hereby gives notice that the following Ocean Transportation Intermediary licenses have been revoked pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. chapter 409) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR part 515, effective on the corresponding date shown below:

License Number: 3597N.

Name: Unit International of Miami, Inc. dba Unit Express.

Address: 8381 NW. 68th Street, Miami, FL 33166.

Date Revoked: October 5, 2010.

Reason: Surrendered license voluntarily.

License Number: 4190F.

Name: Renganathan, Kasi.

Address: 225 Stoney Ridge Drive, Alpharetta, GA 30022.

Date Revoked: October 1, 2010.

Reason: Failed to maintain a valid bond.

License Number: 018888N.

Name: Ship Smart, Inc.

Address: 69 Le Fante Way, Bayonne, NJ 07002.

Date Revoked: October 1, 2010.

Reason: Failed to maintain a valid bond.

License Number: 019201F.

Name: Hidayat I. Shaikh dba Asiapac Freight Forwarding & Supply Chain Management dba Baobao Shipping Co.

Address: 4210 Solar Circle, Union City, CA 94587.

Date Revoked: October 1, 2010.

Reason: Failed to maintain a valid bond.

License Number: 019573NF.

Name: Longron Corporation dba Time Logistics.

Address: 5415 Hilton Avenue, Temple City, CA 91780.

Dates Revoked: September 14, 2010 and October 11, 2010.

Reason: Failed to maintain valid bonds.

License Number: 021519NF.

Name: Transatlantic ARC LLC.

Address: 415 Madison Avenue, Suite 1404, New York, NY 10017.

Date Revoked: October 1, 2010.

Reason: Failed to maintain valid bonds.

License Number: 021755NF.

Name: Gly Expo Logistics Inc.

Address: 200 West Devon Avenue, Suite 5, Bensenville, IL 60106.

Date Revoked: October 8, 2010.

Reason: Failed to maintain valid bonds.

License Number: 021757N.

Name: Champion Xpress Shipping Inc.

Address: 106–13 Liberty Avenue, Ozone, NY 11417.

Date Revoked: October 7, 2010.

Reason: Failed to maintain a valid bond.

License Number: 022320N.

Name: Synergetic Specialty Logistics Inc. dba "Mabuhey! A Balikbayan Box Service."

Address: 660 Fargo Avenue, Elk Grove Village, IL 60007.

Date Revoked: October 8, 2010.

Reason: Failed to maintain a valid bond.

Sandra L. Kusumoto,

Director, Bureau of Certification and Licensing.

[FR Doc. 2010–27204 Filed 10–26–10; 8:45 am]

BILLING CODE 6730–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: OS–0990–30-day notice]

Agency Information Collection Request. 30-Day Public Comment Request

Agency: Office of the Secretary, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *Sherette.funncoleman@hhs.gov*, or call the Reports Clearance Office on (202) 690–5683. Send written comments and recommendations for the proposed information collections within 30 days of this notice directly to the OS OMB Desk Officer; faxed to OMB at 202–395–5806.

Proposed Project: State Medicaid Fraud Control Units' Reports—OMB No. 0990–0162–Extension—Office of Inspector General (OIG).

Abstract: OIG is requesting an approval by Office of Management and Budget on an extension for the collection of information to specifically comply with the requirements in Title 19 of the Social Security Act at 1903 (q) and 42 CFR1007.15 and 1007.17, in accordance with the Paperwork Reduction Act. The information collected consists of fifty separate annual reports and fifty separate application requests for Federal grant certification/re-certification. The collection is submitted yearly to the Office of Inspector General (OIG) by the fifty established State Medicaid Fraud Control Units (Units). OIG uses the information received to assess and determine the Units' eligibility for continued participation in the Federal Medicaid fraud control grant program.

ESTIMATED ANNUALIZED BURDEN TABLE

Respondent	Form	Number of respondents	Number of responses per respondents	Average burden per response (in hours)	Total burden hours
State (MFCU) Units	Annual Report	50	1	88	4400
State (MFCU) Units	Certification/Recertification Application.	50	1	5	250
Total					4650

Seleda Perryman,

Office of the Secretary, Paperwork Reduction Act Clearance Officer.

[FR Doc. 2010–27135 Filed 10–26–10; 8:45 am]

BILLING CODE 4152–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: OS–0990–0221; 30-day notice]

Agency Information Collection Request. 30-Day Public Comment Request

Agency: Office of the Secretary, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *Sherette.funncoleman@hhs.gov*, or call the Reports Clearance Office on (202) 690–5683. Send written comments and recommendations for the proposed information collections within 30 days of this notice directly to the OS OMB

Desk Officer; faxed to OMB at 202–395–5806.

Proposed Project: Family Planning Annual Report: Forms and Instructions—OMB No. 0990–0221—Extension—Office of Population Affairs—Title X Family Planning Program.

Abstract: This request is for a 3-year approval of the Family Planning Annual Report: Forms and Instructions (FPAR). This is an annual reporting requirement for family planning service delivery projects authorized and funded under the Population Research and Voluntary Family Planning Programs (Section 1001 Title X of the Public Health Service Act, 42 U.S.C. 300). The FPAR is the only source of annual, uniform reporting by all Title X family planning service grantees, which include public and private non-profit public heath agencies. OPA uses FPAR data to monitor compliance with statutory requirements, to comply with accountability and performance requirements for GPRA and HHS plans, and to guide program planning and evaluation.

ESTIMATED ANNUALIZED BURDEN TABLE

Forms	Type of respondent	Number of respondents	Number of responses per respondent	Average burden (in hours) per response	Total burden hours
FPAR: Forms and Instructions	Title X service grantee	88	1	40	3,520

Seleda Perryman,

Office of the Secretary, Paperwork Reduction Act Clearance Officer.

[FR Doc. 2010–27136 Filed 10–26–10; 8:45 am]

BILLING CODE 4150–34–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: OS–0990–0323; 60-day Notice]

Agency Information Collection Request. 60-Day Public Comment Request

Agency: Office of the Secretary, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed information collection request for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *Sherette.funncoleman@hhs.gov*, or call the Reports Clearance Office at (202) 690–6162. Written comments and recommendations for the proposed information collections must be directed to the OS Paperwork Clearance Officer at the above e-mail address within 60 days.

Proposed Project: Meeting Request Routing System for MedicalCountermeasures.gov.—OMB No. 0990–0323—Extension—Office of the Assistant Secretary for Preparedness and Response (ASPR)—Office of the Biomedical Advanced Research and Development Authority (BARDA).

Abstract: In order to route product developers to the most appropriate personnel within the Department of Health and Human Services (HHS), HHS collects some basic information about the company's product through *MedicalCountermeasures.gov.* Using this information and a routing system that has been developed with input from participating agencies within HHS, including the Office of the Assistant Secretary for Preparedness and Response (ASPR), the Centers for Disease Control and Prevention (CDC), the Food and Drug Administration (FDA), and the National Institutes of Health (NIH), MedicalCountermeasures.gov routes the meeting request to the appropriate person within HHS. ASPR is requesting an extension by OMB for a three-year clearance.

ESTIMATED ANNUALIZED BURDEN TABLE

Forms	Type of respondent	Number of respondents	Number of responses per respondent	Average burden (in hours) per response	Total burden hours
Meeting Request	Medical Countermeasure Developers	225	1	8/60	30

Seleda M. Perryman,

Office of the Secretary, Paperwork Reduction Act Clearance Officer.

[FR Doc. 2010–27137 Filed 10–26–10; 8:45 am]

BILLING CODE 4150–37–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0544]

Agency Information Collection Activities; Proposed Collection; Comment Request; Application for Participation in the Medical Device Fellowship Program

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the application for participation in the Medical Device Fellowship Program (MDFP).

DATES: Submit either electronic or written comments on the collection of information by December 27, 2010.

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: Daniel Gittleson, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–5156, *Daniel.Gittleson@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. "Collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Application for Participation in the Medical Device Fellowship Program—5 U.S.C. 1104, 1302, 3301, 3304, 3320, 3361, 3393, and 3394 (OMB Control Number 0910–0551)—Extension

Sections 1104, 1302, 3301, 3304, 3320, 3361, 3393, and 3394 of Title 5 of the United States Code, authorize Federal agencies to rate applicants for Federal jobs. Collecting applications for the MDFP will allow FDA's Center for Devices and Radiological Health (CDRH) to easily and efficiently elicit and review information from students and health care professionals who are interested in becoming involved in CDRH activities. The process will reduce the time and cost of submitting written documentation to the Agency and lessen the likelihood of applications being misrouted within the Agency mail system. It will assist the Agency in promoting and protecting the public health by encouraging outside persons to share their expertise with CDRH.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

5 U.S.C. Section	FDA form No.	Number of respondents	Annual frequency per response	Total annual responses	Hours per response	Total hours
1104, 1302, 3301, 3304, 3320, 3361, 3393, 3394	3608	250	1	250	1	250

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

FDA based these estimates on the number of inquiries that have been received concerning the program and the number of requests for application forms over the past 3 years.

Dated: October 21, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–27158 Filed 10–26–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0163]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Draft Guidance, Emergency Use Authorization of Medical Products

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled "Draft Guidance, Emergency Use Authorization of Medical Products" has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Jonna Capezzuto, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–3794, e-mail: *Jonnalynn.capezzuto@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In the **Federal Register** of October 6, 2009 (74 FR 51285), the Agency announced that the proposed information collection had been submitted to OMB for review and clearance under 44 U.S.C. 3507. 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. OMB has now approved the information collection and has assigned OMB control number 0910–0595. The approval expires on January 31, 2013. A copy of the supporting statement for this information collection is available on the Internet at *http://www.reginfo.gov/public/do/PRAMain.*

Dated: October 21, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–27160 Filed 10–26–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0121]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; The Mammography Quality Standards Act Requirements

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled "The Mammography Quality Standards Act Requirements" has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Daniel Gittleson, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–5156, e-mail: *Daniel.Gittleson@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In the **Federal Register** of June 15, 2010 (75 FR 33811), the Agency announced that the proposed information collection had been submitted to OMB for review and clearance under 44 U.S.C. 3507. 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. OMB has now approved the information collection and has assigned OMB control number 0910–0309. The approval expires on October 31, 2013. A copy of the supporting statement for this information collection is available on the Internet at *http://www.reginfo.gov/public/do/PRAMain.*

Dated: October 21, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–27159 Filed 10–26–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, Public Health Service, HHS.

ACTION: Notice.

SUMMARY: The inventions listed below are owned by an agency of the U.S. Government and are available for licensing in the U.S. in accordance with 35 U.S.C. 207 to achieve expeditious commercialization of results of Federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

ADDRESSES: Licensing information and copies of the U.S. patent applications listed below may be obtained by writing to the indicated licensing contact at the Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852–3804; telephone: 301/496–7057; fax: 301/402–0220. A signed Confidential Disclosure Agreement will be required to receive copies of the patent applications.

Immunotoxin for the Treatment of Neuroblastoma Relapse

Description of Technology: Immunotoxins are proteins which have two distinct domains: (1) An antibody or antibody binding fragment which is capable of recognizing a single specific cell surface protein and (2) a toxin domain which is capable of inducing cell death. Immunotoxins are currently being pursued as therapeutics because they specifically kill diseased cells while leaving essential, healthy cells alone. This increases the effectiveness of the therapy while reducing the appearance of side-effects. A particular immunotoxin that is being studied in clinical trials consists of an anti-CD22 antibody binding fragment and a mutated *Pseudomonas* exotoxin A. Although this immunotoxin is being explored primarily as a treatment for hematological malignancies, it can be used to treat any condition where CD22 is overexpressed on the cell membrane of diseased cells.

Neuroblastomas are malignant cancers that start in nerve tissue and primarily affect infants and children. Although frontline treatments for neuroblastoma are often effective, relapse frequently occurs in high risk cases. The most common form of relapse in neuroblastoma patients is caused by Neuroblastoma tumor initiating cells (NB–TIC). Therefore, if NB–TIC could be eliminated, high risk neuroblastoma patients could have a therapeutic option for preventing a relapse.

This invention concerns the discovery that NB–TIC expresses CD22. As a result, NB–TIC are susceptible to treatment with an anti-CD22 immunotoxin. By combining frontline

neuroblastoma treatments with anti-CD22 immunotoxins, both the primary neuroblastoma and cells capable of initiating a relapse can be eliminated. As a result, even high risk neuroblastoma patients should have an increased chance of surviving neuroblastoma.

Application: Treatment and prevention of neuroblastoma relapse.

Advantages:

• Increased therapeutic effectiveness with decreased non-specific killing of essential, healthy cells.

• Neuroblastoma relapse commonly begins in the bone marrow, an environment which is accessible to immunotoxins.

• Combined treatment addresses both the tumor and the cause of relapse, leading to more efficient treatments than frontline therapeutics alone.

Development Status: Preclinical stage of development for treatment of neuroblastoma relapse; immunotoxins have clinical data associated with treatment of hematological malignancies.

Inventors: Thiele (NCI) *et al.*

Patent Status: U.S. provisional application 61/356,202 (E–204–2010/0–US–01).

For more information, see:

• U.S. Patent 7,355,012—"Mutated Anti-CD22 Antibodies with Increased Affinity to CD22—Expressing Leukemia Cells".

• PCT Patent Application WO 2007/016150—"Mutated Pseudomonas Exotoxins with Reduced Antigenicity".

• PCT Patent Application WO 2009/032954—"Deletions in Domain II of Pseudomonas Exotoxin A That Reduce Non-Specific Toxicity".

Licensing Status: Available for licensing.

Licensing Contact: David A. Lambertson, PhD; 301–435–4632; *lambertsond@mail.nih.gov.*

Collaborative Research Opportunity: The Center for Cancer Research, Pediatric Oncology Branch and Laboratory of Molecular Biology, is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate, or commercialize recombinant anti-CD22 immunotoxins for the treatment of neuroblastoma. Please contact John Hewes, Ph.D. at 301–435–3121 or *hewesj@mail.nih.gov* for more information.

Mouse Model of Thyroid Cancer

Description of Technology: This technology describes a mouse model of thyroid cancer where the phosphatidylinositol 3-kinase (PI3K)–AKT/protein kinase B-signaling pathway is overactivated. These mice have a knock-in dominantly negative mutant thyroid hormone receptor β gene (TRβPV mutant) that spontaneously develops thyroid cancer and distant metastasis similar to human follicular thyroid cancer. The thyroids of TRβPV mice exhibit extensive hyperplasia, which progresses to capsular invasion, vascular invasion, anaplasia, and ultimately, metastasis to distant organs. Consequently, this mouse model could be used as a preclinical model to understand genetic changes during cancer development and to identify potential molecular targets for the diagnosis, prevention, and treatment of cancer. For example, the inventors have used the TRβPV mice to show that the peroxisome proliferator-activated receptor γ (PPARγ) could function as a tumor suppressor *in vivo* and that the activation of the PI3K–AKT signaling contributes to thyroid carcinogenesis and could be a potential therapeutic target in follicular thyroid carcinoma.

Applications:

• Identifying potential molecular targets for cancer diagnosis, prevention, and treatment.

• Testing kinase inhibitors and other novel drugs being discovered for the treatment of thyroid cancer.

• Tools to understand the genetic changes during cancer development.

Advantages: This model provides the opportunity to study the alterations in gene regulation that occur during the progression and metastasis of thyroid carcinogenesis, not just the genes that control initial carcinogenesis.

Development Status: The technology is currently in the pre-clinical stage of development.

Inventors: Sheue-yann Cheng (NCI).

Patent Status: HHS Reference No. E–208–2009/0—Research Tool. Patent protection is not being pursued for this technology.

Publications:

1. Furuya F, Lu C, Willingham MC, Cheng SY. Inhibition of phosphatidylinositol 3-kinase delays tumor progression and blocks metastatic spread in a mouse model of thyroid cancer. Carcinogenesis. 2007 Dec;28(12):2451–2458. [PubMed: 17660507]

2. Kato Y, Ying H, Zhao L, Furuya F, Araki O, Willingham MC, Cheng SY. PPARgamma insufficiency promotes follicular thyroid carcinogenesis via activation of the nuclear factor-kappaB signaling pathway. Oncogene. 2006 May 4;25(19):2736–2747. [PubMed: 16314832]

3. Suzuki H, Willingham MC, Cheng SY. Mice with a mutation in the thyroid hormone receptor beta gene spontaneously develop thyroid carcinoma: a mouse model of thyroid carcinogenesis. Thyroid. 2002 Nov;12(11):963–969. [PubMed: 12490073]

4. Kaneshige M, Kaneshige K, Zhu X, Dace A, Garrett L, Carter TA, Kazlauskaite R, Pankratz DG, Wynshaw-Boris A, Refetoff S, Weintraub B, Willingham MC, Barlow C, Cheng S. Mice with a targeted mutation in the thyroid hormone beta receptor gene exhibit impaired growth and resistance to thyroid hormone. Proc Natl Acad Sci U S A. 2000 Nov 21;97(24):13209–13214. [PubMed: 11069286]

Licensing Status: Available for licensing.

Licensing Contact: Whitney A. Hastings; 301–451–7337; *hastingw@mail.nih.gov.*

Chemokine-Tumor Antigen Fusion Proteins as Cancer Vaccines

Description of Technology: Available for licensing is a tumor vaccine construct comprising a chemoattractant (such as human chemokines CCL7 and CCL20) fused to a tumor antigen (including human mucin-1, a transmembrane protein that is aberrantly expressed in cancer; or single chain antibody expressed by B cell malignancy, or melanoma antigen gp100 expressed in human melanomas). The majority of tumor antigens are believed to be poorly immunogenic because they represent oncogene gene products or other cellular genes which are normally present in the host. As a result, poor immunogenicity has been a major obstacle to successful immunotherapy with tumor vaccines. Administration of this fusion chemokine and tumor antigen protein, or a nucleic acid encoding this fusion protein, elicits a tumor specific cellular and humoral immune response thereby providing a potent cancer vaccine.

Applications: Cancer immunotherapy.

Development Status: Proof of the concept and pre-clinical development have been successfully completed.

Market: The global cancer market is forecasted to reach US$40 billion by 2012. Cancer vaccine research is coming to fruition, with a number of products now in Phase III trials and 15 therapeutic cancer vaccines realistically expected to launch by 2013. The therapeutic vaccine market has the potential to mirror the growth seen in the monoclonal antibody market, and reach sales in excess of US$5 billion by 2012.

Inventors: Larry Kwak (NCI) and Arya Biragyn (NIA) (both NCI at time of invention).

Related Publications:

1. Coscia M, Biragyn A. Cancer immunotherapy with chemoattractant peptides. Semin Cancer Biol. 2004 Jun;14(3):209–218. [PubMed: 15246057].

2. Biragyn A, Belyakov IM, Chow YH, Dimitrov DS, Berzofsky JA, Kwak LW. DNA vaccines encoding human immunodeficiency virus-1 glycoprotein 120 fusions with proinflammatory chemoattractants induce systemic and mucosal immune responses. Blood. 2002 Aug 15;100(4):1153–1159. [PubMed: 12149191].

3. Schiavo R, Baatar D, Olkhanud P, Indig FE, Restifo N, Taub D, Biragyn A. Chemokine receptor targeting efficiently directs antigens to MHC class I pathways and elicits antigen-specific CD8+ T-cell responses. Blood. 2006 Jun 15;107(12):4597–4605. [PubMed: 16514063].

4. Biragyn A, Ruffini PA, Coscia M, Harvey LK, Neelapu SS, Baskar S, Wang JM, Kwak LW. Chemokine receptor-mediated delivery directs self-tumor antigen efficiently into the class II processing pathway in vitro and induces protective immunity in vivo. Blood. 2004 Oct 1;104(7):1961–1969. [PubMed: 15191951].

5. Qin H, Nehete PN, He H, Nehete B, Buchl S, Cha SC, Sastry JK, Kwak LW. Prime-boost vaccination using chemokine-fused gp120 DNA and HIV envelope peptides activates both immediate and long-term memory cellular responses in rhesus macaques. J Biomed Biotechnol. 2010;2010:860160. [PubMed: 20454526].

6. Qin H, Cha SC, Neelapu SS, Lou Y, Wei J, Liu YJ, Kwak LW. Vaccine site inflammation potentiates idiotype DNA vaccine-induced therapeutic T cell-, and not B cell-, dependent antilymphoma immunity. Blood. 2009 Nov 5;114(19):4142–4149. [PubMed: 19749091].

7. Singh A, Nie H, Ghosn B, Qin H, Kwak LW, Roy K. Efficient modulation of T-cell response by dual-mode, single-carrier delivery of cytokine-targeted siRNA and DNA vaccine to antigen-presenting cells. Mol Ther. 2008 Dec;16(12):2011–2021. [PubMed: 18813280].

Patent Status: U.S. Patent No. 6,562,347 issued 13 May 2003 (HHS Reference No. E–107–1998/0–US–03).

Licensing Contact: Patrick McCue, PhD; 301–435–5560; *mccuepat@mail.nih.gov*.

Collaborative Research Opportunity: The National Institute on Aging, Laboratory of Immunology, is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate, or commercialize cancer vaccines that target skin antigen-resenting cells. Please contact Nicole Guyton at 301–435–3101 or *guytonn@mail.nih.gov* for more information.

Dated: October 21, 2010.

Richard U. Rodriguez,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. 2010–27179 Filed 10–26–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, Public Health Service, HHS.

ACTION: Notice.

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IL–10 and IFNγ Peptide Inhibitors

Description of Invention: Available for licensing are several potent and selective inhibitors of IL–10 and IFN-γ signaling. Although cytokines play important roles in cancer and inflammation, there are no specific inhibitors of any cytokines to date. IL–10 and IFN-γ cytokine signaling play crucial roles in inflammation, cancer growth, and autoimmune diseases. The investigators have developed short peptides that potently and selectively interfere with dimerization of the cytokines and their binding to the corresponding receptor. Included in the patent application are also metabolically stable lipopeptides mimicking conserved regions of IL–10 and IFN-γ receptors that interfere with STAT3 and STAT1 phosphorylation and subsequent signaling. Lipopeptides potently inhibit STAT3 and STAT1-dependent growth of cancer cells. These compounds are promising drug candidates for the treatment of cancer and many infectious and inflammatory diseases.

Application: Cancer, viral infections and anti-inflammatory treatments.

Advantages:

- Potent, stable peptide inhibitors.
- Selective IL–10 and IFN-γ inhibitors.

Development Status: The technology is currently in the pre-clinical stage of development.

Market: The annual growth rate for the therapeutic peptide market is estimated at about 7.5%.

Inventors: Nadya Tarasova *et al.* (NCI).

Patent Status: U.S. Provisional Application No. 61/333,512 filed 11 May 2010 (HHS Reference No. E–167–2010/0–US–01).

Licensing Status: Available for licensing.

Licensing Contact: Jennifer Wong; 301–435–4633; *wongje@mail.nih.gov.*

Collaborative Research Opportunity: The Center for Cancer Research, Cancer and Inflammation Program, is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate, or commercialize inhibitors of IL10, IFNγ and STAT3 signaling. Please contact John Hewes, Ph.D. at 301–435–3121 or *hewesj@mail.nih.gov* for more information.

Diagnostic and Prognostic HCC-Related Metabolites

Description of Invention: Metabolite profiling identifies and measures changes in cellular metabolites as a means to determine a direct correlation between gene expression and changes in biological function. Investigators at the National Cancer Institute have identified a unique set of metabolite biomarkers associated with hepatocellular carcinoma (HCC), early stage HCC, HCC patient outcome and HCC stem-cell subtype. Subsets of this metabolite/gene signature can distinguish HCC tumors from normal tissues with 88–97% accuracy, identify early stage HCC patients with 62–78% accuracy, wherein early stage is defined as TNM stage I, prognose negative patient outcome, and identify a HCC stem cell subtype with 70–77% accuracy. These metabolites and gene surrogates are elements of the PI3K and Myc signaling networks which can potentially be targeted for therapeutic purposes.

HCC represents an extremely poor prognostic cancer, and patients are often diagnosed with end-stage cancer and have poor survival. HCC is also a very heterogeneous disease and often arises from chronic liver disease. Surgery and transplantation remain the only curative option for patients; however, complications due to cirrhosis mean it is a viable option for 5–10% patients. This HCC gene signature can be developed into assays to enable clinicians to accurately diagnose HCC, including early stages and subtype of this disease, and therefore stratify patients for appropriate treatment and prioritizing liver transplantation candidates based on their metabolite profile.

Applications:

• Method to diagnose HCC, including HCC subtypes.

• Method to prognose HCC patient outcome.

• Method to stratify patients for appropriate treatment.

Advantages: Highly accurate metabolite/gene profile that can be developed into a variety of diagnostic and prognostic applications.

Development Status: The technology is currently in the pre-clinical stage of development.

Market:

• Global oncology biomarker discovery market is expected to grow from $2.5 billion in 2009 to $5.7 billion by 2014.

• North America has the largest metabolomic market with an estimated value of $161.4 million in 2009, and it is projected to reach $324 million by 2014.

• HCC is the fifth most common cancer worldwide with an estimated one million new cases diagnosed annually.

Inventors: Xin Wei Wang and Anuradha S. Budhu (NCI).

Patent Status: U.S. Provisional Application No. 61/323,420 filed 13 Apr 2010 (HHS Reference No. E–139–2010/0–US–01).

Licensing Status: Available for licensing.

Licensing Contact: Jennifer Wong; 301–435–4633; *wongje@mail.nih.gov.*

Collaborative Research Opportunity: The Center for Cancer Research, Laboratory of Human Carcinogenesis, is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate, or commercialize metabolomic signatures for liver cancer. Please contact John Hewes, Ph.D. at 301–435–3121 or *hewesj@mail.nih.gov* for more information.

Stimulation of Natural Killer T-Cell Anti-Tumor Activity

Description of Invention: Natural killer T cells (NKT) are a unique lymphocyte population that has T-cell and NK cell functional properties in order to rapidly elicit an immune response. α-galactosylceramide (α-GalCer) is a potent NKT stimulator and induces of IFN-γ release to promote immunity against tumors and infectious agents. Humans have natural antibodies against α-galactose, which may be one of the reasons why the human clinical trials of α-GalCer or KRN7000 were not very successful.

Investigators at the National Cancer Institute have found that β-mannosylceramide (β-ManCer) promotes immunity in an IFN-γ independent mechanism. β-ManCer is a new class of NKT agonist that induces immune responses alone, through nitric oxide and TNF-α-dependent mechanisms, or synergistically with α-GalCer to enhance α-GalCer's efficacy. Since β-ManCer does not have α-galactose, which can be neutralized by natural antibodies, patients could be treated with multiple doses without negative side effects associated with the loss of IFN-γ production. Hence, β-ManCer is a promising anti-cancer treatment either alone or in combinatorial therapies with α-GalCer to selectively induce immune responses.

Applications:

• Cancer therapeutics.

• Potent stimulator of NKT activity.

Advantages:

• Induces tumor immunity through a novel mechanism.

• Decreased possibility of neutralization by natural antibodies.

• Synergize with α-GalCer.

Development Status: The technology is currently in the pre-clinical stage of development.

Market: Global cancer market is worth more than eight percent of total global pharmaceutical sales.

Inventors: Masaki Terabe (NCI) *et al.*

Patent Status: U.S. Provisional Application No. 61/313,508 filed 12 Mar 2010 (HHS Reference No. E–034–2010/0–US–01).

Licensing Status: Available for licensing.

Licensing Contact: Jennifer Wong; 301–435–4633; *wongje@mail.nih.gov.*

Collaborative Research Opportunity: The Vaccine Branch of the National Cancer Institute is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate, or commercialize β-ManCer. Please contact John Hewes, Ph.D. at 301–435–3121 or *hewesj@mail.nih.gov* for more information.

Modified POTE Peptides for Cancer Immunotherapy

Description of Invention: Investigators at the National Cancer Institute have identified and enhanced immunogenicity of POTE epitopes to improve their efficacy in cancer vaccines. POTE is a novel tumor antigen expressed in a variety of cancers including breast, prostate, colon, lung, ovary, and pancreas cancers. POTE has limited expression in normal tissues and therefore a specific target for cancer treatments, including immunotherapy. Immunotherapy has great potential as a cancer therapeutic because of its specificity and freedom from toxic effects of chemotherapies.

Antigen-specific cancer immunotherapy often relies on identification of epitopes expressed by cancer cells that can be targeted by cytotoxic T cells (CTL). However, the CTL repertoire against high-affinity cancer epitopes is often ineffective because cancer epitopes may share a similar structure to natural "self" antigens. As a result, cancer cells are not recognized by CTLs and destroyed. The enhanced POTE epitopes induce a stronger immune response than natural responses. These modified epitopes are more effective at inducing CTL against POTE expressing cancer cells and have greater potential to serve as cancer vaccine targets.

Applications:

• Therapeutic cancer vaccine.

• Method to treat cancer.

Advantages:

• Enhanced immunogenic peptides.

• Cancer vaccines that overcome self-tolerance to target a variety of tumor cells.

Development Status: The technology is currently in the pre-clinical stage of development.

Market: The therapeutic cancer market will be worth an estimated $633 million in 2014.

Inventors: Jay A. Berzofsky, Yi-Hisang Huang, Ira Pastan, Masaki Terabe (NCI).

Patent Status: U.S. Provisional Application No. 61/313,559 filed 12 Mar 2010 (HHS Reference No. E–003–2010/0–US–01).

Licensing Status: Available for licensing.

Licensing Contact: Jennifer Wong; 301–435–4633; *wongje@mail.nih.gov.*

Collaborative Research Opportunity: The Center for Cancer Research, Vaccine Branch, is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate, or

commercialize this technology. Please contact John Hewes, Ph.D. at 301–435–3121 or *hewesj@mail.nih.gov* for more information.

Dated: October 21, 2010.

Richard U. Rodriguez,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. 2010–27181 Filed 10–26–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, Public Health Service, HHS.

ACTION: Notice.

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Photosensitizing Antibody-Fluorophore Conjugate for Photo-Immunotherapy

Description of Invention: A major goal of targeted cancer therapy is to improve the sensitivity and specificity of the therapy so that cancer cells can be detected and targeted for elimination, while normal cells in the surrounding area remain largely intact. Photodynamic therapy (PDT) is a treatment for cancer and non-cancerous lesions involving light and a photosensitizer. The photosensitizer can be targeted to a specific cell using antibodies specific for proteins expressed on the target cell surface, the target cells will then be destroyed after being exposed to light at appropriate wavelength.

The NIH technology describes a method of photosensitizing cancerous cells by irradiating an antibody fluorophore conjugate. The NIH investigators have conducted in vitro studies using a proprietary IRDye 700DX NHS Ester. The IR700 dye was conjugated to a proprietary humanized anti-HER1 or anti-HER2 or anti-PSMA antibody, Panitumumab or Trastuzumab or huJ591. Subsequent irradiation of non-ionizing near infrared light showed rapid cell death of tumor cells, while normal cells were not noticeably killed. The studies were repeated in mice with similar results.

Applications and Market:

• Photodynamic therapy for cancer by selective targeting and killing of cells without suffering normal tissue side effects.

• Cancer was responsible for about 13% of all human deaths in 2007. There remains a need for therapies that effectively kill the tumor cells while not harming non-cancerous cells.

Development Status: Both *in vitro* and *in vivo* data available.

Inventors: Hisataka Kobayashi, Peter L. Choyke, Makoto Mitsunaga (NCI)

Publications: Manuscript in submission.

Patent Status: U.S. Provisional Patent Application No. 61/363,079, filed July 9, 2010 (HHS Reference No. E–205–2010/0–US–01)

Licensing Status: Available for licensing.

Licensing Contact: Betty B. Tong, PhD; 301–594–6565; *tongb@mail.nih.gov.*

Soluble Glypican-3 Protein for Treatment of Cancer

Description of Technology: Hepatocellular carcinoma (HCC) is a form of liver cancer that is among the more deadly cancers in the world. HCC is typically only detected at the later stages of cancer development, which is always associated with poor prognosis. Because HCC is often associated with liver disease, traditional chemotherapy is not an option, making surgery the most common form of treatment. As a result, there is a need for new treatments.

Glypican-3 (GPC3) is a cell surface protein that is normally involved in cell growth and differentiation. GPC3 has been shown to act through the Wnt-signaling pathway, a pathway that is often activated in a number of different cancer cell types. Significantly, the ability of GPC3 to activate signaling through Wnt requires that GPC3 be bound to the cell membrane. GPC3 is also preferentially expressed on HCC cells, suggesting it could play a particularly important role in tumorigenesis in HCC.

This invention concerns a soluble form of GPC3 that lacks its cell membrane anchoring domain. This soluble form of GPC3 maintains its ability to interact with the Wnt signaling pathway, but cannot induce the activation of the pathway because it is not bound to the cell membrane. By competing with fully functional GPC3, the soluble GPC3 is able to inhibit the growth of HCC cells, thereby decreasing the ability of tumors to grow and metastasize. This suggests that soluble GPC3 represents a possible therapeutic for HCC.

Applications:

• Soluble GPC3 represents a potential therapeutic for patients with cancer with hyperactivated Wnt-signaling pathways.

• Specific cancers include hepatocellular cancer (HCC), melanoma, thyroid cancer, lung squamous cell carcinoma, Wilms' tumor, neuroblastoma, hepatoblastoma, and testicular germ-cell tumors.

Advantages:

• Removal of the glycosyl-phosphatidylinositol (GPI) anchor results in a soluble form of GPC3 that can interrupt Wnt-signaling.

• Soluble GPC3 maintains the ability to compete with fully functional GPC3 despite its inability to activate signaling.

• For treatment of HCC, offers a non-invasive, potentially non-liver toxic alternative to current strategies.

Development Status: Preclinical stage of development; cell culture data with HCC cells

Inventors: Ho (NCI) *et al.*

For more information, see:

• "Recombinant soluble glypican 3 protein inhibits the growth of hepatocellular carcinoma in vitro" Feng *et al.* Int. J. Cancer: E-pub (8 July 2010).

• "Soluble Glypican 3 inhibits the growth of Hepatocellular Carcinoma in vitro and in vivo" Zitterman *et al.* Int. J. Cancer: 126, 1291–1301 (2010).

Patent Status: U.S. provisional applications 61/334,135 (E–176–2010/0–US–01) and 61/350,722 (E–176–2010/1–US–01).

Licensing Status: Available for licensing.

Licensing Contact: David A. Lambertson, PhD; 301–435–4632; *lambertsond@mail.nih.gov.*

Collaborative Research Opportunity: The National Cancer Institute, Laboratory of Molecular Biology, is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate, or commercialize this technology. Please contact John Hewes,

PhD, at 301–435–3121 or *hewesj@mail.nih.gov* for more information.

Drug Combination of DNA Topoisomerase I (TOP1) Inhibitors and Extracellular ATP Produces a Significant Increase in Beneficial Anti-Carcinoma Cytotoxicity

Description of Invention: DNA Topoisomerase inhibitors are a category of drugs used for cancer therapy. DNA topoisomerase 1 (TOP1) inhibitors, such as Camptothecin (CPT) and its structurally related analogues, bind to the TOP1 complex and prevent the religation of the single strand DNA molecules, ultimately leading to cell death. CPT and close analogues show anticancer activity in clinical trials treating ovarian, small-cell lung, and colorectal cancers, but also adverse drug reaction. By reducing the cytotoxic dose in the thousands of folds, the NIH scientists are able to target the tumor and reduce the cytotoxicity to normal cells. The instant invention discloses that the drug combination of DNA topoisomerase 1 (TOP1) inhibitors, such as the anti-cancer drug Camptothecin (CPT), and extracellular ATP produces a significant increase in beneficial anti-carcinoma cytotoxicity.

Applications and Market:

• This invention may provide a new combination of drug with extracellular ATP to target various cancers for treatment.

• Cancer is the second leading cause of death in the U.S. The National Cancer Institute estimate the overall annual costs for cancer in the U.S. at $107 billion; development of more effective therapies with less adverse drug reaction is always in high demand.

Development Status: Pre-clinical stage of development.

Inventors: Joseph Riss, Glenn Merlino, J. Carl Barrett (NCI).

Publications: Manuscript in preparation.

Patent Status: U.S. Provisional Application No. 61/350,660 filed 02 Jun 2010 (HHS Reference No. E–098–2010/0–US–01).

Licensing Status: Available for licensing.

Licensing Contact: Betty B. Tong, PhD; 301–594–6565; *tongb@mail.nih.gov.*

Novel Prognostic and Therapeutic Biomarker for Cancer and Inflammatory Diseases

Description of Invention: There remains a significant unmet need for diagnostics, prognostics, and therapeutics for conditions that involve inflammation and the formation of blood clots such as bleeding disorders, trauma, and diseases such as sepsis, cardiovascular disease, stroke, and cancer. The global market for such products is varied and competitive, and is forecast to be over $40 billion by 2010.

Researchers at the National Cancer Institute (NCI) have identified that levels of a novel soluble protein involved in the repair mechanism for damaged blood vessels correlate with outcome in sepsis and with the diagnosis of disseminated intravascular coagulation, a contributing factor to the morbidity and mortality associated with sepsis.

Further, the NCI researchers have demonstrated that a recombinant version of this novel protein facilitates the clotting of blood, suggesting a potentially significant therapeutic benefit for the treatment of bleeding disorders or trauma.

Applications:

• Diagnostic and prognostic biomarker for diseases that involve inflammation and blood clot formation (*i.e.,* sepsis, cardiovascular disease, stroke, cancer).

• Treatment of bleeding disorders or trauma.

• Treatment of cerebral bleeding associated with aneurism or stroke.

• Therapy for patients with low platelet counts.

• Therapy for women suffering from preeclampsia or thrombotic episodes.

Advantages:

• High specificity.

• Protein levels correlate with disease state/outcome.

• Administration of recombinant protein accelerates the formation of blood clots.

Development Status: Pre-clinical.

Inventors: Daniel McVicar *et al.* (NCI).

Relevant Publications:

1. Washington AV *et al.* TREM-like transcript-1 protects against inflammation-associated hemorrhage by facilitating platelet aggregation in mice and humans. J Clin Invest. 2009 Jun;119(6):1489–1501. [PubMed: 19436112].

2. Ford JW, McVicar DW. TREM and TREM-like receptors in inflammation and disease. Curr Opin Immunol. 2009 Feb;21(1):38–46. [PubMed: 19230638].

Patent Status:

• U.S. Provisional Application No. 61/177,242 filed 11 May 2009 (HHS Reference No. E–197–2009/0–US–01).

• PCT Application No. PCT/US10/34263 filed 10 May 2010 (HHS Reference No. E–197–2009/0–PCT–02).

Licensing Status: Available for licensing.

Licensing Contact: Patrick P. McCue, PhD; 301–435–5560; mccuepat@mail.nih.gov.

Treatment and Prevention of Inflammatory Bowel Disease (IBD) Using Mutant and Chimeric IL–13 Molecules

Description of Invention: Ulcerative colitis (UC) is a chronic inflammatory disease of the colorectum and affects approximately 400,000 people in the United States. The cause of UC is not known, although an abnormal immunological response to bacterial antigens in the gut microflora is thought to be involved. Present treatments for UC include anti-inflammatory therapy using aminosalicylates or corticosteroids, as well as immunomodulators and diet. However, 25–40% of ulcerative colitis patients must eventually have their colons removed due to massive bleeding, severe illness, rupture of the colon, risk of cancer or due to side effects of corticosteroids and novel treatments are still actively being sought. NIH scientists and their collaborators have used a mouse model of experimental colitis (oxazolone colitis, OC) to show that IL–13, a Th2 cytokine, is a significant pathologic factor in OC and that neutralizing IL–13 in these animals effectively prevents colitis.

OC is a colitis induced by intrarectal administration of a relatively low dose of the haptenating agent oxazolone subsequent to skin sensitization with oxazolone. A highly reproducible and chronic colonic inflammation is obtained that is histologically similar to human ulcerative colitis. Studies show that Natural Killer T (NKT) cells, rather than conventional CD4+T cells, mediate oxazolone colitis and are the source of IL–13 as well as being activated by CD1-expressing intestinal epithelial cells. Tissue removed from ulcerative colitis patients were also shown to contain increased numbers of nonclassical NKT cells that produce markedly increased amounts of IL–13 and that in keeping with epithelial damage being a key factor in UC, these NKT cells are cytotoxic for epithelial cells. Building on their previous work, scientists at NIAID and FDA have shown that an Il-13 chimeric fusion protein linked to an effector molecule was able to prevent colitis in a mouse model of ulcerative colitis.

Available for licensing are methods for treating or preventing the inflammatory response of IBD by inhibiting the binding of IL–13 to IL–13 receptors on NKT cells. Additionally, these mutant and chimeric Il-13 molecules are able to block the chronic

inflammatory response that results in fibrosis as seen in Crohn's disease. Preventing the inflammatory response of colitis by either modulating or blocking IL–13 and NKT cell activity continues to be an effective therapeutic approach in animal models of colitis with implications for the treatment of human ulcerative colitis and for the treatment of fibrosis associated with Crohn's disease.

Inventors: Warren Strober (NIAID), Ivan J. Fuss (NIAID), Peter Mannon (NIAID), Jan Preiss (NIAID), Raj Puri (FDA), Koji Kawakami (FDA), Stefan Fichtner-Feigl (NIAID), Atsushi Kitani (NIAID).

Related Publications:

1. F Heller, IJ Fuss, EW Nieuwenhuis, RS Blumberg, W Strober. Oxazolone colitis, a Th2 colitis model resembling ulcerative colitis, is mediated by IL–13-producing NK–T cells. Immunity 2002 Nov;17(5):629–628. [PubMed: 12433369].

2. IJ Fuss, F Heller, M Boirivant, F Leon, M Yoshida, S Fichtner-Feigl, Z Yang, M Exley, A Kitani, RS Blumberg, P Mannon, W Strober. Nonclassical CD1d-restricted NK T cells that produce IL–13 characterize an atypical Th2 response in ulcerative colitis. J Clin Invest. 2004 May 15;113(10):1490–1497. [PubMed: 15146247].

Patent Status: U.S. Patent Application No. 11/918,711 filed 14 Apr 2006 (HHS Reference No. E–003–2005/0–US–03) and related international filings.

Related Technologies:

- IL–13 modulators and inhibitors—U.S. Patent No. 7,666,411 issued 23 Feb 2010 (HHS Reference No. 131–2002/0–US–02), U.S. Patent Application No. 12/709,029 filed 19 Feb 2010 (HHS Reference No. E–131–2002/0–US–10), and related international filings.
- NF-kappa B decoy oligonucleotides—U.S. Patent Application No. 11/920,214 filed 09 Nov 2007 (HHS Reference No. E–108–2005/0–US–03).

Licensing Status: Available for licensing.

Licensing Contact: Betty B. Tong, Ph.D.; 301–594–6565; *tongb@mail.nih.gov*.

Dated: October 21, 2010.

Richard U. Rodriguez,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. 2010–27177 Filed 10–26–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Guidelines for Use of Stored Specimens and Access to Ancillary Data and Proposed Cost Schedule: Stored Biologic Specimens and Ancillary Data From the Collaborative Perinatal Project (CPP)

ACTION: Notice and request for comments.

SUMMARY: The Division of Epidemiology, Statistics and Prevention Research (hereafter, Division) of the *Eunice Kennedy Shriver* National Institute of Child Health and Human Development (NICHD) maintains an extensive repository of datasets from completed studies, biospecimens, and ancillary data. The Division intends to make datasets and biospecimens more widely available to the research community for use by qualified researchers and to establish procedures for access consistent with the National Institutes of Health (NIH) Data Sharing Policy. The Division has established an internal committee, the Biospecimen Repository Access and Data Sharing Committee (BRADSC), to oversee the repository access and data sharing program. *The purpose of this notice is to request comments on this program and present the initial proposed cost schedule.* After full consideration of comments submitted in response to this notice, the BRADSC will finalize proposal guidelines and procedures, publish the cost schedule to the Division Web site, and begin to accept proposals for use of the stored biologic samples and for access to ancillary data that may not be available electronically. The first specimens and ancillary data that will be made available under this program are those from the national Collaborative Perinatal Project (CPP).

The CPP is a large, prospective cohort study, conducted by the National Institute of Neurological Diseases and Stroke (NINDS) of the National Institutes of Health (NIH), which recruited and enrolled 48,197 women who contributed 54,390 pregnancies that were prospectively followed from 1959–1966 at twelve academic medical centers across the United States. Custody for disposition of the CPP serum specimens was transferred to the Division from the NINDS in 1993 and for the microfiche archives in 1999. However, under the Federal Privacy Act of 1974 the samples and archive still belong to NINDS. Since 1992, the specimens have had limited public availability through Division investigators. Going forward, the Biospecimen Repository Access and Data Sharing Committee (BRADSC) will oversee the repository access and data sharing program. Access to other Division resources will be announced on the Division Web site. The BRADSC reserves the right to amend the procedures and costs schedules as necessary to maintain the integrity of the program and to suit the conditions under which other specimens were collected. Announcements and current proposal guidelines will be available under the Research link at *http://despr.nichd.nih.gov,* and interested researchers should consult the Division Web site for resources available, the most recent guidelines for proposal submission and evaluation, and cost schedules. Procedures may vary depending on the age and nature of the samples and original institutional review board (IRB) approval, although the general outline of the procedures should remain the same. Cost schedules may vary depending on the nature and complexity of the request.

No funding is provided as part of this notice nor will any be available as part of the program either to support laboratory analyses or data management. Samples will only be provided to approved projects upon receipt of evidence of necessary IRB approval(s), funding and payment of repository costs and shipping. Approved projects that do not obtain funding will be canceled within one year of their approval date. A more complete description of this program follows. Comments or requests for clarification on all aspects of the program are welcome.

DATES:

- *Comment Receipt Date:* December 15, 2010.
- *Invitation to Submit Proposal:* Proposals can be submitted on an ongoing basis.
- *Scientific Review Dates:* Technical Panels for reviews will be assembled beginning on January 1, May 1, or September 1 of the calendar year so that proposals can be evaluated well in advance of Federal funding deadlines.
- *Anticipated Distribution of Samples:* Within one month of demonstrable proof of applicant IRB approval and receipt of payment to cover repository costs and shipping.

ADDRESSES: To send comments and to request information, *contact:* Dr. Mary L. Hediger, Division of Epidemiology, Statistics and Prevention Research, *Eunice Kennedy Shriver* National Institute of Child Health and Human Development, 6100 Executive Blvd,

Room 7B03, MSC 7510, Rockville, MD 20852, *Phone:* 301–435–6897, *E-mail: hedigerm@exchange.nih.gov.*

SUPPLEMENTARY INFORMATION:

The Collaborative Perinatal Project (CPP): The major stated aims of the CPP were to: (1) Determine the relationship between factors in the perinatal environment and the continuum of human reproductive failure, with particular reference to the central nervous system (CNS) for early (infancy and early childhood) and later (childhood) manifestations of deficits; (2) study the effect of the extra-uterine environment on fetal development (e.g., socio-economic factors, family structure); (3) determine the relationship of prematurity to factors in the perinatal environment and the continuum of human reproductive failure, with particular reference to the CNS; (4) study the clinico-pathological correlations in the continuum of human reproductive failure, with particular reference to the CNS; and (5) improve the classification, treatment and prevention of cerebral palsy. The Collaborative Perinatal Project (CPP) enrolled 48,197 women who contributed 54,390 pregnancies that were prospectively followed from 1959–1966 at twelve academic medical centers across the United States, including hospitals in Baltimore MD, Boston MA, Buffalo NY, Memphis TN, Minneapolis MN, New Orleans LA, New York NY (2 sites), Philadelphia PA, Providence RI, Portland OR, and Richmond VA. The women were recruited generally in the second trimester of pregnancy and followed through delivery. The children were followed periodically to seven or eight years of age. Data collection was concluded in 1974, and data were stored on computer tapes in "card image" format (80 columns/card).

A wide range of data was collected using standardized protocols and forms, including socio-demographic, obstetric, pediatric, infant neurological, and child psychological information. Electronic data files, forms, and documentation are available and accessible in the public domain. The CPP collected serum samples at recruitment, every eight weeks thereafter during pregnancy, and at the time of the delivery hospitalization. Cord blood was collected from approximately 60 percent of the infants, and some serum samples are available from women at six weeks postpartum. Residual serum and cord blood samples have been stored continuously in glass vials at −20 °C since collection, are inventoried, and are linkable to individual electronic records by the original CPP identification number. A microfiche archive is also stored and available, compiled by identification number, and containing CPP completed forms and records with ancillary information, original medical notes, and comments.

In 1983, electronic data files, forms, and documentation were compiled from the original tapes and manuals, documented, and written to other media. The data and documentation are currently available and accessible in the public domain (*e.g., http://www.nber.org/cpp/docs/*). In addition to the files available electronically, the CPP collected serum samples at recruitment, subsequently every eight weeks during pregnancy, and at the time of the delivery hospitalization. Cord blood was collected from approximately 60 percent of the infants, and some serum samples are available from women at six weeks postpartum. Residual serum and cord blood samples have been stored continuously in glass vials at −20 °C since collection, are inventoried, and are linkable to individual electronic records by the original CPP identification number. A microfiche archive, compiled by identification number containing CPP completed forms and records with ancillary information, original medical notes, and comments, is also stored and available.

There are CPP serum samples from at least 53,515 pregnancies from 46,424 women available for research proposals using CPP samples. There are approximately 32,130 samples of cord blood.

Clinical Significance: Because the CPP samples were collected before controlling guidelines were available, participants did not consent to future use. Therefore, only research projects that propose laboratory results or findings in the ancillary data that do *not* have immediate clinical significance to an individual will be deemed acceptable for the CPP. Applicants should address this clearly in the research proposal.

Clinical significance for laboratory studies is defined by the following criteria:

The findings are valid and done by a CLIA-certified laboratory; and

The findings may have significant immediate implications for the subjects' health concerns; and

A course of action to ameliorate, or treat the concerns is readily available.

Clinical significance for ancillary findings is defined:

The findings may have significant immediate implications for the subjects' or their family's health concerns; and

A course of action to ameliorate, or treat the concerns is readily available.

Proposals for Use of the Samples and Access to the Ancillary Data: All proposals for use of CPP samples and access to the ancillary data will be evaluated by an *ad hoc* Technical Panel for scientific merit. The BRADSC will generally rely on the investigators' approval of the proposal by their institutional review board (IRB) for use of the samples and access, although the BRADSC reserves the right in questionable cases to have the NICHD IRB review the proposal even if the investigators have already received approval by their IRB.

Evaluation Criteria: To determine if the biologic specimens (a limited resource) should be used in the proposed projects or if an applicant should be given access to the microfiche archives, an *ad hoc* Technical Panel, chosen and overseen by BRADSC and comprised of two content and one statistical reviewer, will evaluate the public health significance and scientific merit of each proposed research project. Applicants may be asked to suggest outside reviewers, but the final composition of the Technical Panel will be at the discretion of the BRADSC. Scientific merit will be judged as to the scientific, technical or medical significance of the research, the appropriateness and adequacy of the experimental approach, and the methodology proposed to reach the research goals. If the project involves biologic specimens, the Technical Panel will also consider the amount of sample requested and weigh the significance of the research against the amount of sample requested and that remaining. Investigators are encouraged to request the smallest amount of sample possible consistent with best scientific practices and the aims of their study. The proposal should outline how the results from the laboratory analysis or findings from the original forms will be used. The appropriateness of the CPP sample to address the goals of the proposal will be an important aspect of scientific merit. The Technical Panel will review the analysis plan and evaluate whether the proposal is an appropriate use of the CPP population and likely to be successful. The Technical Panel will also assure that the proposed project does not go beyond the specific stated goals of the proposal. Investigators are encouraged to review the CPP forms and documentation at: *http://despr.nichd.nih.gov* or *http://www.nber.org/cpp/docs/.* The Division Web site will also have posted

accessible copies of pertinent publications on the history of the CPP and scientific papers with notable findings.

Procedures for Proposals: All investigators (including NIH and NICHD investigators) must submit a proposal for use of CPP specimens. Proposals are limited to a maximum of ten (10) single-spaced typed pages, excluding figures and tables, using 12 cpi type density. The proposal should be comprehensive and tailored to the request and not simply be sections lifted from another Federal or foundation application. The cover of the proposal should include the name, address, and phone number and e-mail address of the Principal Investigator (PI) and the name of the institution where the laboratory analysis will be done if they are a component of the project. All proposals should be e-mailed to the address specified on the Web site. Proposals must include a cover page with the title of the proposal and the name, address, phone number and e-mail address of all investigators. The following criteria will be used for technical evaluation of proposals:

Proposals should include the following information:

(1) *Specific Aims:* List the broad objectives; describe concisely and realistically what the research is intended to accomplish, and state the specific hypotheses to be tested.

(2) *Background and Public Health Significance:* Describe the public health significance, scientific merit and practical utility of the assay or information. Briefly describe in one or two pages the background of the proposal, identifying how the project may also relate to previous (published) analyses of the CPP and gaps in knowledge that the project is intended to fill. State concisely the importance of the research in terms of the broad, long-term objectives and public health relevance including a discussion of how the results will affect public health policy or further scientific knowledge. The proposer should convey how the results will be used and the relationship of the results to the data already collected in the CPP. The applicant should include an analysis plan. Applicants are encouraged strongly to have a statistical consultant or someone knowledgeable about statistics be part of the investigative team or nominally review the plan before submission. The analyses ought to be consistent broadly with the CPP aims and the health status variables.

(3) *Research Design and Methods:* Describe the research design and the procedures to be used. Data and/or biospecimen requests should specify the exact variable(s) or sample name(s) as provided in the CPP documentation or give an expectation of findings in notes or other forms in the microfiche archive. If there is a laboratory component, a detailed description of laboratory methods including validity and reliability must be included with references. Because the samples were collected over forty years ago, applicants should consider how aging might have affected the samples. If no data are available on how aging might have affected the samples, a limited number of samples of the same historical age are available for pilot studies. Even if the proposal is meritorious, the BRADSC may expect, upon advice of the Technical Panel, that a pilot be completed before all specimens requested are released to the investigators.

The volume of specimen and number of samples requested must be specified. Adequate methods for handling and storage of samples must also be addressed. The laboratory must demonstrate expertise in the proposed laboratory test including the capability for handling the workload requested in the proposal. The proposal should also include a justification for determination of study sample size or a power calculation. If the researcher is requesting a regional or targeted sub-sample of specimens, a detailed description and justification must be given. The study design and analysis plan in the proposal will be evaluated to determine whether the project is feasible and can be performed using the CPP.

(4) *Clinical Significance or Results:* Since individual results cannot be provided, the clinical significance of the proposed laboratory test should be addressed. The proposal should include a discussion of the potential clinical significance of the results and whether there is definitive evidence that results of the test would provide grounds for medical intervention even given that many years have passed since the examination of the participant and collection of the sample. Any test with results that should be reported immediately to a participant is not appropriate for testing on the stored samples.

(5) *Qualifications:* Provide a brief description of the Principal Investigator and other investigators' expertise in the proposed area, including publications in this area within the last three years. A representative sample of earlier publications may be listed as long as this section does not exceed two pages.

(6) *Period of performance:* Specify the project period. Substantial progress must be made in the first year, and the project should be completed in two years. If additional time is needed for the research project a detailed justification with a timeline should be included. The investigators should address their ability to comply with this timeline or request and justify additional time for the project. Return of the specimens will be requested if progress is not made in the project at the end of the second year. Refund of payment for the specimens will not be returned in this situation. At the end of the project period, any unused samples must be returned to the Division Repository or discarded, according to the wishes of the BRADSC. Within six months to one year of the end of the project period, and consistent with NIH Data Sharing guidelines, the investigators will submit to the Division for access by the wider research community a complete and clean copy of the new data obtained, whether from laboratory analyses or the microfiche archives, coded and linkable to the main CPP database through the study ID, documentation, and a letter from the PI certifying the data.

(7) *Funding:* Include the source and status of the funding to perform the requested laboratory analysis should be included. Investigators will be responsible for the cost of processing and shipping the samples. The basis for the cost structure is in the last section of this notice. Reimbursement for the samples will be collected before the samples are released.

Submission of Proposals: Proposals can be submitted in MS Word or pdf format by e-mail to: *hedigerm@exchange.nih.gov.*

Summary of Evaluation Criteria: (1) Relevance of the study question to current research; (2) adequacy of the study design to address the question; (3) feasibility and appropriateness of the CPP for conducting the study; (4) if there is a laboratory component, appropriateness of the assay, including evidence that the analyte is stable under prolonged storage at -20 °C; and (5) experience of the investigators in conducting similar studies, including knowledge of the CPP.

Approved Proposals: Approved projects will be provided specimens upon receipt of a check to cover the cost of accessing, preparing, and shipping the specimens. Approved projects requesting access to the microfiche archives will be granted access once arrangements have been made with the Division. Approved and funded projects will be posted by title and abstract on the Division Web site once specimens have been shipped. *Note* that

biospecimens will be distributed blinded, that is, with an identifier that will only be linked to the study identification number upon completion of laboratory analyses, unless arrangements have been made for interim analyses beforehand.

Progress Reports: Brief progress reports must be submitted annually to judge progress.

Disposition of Results and Samples: No samples provided can be used for any purpose other than those specifically requested in the proposal and approved by the Technical Panel. No sample can be shared with others, including other investigators, unless specified in the proposal and so approved. Any unused samples must be either discarded or returned to the Division Repository, according to the wishes of the BRADSC upon completion of the approved project.

Proposed Cost Schedule for Providing CPP Specimens: A nominal processing fee of approximately $8.00–$16.00 per sample, plus express shipping costs is anticipated for each sample requested and received. Costs will be fully estimated at the time of proposal acceptance and will take into consideration time and materials for the collection, storage and processing of the specimens by the Division Repository along with the preparation of the accompanying data files. The material costs are for the recurring laboratory costs to dispense and prepare the samples during collection and the computer software needed for the preparation of the data files. Because size of the shipments and distance to laboratories may vary, shipping costs will be estimated at the time of proposal acceptance. Cost reimbursement structures negotiated and accepted as part of a final proposal acceptance will be honored for one year from the date of proposal acceptance.

Proposed Cost for Accessing CPP Microfiche Archives: There is no direct cost for accessing the CPP microfiche archives, although arrangements will have to be made for access to the building and is dependent upon the space available to accommodate a researcher.

As additional specimens and resources from Division projects are made available for public use, announcements will be made on the Division Web site without further announcement in the **Federal Register**. As a reminder, the BRADSC and Division reserve the right to amend the proposal guidelines and cost schedule as needed and in keeping with the nature and complexity of the applicants' request.

Dated: October 20, 2010.

Germaine M. Buck Louis,

Director and Senior Investigator, Division of Epidemiology, Statistics, and Prevention Research, Eunice Kennedy Shriver National Institute of Child Health and Human Development.

[FR Doc. 2010–27183 Filed 10–26–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Closed 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 Mental Health Special Emphasis Panel; NRSA Institutional Research Training (T32).

Date: November 17, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Melrose Hotel, 2430 Pennsylvania Ave., NW., Washington, DC 20037.

Contact Person: Aileen Schulte, PhD, Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd, Room 6140, MSC 9608, Bethesda, MD 20892–9608, 301–443–1225, *aschulte@mail.nih.gov.*

Name of Committee: National Institute of Mental Health Special Emphasis Panel; Novel NeuroAIDS Therapeutics.

Date: November 22, 2010.

Time: 12 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: David W Miller, PhD, Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6140, MSC 9608, Bethesda, MD 20892–9608, 301–443–9734, *millerda@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, National Institutes of Health, HHS)

Dated: October 20, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–27186 Filed 10–26–10; 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, Small Business: Skeletal Muscle and Exercise Physiology.

Date: November 10–11, 2010.

Time: 9 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting)

Contact Person: Richard Ingraham, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4116, MSC 7814, Bethesda, MD 20892, 301–496–8551, *ingrahamrh@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel, RFA Panel: Developmental Pharmacology.

Date: December 6–7, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting)

Contact Person: Janet M Larkin, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of

Health, 6701 Rockledge Drive, Room 1102, MSC 7840, Bethesda, MD 20892, 301–806–2765, *larkinja@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: October 21, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–27192 Filed 10–26–10; 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(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the Subcommittee for Planning the Annual Strategic Plan Updating Process of the Interagency Autism Coordinating Committee (IACC).

The purpose of the Subcommittee meeting is to plan the process for updating the IACC Strategic Plan for Autism Spectrum Disorder Research. The meeting will be open to the public and will also be accessible by webinar and conference call.

Name of Committee: Interagency Autism Coordinating Committee (IACC).

Type of meeting: Subcommittee for Planning the Annual Strategic Plan Updating Process.

Date: November 19, 2010.

Time: 8 a.m. to 11 a.m. Eastern Time.

Agenda: To discuss plans for updating the IACC Strategic Plan for ASD Research.

Place: The National Institute of Mental Health, The Neuroscience Center, 6001 Executive Boulevard, Conference Room 8120, Rockville, MD 20852.

Webinar Access: https://www2.gotomeeting.com/register/406821610.

Registration: http://www.acclaroresearch.com/oarc/11–19–10. Pre-registration is recommended to expedite check-in. Seating in the meeting room is limited to room capacity and on a first come, first served basis.

Conference Call: Dial: 888–848–6715. Access code: 5341736.

Contact Person: Ms. Lina Perez, Office of Autism Research Coordination, Office of the Director, National Institute of Mental Health, NIH, 6001 Executive Boulevard, NSC, Room 8185a, Rockville, MD 20852, Phone: (301) 443–6040, E-mail: *IACCPublicInquiries@mail.nih.gov.*

Please Note: The meeting will be open to the public and accessible via webinar and conference call. Members of the public who participate using the conference call phone number will be able to listen to the meeting but will not be heard. If you experience any technical problems with the conference call, please e-mail *IACCTechSupport@acclaroresearch.com.*

If you experience any technical problems with the Web presentation tool, please contact GoToWebinar at (800) 263–6317. To access the Web presentation tool on the Internet the following computer capabilities are required: (A) Internet Explorer 5.0 or later, Netscape Navigator 6.0 or later or Mozilla Firefox 1.0 or later; (B) Windows® 2000, XP Home, XP Pro, 2003 Server or Vista; (C) Stable 56k, cable modem, ISDN, DSL or better Internet connection; (D) Minimum of Pentium 400 with 256 MB of RAM (Recommended); (E) Java Virtual Machine enabled (Recommended).

Individuals who participate in person or by using these electronic services and who need special assistance, such as captioning of the conference call or other reasonable accommodations, should submit a request to the Contact Person listed on this notice at least 7 days prior to the meeting.

Schedule is subject to change.

Information about the IACC is available on the Web site: *http://www.iacc.hhs.gov.*

Dated: October 21, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–27190 Filed 10–26–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center on Minority Health and Health Disparities; 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 materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Center on Minority Health and Health Disparities Special Emphasis Panel; NCMHD Health Disparities Research on Minority and Underserved Population (R01).

Date: November 19, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Suite 800, Bethesda, MD 20892. (Virtual Meeting).

Contact Person: Maryline Laude-Sharp, PhD, Scientific Review Officer, National Institute on Minority Health and Health Disparities, 6707 Democracy Boulevard, Suite 800, Bethesda, MD 20892, (301) 451–9536, *mlaudesharp@mail.nih.gov.*

Dated: October 21, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–27188 Filed 10–26–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Director, National Institutes of Health; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the Scientific Management Review Board.

The NIH Reform Act of 2006 (Pub. L. 109–482) provides organizational authorities to HHS and NIH officials to: (1) Establish or abolish national research institutes; (2) reorganize the offices within the Office of the Director, NIH including adding, removing, or transferring the functions of such offices or establishing or terminating such offices; and (3) reorganize divisions, centers, or other administrative units within an NIH national research institute or national center including adding, removing, or transferring the functions of such units, or establishing or terminating such units. The purpose of the Scientific Management Review Board (also referred to as SMRB or Board) is to advise appropriate HHS and NIH officials on the use of these organizational authorities and identify the reasons underlying the recommendations.

The meeting will be open to the public.

Name of Committee: Scientific Management Review Board.

Date: November 10, 2010.

Time: 1 p.m. to 2 p.m.

Agenda: Presentation and discussion will focus on the most recent charge to the SMRB, which entails (1) identifying the attributes, activities, and functional capabilities of an effective translational medicine program for advancing therapeutics; and (2) broadly assessing, from a high-level view, the NIH landscape for extant programs, networks, and centers for inclusion in this network and

recommending their optimal organization. Time will be allotted on the agenda for public comment. To sign up for public comment, please submit your name and affiliation to the contact person listed below by November 9, 2010. Sign up will be restricted to one sign up per e-mail. In the event that time does not allow for all those interested to present oral comments, anyone may file written comments using the contact person address below.

Dial-In Information: The toll-free number to participate in this call is 1–800–779–1545. Indicate to the conference operator that your participant pass code is "NIH".

Place: National Institutes of Health, 6705 Rockledge Drive, Suite 750, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Lyric Jorgenson, Office of Science Policy, Office of the Director, NIH, National Institutes of Health, 6705 Rockledge Drive, Suite 750, Bethesda, MD 20892; *smrb@mail.nih.gov,* (301) 496–6837.

This meeting is being published less than 15 days prior to the meeting due to scheduling conflicts of the Members.

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.

The draft agenda, meeting materials, dial-in information, and other information about the SMRB, will be available at *http://smrb.od.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.14, Intramural Research Training Award; 93.22, Clinical Research Loan Repayment Program for Individuals from Disadvantaged Backgrounds; 93.232, Loan Repayment Program for Research Generally; 93.39, Academic Research Enhancement Award; 93.936, NIH Acquired Immunodeficiency Syndrome Research Loan Repayment Program; 93.187, Undergraduate Scholarship Program for Individuals from Disadvantaged Backgrounds, National Institutes of Health, HHS)

Dated: October 21, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–27187 Filed 10–26–10; 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; RFA Panel: Biology of Uterine Fibroids.

Date: November 3, 2010.

Time: 3 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call)

Contact Person: David Weinberg, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6170, MSC 7892, Bethesda, MD 20892, 301–435–1044, *David.Weinberg@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; Small Business: Muscle Rehabilitation.

Date: November 5, 2010.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Mayflower Park Hotel, 405 Olive Way, Seattle, WA 98101.

Contact Person: Jo Pelham, BA, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4102, MSC 7814, Bethesda, MD 20892, (301) 435–1786, *pelhamj@csr.nih.gov.*

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: October 20, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–27185 Filed 10–26–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2010–0042; OMB No. 1660–0089]

Agency Information Collection Activities: Submission for OMB Review; Comment Request; FEMA Mitigation Success Story Database

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice; 30-day notice and request for comments; revision of a currently approved information collection; OMB No. 1660–0089; FEMA Form 086–0–25, Mitigation Best Practice Submission Worksheet.

SUMMARY: The Federal Emergency Management Agency (FEMA) has submitted the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission describes the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort and resources used by respondents to respond) and cost, and the actual data collection instruments FEMA will use.

DATES: Comments must be submitted on or before November 26, 2010.

ADDRESSES: Submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the Desk Officer for the Department of Homeland Security, Federal Emergency Management Agency, and sent via electronic mail to *oira.submission@omb.eop.gov* or faxed to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Records Management Division, 1800 South Bell Street, Arlington, VA 20598–3005, facsimile number (202) 646–3347, or e-mail address *FEMA-Information-Collections-Management@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Collection of Information

Title: FEMA Mitigation Success Story Database.

Type of information collection: Revision of a currently approved information collection.

OMB Number: 1660–0089.

Form Titles and Numbers: FEMA Form 086–0–25, Mitigation Best Practice Submission Worksheet.

Abstract: FEMA uses the information provided through success stories to document and disseminate first-hand experiences of mitigation activities that result in benefits to individuals. By sharing information, communities and individuals can learn about available Federal programs to support the implementation of noteworthy local activities that lessen the chance of a catastrophic event causing damage or possibly loss of life.

Affected Public: Individuals or households; State, local or Tribal Government.

Estimated Number of Respondents: 50.

Frequency of Response: On occasion.

Estimated Hour Burden per Respondent: 5.5 (Informal Interview, 4 hours, and FEMA Form 086–0–25, 1.5 hours).

Estimated Total Annual Burden Hours: 87.5 hours.

Estimated Cost: There are no operation, maintenance, capital or start-up costs associated with this collection.

Lesia M. Banks,

Director, Records Management Division, Mission Support Bureau, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2010–27180 Filed 10–26–10; 8:45 am]

BILLING CODE 9110–11–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2010–0061]

Agency Information Collection Activities: Proposed Collection; Comment Request, OMB No. 1660–NEW; Logistics Capability Assessment Tool (LCAT)

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice; 60-day notice and request for comments; new information collection; OMB No. 1660–NEW; FEMA Form 008–0–1, LCAT Booklet.

SUMMARY: The Federal Emergency Management Agency, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a proposed new information collection. In accordance with the Paperwork Reduction Act of 1995, this Notice seeks comments concerning the Logistics Capability Assessment Tool.

DATES: Comments must be submitted on or before December 27, 2010.

ADDRESSES: To avoid duplicate submissions to the docket, please use only one of the following means to submit comments:

(1) *Online.* Submit comments at *http://www.regulations.gov* under Docket ID FEMA–2010–0061. Follow the instructions for submitting comments.

(2) *Mail.* Submit written comments to Office of Chief Counsel, Legislation, Regulations and Policy Division, DHS/FEMA, 500 C Street, SW., Room 835, Washington, DC 20472–3100.

(3) *Facsimile.* Submit comments to (703) 483–2999.

(4) *E-mail.* Submit comments to FEMA-POLICY@dhs.gov. Include Docket ID FEMA-2010–0061 in the subject line.

All submissions received must include the agency name and Docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Nicole Kelsey, Program Analyst, Logistics Management Directorate, Logistics Plans and Exercises Division, 202–212–7323 for additional information. You may contact the Records Management Division for copies of the proposed collection of information at facsimile number (202) 646–3347 or e-mail address: *FEMA-Information-Collections-Management@dhs.gov.*

SUPPLEMENTARY INFORMATION: The Logistics Capability Assessment Tool (LCAT) is tailored for use by States to evaluate their current disaster logistics readiness, identify areas for targeted improvement, and develop a roadmap to both mitigate weaknesses and further enhance strengths. The LCAT is authorized by sections 636 and 637 of the Post-Katrina Emergency Reform Act of 2006, Public Law 109–295.

Collection of Information

Title: Logistics Capability Assessment Tool (LCAT).

Type of Information Collection: New information collection.

OMB Number: 1660–NEW.

Form Titles and Numbers: FEMA Form 008–0–1, LCAT Booklet.

Abstract: The Logistics Capability Assessment Tool (LCAT) is a voluntary maturity model for States to self assess disaster logistics planning and response capabilities and identify areas of relative strength and weakness. The LCAT is facilitated through two-day collaborative sessions at States and is hosted by the State emergency management agency. FEMA provides State emergency management agencies with a detailed analysis report and roadmap for continuous improvement if the State decides to share the outcome.

Affected Public: State, local, or Tribal Government.

Estimated Total Annual Burden Hours: 123.3 hours.

TABLE A.12—ESTIMATED ANNUALIZED BURDEN HOURS AND COSTS

Type of respondent	Form name/ form number	Number of respondents	Number of responses per respondent	Total Number of responses	Avg. burden per response (in hours)	Total annual burden (in hours)	Avg. hourly wage rate*	Total annual respondent cost
State, Local or Tribal Government.	LCAT Briefing/No Form.	10	1	10	0.33 hour (20 minutes)	3.3	$33.59	$111.00

TABLE A.12—ESTIMATED ANNUALIZED BURDEN HOURS AND COSTS—Continued

Type of respondent	Form name/ form number	Number of respondents	Number of responses per respondent	Total Number of responses	Avg. burden per response (in hours)	Total annual burden (in hours)	Avg. hourly wage rate*	Total annual respondent cost
State, Local or Tribal Government.	State & local Self-Assessment and Instructions/ FEMA Form 008–0–1.	10	1	10	12 hours	120	33.59	4,030.80
Total	.....	10				123.3		4,141.80

Estimated Cost: There are no operation and maintenance, or capital and start-up costs associated with this collection of information.

Comments:

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) Evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Lesia M. Banks,

Director, Records Management Division, Mission Support Bureau, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2010–27182 Filed 10–26–10; 8:45 am]

BILLING CODE 9111–A9–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5300–FA–18]

Announcement of Funding Awards for the Community Development Technical Assistance Programs Fiscal Year 2009

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice of funding awards.

SUMMARY: In accordance with section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989, this announcement notifies the public of funding decisions made by the Department in a competition for funding under the Notice of Funding Availability (NOFA) for the Community Development Technical Assistance programs. This announcement contains the names of the awardees and amounts of the awards made available by HUD.

FOR FURTHER INFORMATION CONTACT: Holly A. Kelly, Acting Director, Technical Assistance Division, Office of Community Planning and Development, 451 Seventh Street, SW., Room 7218, Washington, DC 20410–7000; telephone (202) 402–6324 (this is not a toll-free number). Persons with speech or hearing impairments may access this telephone number via TTY by calling the toll-free Federal Information Relay Service during working hours at 800–877–8339. For general information on this and other HUD programs, call Community Connections at 1–800–998–9999 or visit the HUD Web site at *http://www.hud.gov.*

SUPPLEMENTARY INFORMATION: The Fiscal Year 2009 Community Development Technical Assistance program was designed to increase the effectiveness of HUD's HOME Investment Partnerships Program (HOME), CHDO (HOME) program. McKinney-Vento Homeless Assistance programs (Homeless), Housing Opportunities for Persons with AIDS (HOPWA) program, Community Development Block Grant (CDBG) program through the selection of technical assistance (TA) providers for these five programs.

The competition was announced in the SuperNOFA published December 29, 2008 (73 FR 79548). The CD–TA NOFA was extended on August 20, 2009 (74 FR 17685) and closed on October 21, 2009. The NOFA allowed for approximately $23.87 million for CD–TA awards. Applications were rated and selected for funding on the basis of selection criteria contained in the Notice. For the Fiscal Year 2009 competition, 49 awards totaling $22,963,914 were awarded to 32 distinct technical assistance providers nationwide.

In accordance with section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989 (103 Stat. 1987, 42 U.S.C. 3545), the Department is publishing the grantees and the amounts of the awards in Appendix A to this document.

Dated: October 15, 2010.

Jeanne Van Vlandren,

General Deputy Assistant Secretary (Acting) for Community Planning and Development.

Recipient	State	Amount
Chicago Rehabilitation Network	IL	$120,000.00
Community Frameworks	WA	20,000.00
Douglas-Cherokee Economic Authority, Inc	TN	100,000.00
Homeless and Housing Coalition of Kentucky, Inc	KY	150,000.00
Housing Action Illinois	IL	120,000.00

Recipient	State	Amount
Housing Assistance Council	DC	725,000.00
Local Initiatives Support Corporation	NY	330,000.00
Minnesota Housing Partnership	MN	200,000.00
New York State Rural Housing Coalition, Inc	NY	118,915.00
Ohio Capital Corporation for Housing	OH	150,000.00
Regional Housing and Community Development Alliance	MO	100,000.00
Rural Community Assistance Corporation	CA	650,000.00
State of Michigan	MI	200,000.00
The Affordable Housing Group of North Carolina, Inc	NC	99,999.00
Training & Development Associates, Inc	NC	443,914.00
Training & Development Associates, Inc	NC	2,756,086.00
Urban Strategies, Inc	WI	50,000.00
Vermont Housing and Conservation Board	VT	60,000.00
Total CHDO		6,393,914.00
Capital Access, Inc	PA	490,000.00
Dennison Associates, Inc	DC	430,000.00
Douglas-Cherokee Economic Authority, Inc	TN	30,000.00
ICF Incorporated, LLC	VA	2,250,000.00
ICF Incorporated, LLC	VA	874,790.00
Minnesota Housing Partnership	MN	60,000.00
Ohio Capital Corporation for Housing	OH	50,000.00
Rural Community Assistance Corporation	CA	185,000.00
State of Michigan	MI	110,000.00
Training & Development Associates, Inc	NC	660,210.00
Training & Development Associates, Inc	NC	1,110,000.00
Total HOME		6,250,000.00
Abt Associates Inc	MA	655,290.00
Cloudburst Consulting Group, Inc	MD	662,116.00
ICF Incorporated, LLC	VA	682,594.00
Total CDBG		2,000,000.00
Abt Associates Inc	MA	2,100,000.00
Cloudburst Consulting Group, Inc	MD	1,100,000.00
Dennison Associates, Inc	DC	72,000.00
HomeBase/The Center for Common Concerns	CA	82,000.00
Homeless Network of Texas, Inc	TX	32,000.00
ICF Incorporated, LLC	VA	198,000.00
ICF Incorporated, LLC	VA	1,800,000.00
Minnesota Housing Partnership	MN	31,000.00
National Center on Family Homelessness, Inc	MA	450,000.00
New Mexico Coalition to End Homelessness	NM	20,000.00
Paula Harper dba Community Solutions	SC	11,000.00
Technical Assistance Collaborative, Inc	MA	526,000.00
The Corporation for Supportive Housing	NY	91,000.00
Training & Development Associates, Inc	NC	322,000.00
Total Homeless		6,835,000.00
Building Changes	WA	200,000.00
Collaborative Solutions, Inc	AL	750,000.00
Victory Programs, Inc	MA	535,000.00
Total HOPWA		1,485,000.00
Grand Total		22,963,914.00

[FR Doc. 2010–27199 Filed 10–26–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R9–IA–2010–N237; 96200–1672–0002–R5; OMB Control Number 1018–0123]

Proposed Information Collection; International Conservation Grant Programs

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (U.S. Fish and Wildlife Service) will ask the Office of Management and Budget (OMB) to approve the information collection (IC) described below. As required by the Paperwork Reduction Act of 1995 and as part of our continuing efforts to reduce paperwork and respondent burden, we invite the general public and other Federal agencies to take this opportunity to comment on this IC. This IC is scheduled to expire on May 31, 2011. We may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: To ensure that we are able to consider your comments on this IC, we must receive them by December 27, 2010.

ADDRESSES: Send your comments on the IC to Hope Grey, Information Collection Clearance Officer, Fish and Wildlife Service, MS 222–ARLSQ, 4401 North Fairfax Drive, Arlington, VA 22203 (mail); or *hope_grey@fws.gov* (e-mail).

FOR FURTHER INFORMATION CONTACT: To request additional information about this IC, contact Hope Grey by mail or e-mail (*see* **ADDRESSES**) or by telephone at (703) 358–2482.

SUPPLEMENTARY INFORMATION:

I. Abstract

Some of the world's most treasured and exotic animals are dangerously close to extinction. Destruction of natural habitat, illegal poaching, and pet-trade smuggling are devastating populations of tigers, rhinos, marine turtles, great apes, elephants, and many other highly cherished species. The Division of International Conservation administers 11 competitive grant programs funded under the:

- African Elephant Conservation Act (16 U.S.C. 4201–4245).
- Asian Elephant Conservation Act of 1997 (16 U.S.C. 4261).
- Great Apes Conservation Act of 2000 (Pub. L. 106–411).
- Rhinoceros and Tiger Conservation Act of 1994 (16 U.S.C. 5306).
- Marine Turtle Conservation Act (Pub. L. 108–266).
- Endangered Species Act (16 U.S.C. 1531 *et seq.*) (Wildlife Without Borders Programs—Africa, Mexico, Latin America and the Caribbean, Russia, Critically Endangered Species, and Amphibians in Decline).

Currently, information that we collect for Critically Endangered Species grants is approved under OMB Control No. 1018–0142, which expires December 31, 2012. Information collection for Amphibians in Decline grants is approved under OMB Control No. 1018–0144, which expires September 30, 2013. We are proposing to consolidate all of our international conservation grants under OMB Control No. 1018–0123. If OMB approves this request, we will discontinue OMB Control Numbers 1018–0142 and 1018–0144.

Applicants submit proposals for funding in response to Notices of Funding Availability that we will publish on Grants.gov. We collect the following information:

- Cover page with basic project details (FWS Form 3–2338).
- Project summary and narrative.
- Letter of appropriate government endorsement.
- Brief curricula vitae for key project personnel.
- Complete Standard Forms 424 and 424b (nondomestic applicants do not submit the standard forms).

Proposals may also include, as appropriate, a copy of the organization's Negotiated Indirect Cost Rate Agreement (NIRCA) and any additional documentation supporting the proposed project.

The project summary and narrative are the basis for this information collection request. A panel of technical experts reviews each proposal to assess how well the project addresses the priorities identified by each program's authorizing legislation. As all of the on-the-ground projects are conducted outside the United States, the letter of appropriate government endorsement ensures that the proposed activities will not meet with local resistance or work in opposition to locally identified priorities and needs. Brief curricula vitae for key project personnel allow the review panel to assess the qualifications of project staff to effectively carry out the project goals and objectives. As all Federal entities must honor the indirect cost rates an organization has negotiated with its cognizant agency, we require all organizations with a NICRA to submit the agreement paperwork with their proposals to verify how their rate is applied in their proposed budget. Applicants may provide any additional documentation that they believe best supports their proposal.

All assistance awards under these grant programs have a maximum reporting requirement of a:

- Mid-term report (performance report and a financial status report) due within 30 days of the conclusion of the first half of the project period, and
- Final report (performance and financial status report and copies of all deliverables, photographic documentation of the project and products resulting from the project) due within 90 days of the end of the performance period.

II. Data

OMB Control Number: 1018–0123.

Title: International Conservation Grant Programs.

Service Form Number: 3–2338.

Type of Request: Revision of a currently approved collection.

Affected Public: Domestic and nondomestic individuals, nonprofit organizations, educational institutions, private sector entities, and State, local and Tribal governments.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Activity	Number of respondents	Number of responses	Completion time per response	Total annual burden hours
Applications	619	619	12 hours	7,428
Reports	146	292	30 hours	8,760
Totals	766	911	.....	16,188

III. Comments

We invite comments concerning this information collection on:

- Whether or not the collection of information is necessary, including whether or not the information will have practical utility;
- The accuracy of our estimate of the burden for this collection of information;
- Ways to enhance the quality, utility, and clarity of the information to be collected; and
- Ways to minimize the burden of the collection of information on respondents.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this IC. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: October 19, 2010.

Hope Grey,

Information Collection Clearance Officer, Fish and Wildlife Service.

[FR Doc. 2010–27205 Filed 10–26–10; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R9–ES–2010–N236; 92220–1113–0000–F5]

Information Collection Sent to the Office of Management and Budget (OMB) for Approval; OMB Control Number 1018–0094; Federal Fish and Wildlife Permit Applications and Reports—Native Endangered and Threatened Species

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (U.S. Fish and Wildlife Service) have sent an Information Collection Request (ICR) to OMB for review and approval. We summarize the ICR below and describe the nature of the collection and the estimated burden and cost. This ICR is scheduled to expire on November 30, 2010. We may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. However, under OMB regulations, we may continue to conduct or sponsor this information collection while it is pending at OMB.

DATES: You must submit comments on or before November 26, 2010.

ADDRESSES: Send your comments and suggestions on this information collection to the Desk Officer for the Department of the Interior at OMB–OIRA at (202) 395–5806 (fax) or *OIRA_DOCKET@OMB.eop.gov* (e-mail). Please provide a copy of your comments to Hope Grey, Information Collection Clearance Officer, U.S. Fish and Wildlife Service, MS 222–ARLSQ, 4401 North Fairfax Drive, Arlington, VA 22203 (mail), or *hope_grey@fws.gov* (e-mail).

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Hope Grey by mail or e-mail (*see* **ADDRESSES**) or by telephone at (703) 358–2482.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 1018–0094.

Title: Federal Fish and Wildlife Permit Applications and Reports—Native Endangered and Threatened Species, 50 CFR 13 and 17.

Service Form Number(s): 3–200–54, 3–200–55, and 3–200–56.

Type of Request: Extension of a currently approved collection.

Affected Public: Individuals/households, businesses, State and local agencies, private organizations, and scientific and research institutions.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion for application forms and notifications; annually for reports.

Estimated Annual Nonhour Burden: $55,000 for fees associated with permit applications.

Activity	Number of respondents	Number of responses	Completion time per response	Total annual burden hours
3–200–54—permit application	11	11	3 hours	33
3–200–54—annual report	64	64	8 hours	512
3–200–54—notifications (incidental take and change in landowner).	2	2	1 hour	2
2–200–55—permit application	579	579	4 hours	2,316
3–200–55—annual report	1,034	1,034	8 hours	8,272
3–200–55—notification (escape of living wildlife)	1	1	1 hour	1
3–200–56—permit application	60	60	3 hours	180
3–200–56—annual report	748	748	10 hours	7,480
Totals	2,499	2,499		18,796

Abstract: Our Endangered Species Program uses information that we collect on permit applications to determine the eligibility of applicants for permits requested in accordance with the criteria in various Federal wildlife conservation laws, including:

- Endangered Species Act (16 U.S.C. 1531 *et seq.*).
- Migratory Bird Treaty Act (16 U.S.C. 703 *et seq.*).
- Lacey Act (16 U.S.C. 3371 *et seq.*).
- Bald and Golden Eagle Protection Act (16 U.S.C. 668).
- Marine Mammal Protection Act (16 U.S.C. 1374).

Service regulations implementing these statutes and treaties are in Chapter I, Subchapter B of Title 50 of the Code of Federal Regulations (CFR). These regulations stipulate general and specific requirements that when met allow us to issue permits to authorize activities that are otherwise prohibited. This IC includes the following permit application forms and the reporting requirements for each permit:

(1) FWS Form 3–200–54—Enhancement of Survival Permits Associated with Safe Harbor Agreements and Candidate Conservation Agreements with Assurances.

(2) FWS Form 3–200–55—Permits for Scientific Purposes, Enhancement of Propagation or Survival (*i.e.,* Recovery) and Interstate Commerce.

(3) FWS Form 3–200–56—Incidental Take Permits Associated with a Habitat Conservation Plan.

Comments: On March 10, 2010, we published in the **Federal Register** (75 FR 11192) a notice of our intent to request that OMB renew this ICR. In that notice, we solicited comments for 60 days, ending on May 10, 2010. We did not receive any comments.

We again invite comments concerning this information collection on:

- Whether or not the collection of information is necessary, including whether or not the information will have practical utility;
- The accuracy of our estimate of the burden for this collection of information;
- Ways to enhance the quality, utility, and clarity of the information to be collected; and
- Ways to minimize the burden of the collection of information on respondents.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask OMB in your comment to withhold your personal identifying information from public review, we cannot guarantee that it will be done.

Dated: October 19, 2010.

Hope Grey,

Information Collection Clearance Officer, Fish and Wildlife Service.

[FR Doc. 2010–27202 Filed 10–26–10; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

National Park Service

[OMB Control Number 1024–0245]

Information Collection Sent to the Office of Management and Budget (OMB) for Approval; National Park Police Personal History Statement

AGENCY: National Park Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (National Park Service) have sent an Information Collection Request (ICR) to OMB for review and approval. We summarize the ICR below and describe the nature of the collection and the estimated burden and cost. This ICR is scheduled to expire on November 30, 2010. We may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. However, under OMB regulations, we may continue to conduct or sponsor this information collection while it is pending at OMB.

DATES: You must submit comments on or before November 26, 2010.

ADDRESSES: Send your comments and suggestions on this information collection to the Desk Officer for the Department of the Interior, Office of Information and Regulatory Affairs, OMB, at (202) 395–5806 (fax) or *OIRA_DOCKET@OMB.eop.gov* (e-mail). Please provide a copy of your comments to Lieutenant Steven L. Booker, Assistant Commander, Human Resources Office, United States Park Police, 1100 Ohio Drive, SW., Washington, DC 20024 (mail); via fax at (202) 619–7090; or via e-mail at *Steve_Booker@nps.gov.*

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Lieutenant Booker by mail, fax, or e-mail (*see* **ADDRESSES**) or by telephone at (202) 619–7388.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 1024–0245.

Title: United States Park Police Personal History Statement.

Form Number: USPP Form 1.

Type of Request: Revision of a current approved collection.

Description of Respondents: Individuals seeking employment as a United States Park Police Officer.

Respondent's Obligation: Required to obtain a benefit.

Frequency of Collection: Once per respondent.

Estimated Number of Respondents: 1,000.

Estimated Number of Responses: 1,000.

Completion Time per Response: 8 hours.

Estimated Annual Burden Hours: 8,000.

Estimated Annual Nonhour Burden Cost: $10,900 associated with printing costs and notarization fees.

Abstract: The United States Park Police (USPP) have jurisdiction in all National Park Service areas and certain other Federal and State lands. The USPP are highly trained and professional police officers who prevent and detect criminal activity; conduct investigations; apprehend individuals suspected of committing offenses against Federal, State and local laws; provide protection to the President of the United States and visiting dignitaries; and provide protective services to some of the most recognizable monuments and memorials in the world.

Applicants for USPP officer positions must complete and pass a competitive written examination, an oral interview, a medical examination and psychological evaluation, and a battery of physical fitness and agility tests. As part of this application process, we use USPP Form 1 (United States Park Police Personal History Statement) to collect detailed personal history information from applicants. We use this information as a basis for an investigation to determine suitable applicants for USPP positions.

Comments: On May 17, 2010, we published in the **Federal Register** (75 FR 27574) a notice of our intent to request that OMB renew this information collection. In that notice, we solicited comments for 60 days, ending on July 16, 2010. We did not receive any comments in response to that notice.

We again invite comments concerning this information collection on:

- Whether or not the collection of information is necessary, including whether or not the information will have practical utility;
- The accuracy of our estimate of the burden for this collection of information;
- Ways to enhance the quality, utility, and clarity of the information to be collected; and
- Ways to minimize the burden of the collection of information on respondents.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask OMB in your comment to withhold your personal identifying information from public review, we cannot guarantee that it will be done.

Dated: October 22, 2010.

Pocahontas Simmons,

NPS, Information Collection Clearance Officer.

[FR Doc. 2010–27213 Filed 10–26–10; 8:45 am]

BILLING CODE 4312–53–P

DEPARMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R5–ES–2010–N124; 50120–1113–0000–F4]

Endangered and Threatened Wildlife and Plants: New Hampshire Fish and Game Department, Application for Enhancement of Survival Permit, New England Cottontail, Hillsborough, Rockingham, Merrimack, Cheshire, and Strafford Counties, NH

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability and receipt of application; request for comments.

SUMMARY: The New Hampshire Fish and Game Department (NHFGD) has applied to the U.S. Fish and Wildlife Service (Service) for an Enhancement of Survival Permit under the Endangered Species Act of 1973 (ESA), as amended. The requested permit would authorize take of the New England cottontail (*Sylvilagus transitionalis;* hereafter, NEC) resulting from certain habitat improvement and land use activities should the species be listed as endangered or threatened in the future. The permit application includes a proposed Candidate Conservation Agreement with Assurances (CCAA) between the NHFGD and the Service. In accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA), we have prepared a draft categorical exclusion of the impacts of the requested permit. We are accepting comments on the permit application, proposed CCAA, and draft NEPA document.

DATES: Written comments on the permit application, draft CCAA, and draft NEPA document must be received on or before November 26, 2010.

ADDRESSES: Address any written comments concerning this notice to Anthony Tur, New England Field Office, U.S. Fish and Wildlife Service, 70 Commercial Street, Suite 300, Concord, NH 03301; alternatively, fax written comments to 603–224–0104, or electronically mail comments to *Anthony_Tur@fws.gov.*

FOR FURTHER INFORMATION CONTACT: Anthony Tur, at the New England Field Office (*see* **ADDRESSES** above), 603–223–2541; facsimile 603–223–0104, or *Anthony_Tur@fws.gov.* If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Document Availability

Copies of the permit application, proposed CCAA, and draft NEPA document are available for public inspection, by appointment, at the New England Field Office (*see* **ADDRESSES**), or you may view them on the Internet at *http://www.fws.gov/newengland/.* Copies of these documents can also be obtained by contacting the office and personnel listed in the **ADDRESSES** section.

We furnish this notice to provide the public, other State and Federal agencies, and interested Tribes an opportunity to review and comment on the permit application, proposed CCAA, and draft NEPA document. We specifically request information, views, and opinions from the public on the proposed Federal action of issuing a permit. Further, we solicit information regarding the adequacy of the permit application, including the proposed CCAA, as measured against our permit issuance criteria found in 50 CFR 17.22(d) and 17.32(d).

Public Availability of Comments

Before including your address, telephone number, electronic mail address, or other personal identifying information in your comment, be advised that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold from public review your personal identifying information, we cannot guarantee that we will be able to do so.

Background

Permits for enhancement of survival through CCAAs encourage non-Federal property owners to implement conservation measures for species that are, or are likely to become, candidates for Federal listing as endangered or threatened by assuring property owners they will not be subjected to increased property use restrictions if the covered species becomes listed in the future. Application requirements and issuance criteria for permits for enhancement of survival through CCAAs are in the Code of Regulations (CFR) at 50 CFR 17.22(d) and 17.32(d). See also our policy on CCAAs (64 FR 32726; June 17, 1999).

The CCAA that is the subject of this notice is a programmatic agreement between the Service and the NHFGD to further the conservation of the NEC. Under the CCAA, the NHFGD would establish a program in which individual property owners can enroll. To enroll in the program, a property owner would enter into a cooperative agreement with the NHFGD that contains a site-specific management plan for the enrolled lands, and the NHFGD would then issue the property owner a Certificate of Inclusion. The site-specific management plan will specify conservation measures to address known threats to the NEC which may include, but are not limited to, cutting vegetation to promote establishment of shrubland habitat, maintaining existing shrubland habitat, planting seeds and seedlings, controlling invasive plants species, removing non-native eastern cottontails, and translocating NEC to newly created habitats. The plan will also specify measures to minimize the incidental take of NEC that might occur as a result of implementing the conservation measures or conducting other covered activities. The Certificate of Inclusion issued to the property owner will authorize this incidental take of the NEC if the species becomes listed under the ESA in the future.

The NHFGD seeks to enroll in the program 3,000 to 5,000 acres of private and State-owned lands for NEC habitat management in Hillsborough, Rockingham, Merrimack, Cheshire, and Strafford Counties in southern New Hampshire. Lands targeted for NEC habitat management are generally those for which the current land use maintains or is capable of maintaining suitable NEC habitat with minimal take of NECs. Site potential for enrolled lands will be evaluated through a Habitat Suitability Index. Because resources for implementing conservation measures on enrolled lands are limited, sites with the highest potential value will be prioritized for enrollment based on proximity to existing occupied sites, along with other habitat parameters. Also eligible for enrollment are those lands under the same ownership that are adjacent to lands being managed for the benefit of NEC (hereafter referred to as "adjacent lands"). These adjacent lands include areas where ongoing and future activities (*e.g.,* hay production and timber harvesting) may result in inadvertent take of NEC. Although the amount of adjacent acreage that a property owner will enroll under this CCAA will depend on the circumstances specific to the property and property owner, we estimate that the typical property owner will enroll an area of adjacent lands about equal to twice the area of the lands managed for NEC. Therefore, about 10,000 acres of adjacent lands are associated with the 5,000 acres targeted for NEC habitat management. If we were to reach our target of 5,000 acres managed for NEC

under this CCAA, then we estimate a total of about 15,000 acres would be enrolled under this CCAA.

As required by NEPA, we evaluated the effects to the environment that would result from issuance of the requested permit, and we do not foresee any significant effects. Therefore, we are proposing to categorically exclude this action from further analysis under NEPA. Entering into a cooperative agreement is strictly voluntary for property owners, and the activities to be covered under the permit are generally activities already occurring on these properties.

We will evaluate the permit application, associated documents, and comments we receive to determine whether the permit application meets the requirements of the ESA, NEPA, and implementing regulations. If we determine that all requirements are met, we will sign the proposed CCAA and issue a permit under section 10(a)(1)(A) of the ESA to the NHFGD for take of NEC. We will not make our final decision until after the end of the 30-day public comment period, and we will fully consider all comments we receive during the public comment period.

Dated: June 18, 2010.

Sherry W. Morgan,

Acting Regional Director, Region 5, U.S. Fish and Wildlife Service, Hadley, Massachusetts.

[FR Doc. 2010–27001 Filed 10–26–10; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–ES–2010–N231; 80221–1113–0000–F5]

Endangered Species Recovery Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of permit applications; request for comment.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications to conduct certain activities with endangered species. With some exceptions, the Endangered Species Act (Act) prohibits activities with endangered and threatened species unless a Federal permit allows such activity. The Act also requires that we invite public comment before issuing these permits.

DATES: Comments on these permit applications must be received on or before November 26, 2010.

ADDRESSES: Written data or comments should be submitted to the U.S. Fish and Wildlife Service, Endangered Species Program Manager, Region 8, 2800 Cottage Way, Room W–2606, Sacramento, CA 95825 (telephone: 916–414–6464; fax: 916–414–6486). Please refer to the respective permit number for each application when submitting comments.

FOR FURTHER INFORMATION CONTACT: Daniel Marquez, Fish and Wildlife Biologist; see **ADDRESSES** (telephone: 760–431–9440; fax: 760–431–9624).

SUPPLEMENTARY INFORMATION: The following applicants have applied for scientific research permits to conduct certain activities with endangered species under section 10(a)(1)(A) of the Act (16 U.S.C. 1531 *et seq.*). We seek review and comment from local, State, and Federal agencies and the public on the following permit requests. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Permit No. TE–20186A

Applicant: Garret R. Huffman, Phoenix, Arizona.

The applicant requests a permit to take (survey by pursuit) the Quino checkerspot butterfly (*Euphydryas editha quino*) in conjunction with surveys throughout the range of the species in California for the purpose of enhancing its survival.

Permit No. TE–006112

Applicant: Gretchen E. Flohr, Los Altos Hills, California.

The applicant requests an amendment to an existing permit (February 1, 1999, 64 FR 4888) to take (biological samples) the California tiger salamander (*Ambystoma californiense*) in conjunction with disease research throughout the range of the species in California for the purpose of enhancing its survival.

Permit No. TE–797315

Applicant: Dr. Michael L. Morrison, College Station, Texas.

The applicant requests an amendment to an existing permit (January 13, 2000, 65 FR 2188) to take (survey, trap, capture, handle, mark, and release) the salt marsh harvest mouse (*Reithrodontomys raviventris*) in conjunction with presence/absence surveys, population/habitat studies, relocation, and research throughout the range of the species in California for the purpose of enhancing its survival.

Permit No. TE–24281A

Applicant: Todd A. Hoggan, Idyllwild, California.

The applicant requests a permit to take (harass by survey and monitor nests) the southwestern willow flycatcher (*Empidonax traillii extimus*), least Bell's vireo (*Vireo bellii pusillus*), and Yuma clapper rail (*Rallus longirostris yumanensis*) in conjunction with surveys and population monitoring activities throughout the range of the species in California and Nevada for the purpose of enhancing their survival.

Permit No. TE–24603A

Applicant: Karen J. Carter, Running Springs, California.

The applicant requests a permit to take (capture, handle, and release) the San Bernardino kangaroo rat (*Dipodomys merriami parvus*) and take (harass by survey) the Yuma clapper rail (*Rallus longirostris yumanensis*) and southwestern willow flycatcher (*Empidonax traillii extimus*) in conjunction with surveys and population monitoring activities throughout the range of the species in California and Nevada for the purpose of enhancing their survival.

Permit No. TE–24582A

Applicant: Russell C. Croel, Folsom, California.

The applicant requests a permit to take (capture, collect, and kill) the vernal pool tadpole shrimp (*Lepidurus packardi*), the conservancy fairy shrimp (*Branchinecta conservatio*), and the longhorn fairy shrimp (*Branchinecta longiantenna*) in conjunction with surveys and research activities in Alameda, Butte, Colusa, Contra Costa, Fresno, Glenn, Kings, Merced, Placer, Sacramento, San Joaquin, Shasta, Solano, Stanislaus, Sutter, Tehama, Tulare, Yolo, and Yuba Counties, in California for the purpose of enhancing their survival.

Permit No. TE–007907

Applicant: United States Geological Survey, Klamath Falls, Oregon.

The applicant requests an amendment to an existing permit (May 3, 2010, 84 FR 23287) to take (capture, mark, collect, transport, and release) the Lost River sucker (*Deltistes luxatus*) and the shortnose sucker (*Chasmistes brevirostrum*) in conjunction with surveys, research, population

monitoring and life history studies throughout the range of each species in California and Oregon, for the purpose of enhancing their survival.

Permit No. TE–025732

Applicant: Samuel S. Sweet, Santa Barbara, California.

The applicant requests an amendment to an existing permit (October 4, 2001, 66 FR 50671) to take (capture, handle, measure, translocate, temporarily confine and release) the arroyo toad (*Bufo californicus*) in conjunction with surveys, research, population monitoring and life history studies in Los Angeles, Santa Barbara, San Luis Obispo and Ventura, in California and Oregon, for the purpose of enhancing its survival.

Permit No. TE–122026

Applicant: Tracy Y. Bailey, Santa Barbara, California.

The applicant requests an amendment to an existing permit (July 24, 2006, 71 FR 41832) to take (capture, handle, release) the Stephens'= kangaroo rat (*Dipodomys stephensi*), the San Bernardino kangaroo rat (*Dipodomys merriami parvus*), and the Morro Bay kangaroo rat (*Dipodomys heermanni morroensis*) in conjunction with surveys, population monitoring, and life history studies throughout the range of each species in California, for the purpose of enhancing their survival.

Permit No. TE–24653A

Applicant: University of California, Berkeley, California.

The applicant requests a permit to take (capture, collect, and kill) the vernal pool tadpole shrimp (*Lepidurus packardi*) and the conservancy fairy shrimp (*Branchinecta conservatio*) in conjunction with soil extraction and soil analysis research in Merced County, California for the purpose of enhancing their survival.

We invite public review and comment on each of these recovery permit applications. Comments and materials we receive will be available for public inspection, by appointment, during normal business hours at the address listed in the **ADDRESSES** section of this notice.

Michael M. Long,

Acting Regional Director, Region 8, Sacramento, California.

[FR Doc. 2010–27215 Filed 10–26–10; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice supplements the list of "Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs," published in the **Federal Register** on October 1, 2010, and announces that, as of October 1, 2010, the Shinnecock Indian Nation is an Indian entity recognized and eligible to receive services from the Bureau of Indian Affairs (BIA).

FOR FURTHER INFORMATION CONTACT: Elizabeth Colliflower, Bureau of Indian Affairs, Division of Tribal Government Services, Mail Stop 4513–MIB, 1849 C Street, NW., Washington, DC 20240. Telephone number: (202) 513–7641.

SUPPLEMENTARY INFORMATION: This notice supplements the list of Indian entities recognized and eligible to receive services from the BIA dated September 22, 2010, and published in the **Federal Register** on October 1, 2010, pursuant to Section 104 of the Act of November 2, 1994 (Pub. L. 103–454; 108 Stat. 4791, 4792), and in exercise of authority delegated to the Assistant Secretary—Indian Affairs under 25 U.S.C. 2 and 9, 43 U.S.C. 1457, and 209 DM 8. As of October 1, 2010, the Shinnecock Indian Nation, New York, is an Indian entity recognized and eligible to receive services from the BIA. This addition to the list of Indian entities results from the October 1, 2010, Interior Board of Indian Appeals order dismissing requests for reconsideration in docket numbers IBIA 10–112 and 10–116, *In Re Federal Acknowledgment of the Shinnecock Indian Nation.*

Dated: October 19, 2010.

Paul Tsosie,

Chief of Staff to the Assistant Secretary—Indian Affairs.

[FR Doc. 2010–27138 Filed 10–26–10; 8:45 am]

BILLING CODE 4310–4J–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLORV00000–L10200000.DD0000; HAG 11–0042]

Notice of Public Meeting, National Historic Oregon Trail Interpretive Center Advisory Board

AGENCY: Bureau of Land Management, Interior.

ACTION: Meeting Notice for the National Historic Oregon Trail Interpretive Center Advisory Board.

SUMMARY: Pursuant to the Federal Land Policy and Management Act and the Federal Advisory Committee Act, the U.S. Department of the Interior, Bureau of Land Management (BLM) National Historic Oregon Trail Interpretive Center (NHOTIC) Advisory Board will meet as indicated below:

DATES: The meeting will begin at 1 p.m. (Pacific Time) on November 29, 2010.

ADDRESSES: The meeting will take place at the National Historic Oregon Trail Interpretive Center, 22267 Highway 86, Baker City, Oregon.

FOR FURTHER INFORMATION CONTACT: Mark Wilkening, Public Affairs Officer, BLM Vale District Office, 100 Oregon Street, Vale, Oregon 97918, (541) 473–6218, or e-mail *mark_wilkening@blm.gov.*

SUPPLEMENTARY INFORMATION: At the NHOTIC Advisory Board meeting, we will welcome members and interested public, discuss NHOTIC funding for Fiscal Year 2011, provide an update on the Boardman to Hemmingway transmission right-of-way application, discuss the benefits/options for continuing the NHOTIC Advisory Board, get an update from the NHOTIC Manager, and consider other matters that may reasonably come before the NHOTIC Advisory Board. The meeting will take place from 1 p.m.to 4:30 p.m. (Pacific Time). The public is welcome to attend all portions of the meeting and may make oral comments to the NHOTIC Advisory Board at 3:45 p.m. on November 29, 2010. Those who verbally address the NHOTIC Advisory Board are asked to provide a *written* statement of their comments or presentation. Unless otherwise approved by the NHOTIC chair, the public comment period will last no longer than 15 minutes, and each speaker may address the NHOTIC Advisory Board for a maximum of five minutes. If reasonable accommodation is required, please contact Mark Wilkening, Public Affairs Officer, at the BLM Vale District Office at (541) 473–6218 as soon as possible. For a copy of

the information to be distributed to the NHOTIC Advisory Board members, please submit a written request to the BLM Vale District Office 10 days prior to the meeting.

Dated: October 20, 2010.

Donald N. Gonzalez,

District Manager.

[FR Doc. 2010–27155 Filed 10–26–10; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Public Meeting and Request for Comments

AGENCY: National Park Service, Interior.

ACTION: Notice/Request for Public Meeting and Public Comments—The National Christmas Tree Lighting and the subsequent 23 day event.

SUMMARY: The National Park Service is seeking public comments and suggestions on the planning of the 2010 National Christmas Tree Lighting and the subsequent 23 day event.

DATES: The meeting will be held on November 12, 2010. Written comments will be accepted until November 12, 2010.

ADDRESSES: The meeting will be held at 9 a.m. on November 12, 2010, in Room 234 of the National Capital Region Headquarters Building, at 1100 Ohio Drive, SW., Washington, DC (East Potomac Park). Written comments may be sent to the Chief of Interpretation and Education, White House Visitor Center, 1100 Ohio Drive, SW., Washington, DC 20242. Due to delays in mail delivery, it is recommended that comments be provided by telefax at 202–208–1643 or by e-mail to *Petert_Lonsway@nps.gov.* Comments may also be delivered by messenger to the White House Visitor Center at 1450 Pennsylvania Avenue, NW., in Washington, DC.

FOR FURTHER INFORMATION CONTACT: Peter Lonsway at the White House Visitor Center weekdays between 9 a.m. and 4 p.m. at (202) 208–1631.

SUPPLEMENTARY INFORMATION: The National Park Service is seeking public comments and suggestions on the planning of the 2010 National Christmas Tree Lighting and the subsequent 23 day event, which opens on December 9, 2010, on the Ellipse (President's Park), south of the White House. In order to facilitate this process the National Park Service will hold a meeting at 9 a.m. on November 12, 2010, in Room 234 of the National Capital Region Headquarters Building, at 1100 Ohio Drive, SW., Washington, DC (East Potomac Park). Persons who would like to comment at the meeting should notify the National Park Service by November 5, 2010, by calling the White House Visitor Center weekdays between 9 a.m. and 4 p.m. at (202) 208–1631.

In addition public comments and suggestions on the planning of the 2010 National Christmas Tree Lighting and the subsequent 23 day event may be submitted in writing. Written comments may be sent to the Chief of Interpretation and Education, White House Visitor Center 1100 Ohio Drive, SW., Washington, DC 20242, and will be accepted until November 12, 2010. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, be advised that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask in your comment to withhold from public review your personal identifying information, we cannot guarantee that we will be able to do so.

Dated: October 20, 2010.

John Stanwich,

Deputy National Park Service Liaison to the White House.

[FR Doc. 2010–27210 Filed 10–26–10; 8:45 am]

BILLING CODE 4312–54–P

DEPARTMENT OF THE INTERIOR

National Park Service

Federal Land Managers' Air Quality Related Values Work Group (FLAG)

AGENCY: National Park Service, Interior.

ACTION: Notice of availability of final report.

SUMMARY: On July 8, 2008 (FR39039), the National Park Service, in cooperation with the U.S. Fish and Wildlife Service and the U.S. Department of Agriculture Forest Service, announced the availability of, and solicited comments on, the draft *FLAG Phase I Report—REVISED.* The purpose of this notice is to announce the availability of the final revised FLAG report, and the accompanying *Response to Public Comments* document.

The *F*ederal *L*and Managers' *A*ir Quality Related Values Work *G*roup (FLAG) was formed (1) to develop a more consistent and objective approach for the Federal Land Managers (FLMs), *i.e.,* National Park Service, U.S. Fish and Wildlife Service, and U.S. Department of Agriculture Forest Service (the Agencies), to evaluate air pollution effects on their air quality related values (AQRVs); and (2) to provide State permitting authorities and potential permit applicants consistency on how to assess the impacts of new and existing sources on AQRVs. The FLAG effort focuses on the effects of the air pollutants that could affect the health and status of resources in areas managed by the three agencies, primarily such pollutants as ozone, particulate matter, nitrogen dioxide, sulfur dioxide, nitrates, and sulfates. FLAG formed subgroups that concentrated on four issues: (1) Terrestrial effects of ozone; (2) aquatic and terrestrial effects of wet and dry pollutant deposition; (3) visibility; and (4) process and policy issues. In December 2000, after undergoing a public review and comment process that included a 90-day public comment period announced in the **Federal Register** and a public meeting, the FLMs published a final Phase I report (FLAG 2000), along with an accompanying "Response to Public Comments" document.

FLAG 2000 has been a useful tool to the FLMs, State permitting authorities, and permit applicants. It was intended to be a working document that would be revised as necessary as the FLMs learn more about how to better assess the health and status of AQRVs. Based on knowledge gained and regulatory developments since FLAG 2000, the FLMs believe certain revisions to FLAG 2000 are now appropriate. The final revised report reflects those changes.

During the 60-day public comment period on the draft report, the Agencies received 22 comment letters from various constituencies (*e.g.,* State air regulatory agencies, concerned citizens, environmental groups, industry representatives, Tribal representatives). These commenters raised specific concerns, and many supported the proposed revisions in general and thought that the changes were warranted and helpful. The Agencies considered all comments received and revised the draft FLAG report accordingly. The Agencies also prepared an accompanying "Response to Public Comments" document that discusses the public comments and provides the Agencies' rationale for accepting or rejecting the comment. The Agencies did not make any major technical or policy changes from the draft revised report. However, we made some editorial changes and inserted clarifying language as a result of comments received, and reformatted the report to make it more reader friendly.

ADDRESSES: A copy of the final *FLAG Phase I Report—REVISED* and the accompanying *Response to Public Comments* document can be downloaded from the Internet at: *http://www.nature.nps.gov/air/permits/flag/index.cfm.*

A copy can also be obtained from John Bunyak, Air Resources Division, National Park Service, P.O. Box 25287, Denver, Colorado 80225; e-mail: *john_bunyak@nps.gov.*

FOR FURTHER INFORMATION CONTACT: John Bunyak at the above address or by calling (303) 969–2818.

Dated: September 8, 2010.

Thomas L. Strickland,

Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior.

[FR Doc. 2010–27211 Filed 10–26–10; 8:45 am]

BILLING CODE P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–476 and 731–TA–1179 (Preliminary)]

Multilayered Wood Flooring From China

AGENCY: United States International Trade Commission.

ACTION: Institution of antidumping and countervailing duty investigations and scheduling of preliminary phase investigations.

SUMMARY: The Commission hereby gives notice of the institution of investigations and commencement of preliminary phase antidumping and countervailing duty investigations Nos. 701–TA–476 and 731–TA–1179 (Preliminary) under sections 703(a) and 733(a) of the Tariff Act of 1930 (19 U.S.C. 1671b(a) and 1673b(a)) (the Act) to determine whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from China of multilayered wood flooring, provided for in subheadings 4409.10, 4409.29, 4412.31, 4412.32, 4412.39, 4412.94, 4412.99, 4418.71, 4418.72, 4418.79.00, and 4418.90 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value and alleged to be subsidized by the Government of China. Unless the Department of Commerce extends the time for initiation pursuant to sections 702(c)(1)(B) or 732(c)(1)(B) of the Act (19 U.S.C. 1671a(c)(1)(B) or 1673a(c)(1)(B)), the Commission must reach a preliminary determination in antidumping and countervailing duty investigations in 45 days, or in this case by December 6, 2010. The Commission's views are due at Commerce within five business days thereafter, or by December 13, 2010.

For further information concerning the conduct of these investigations and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and B (19 CFR part 207).

DATES: *Effective Date:* October 21, 2010.

FOR FURTHER INFORMATION CONTACT: Fred Ruggles (202–205–3187 or *fred.ruggles@usitc.gov*), Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—These investigations are being instituted in response to a petition filed on October 21, 2010, on behalf of the Coalition for American Hardwood Parity ("CAHP"), an ad hoc association of U.S. manufacturers of multilayered wood flooring. The following companies are members of the CAHP: Anderson Hardwood Floors, LLC, Fountain Inn, SC; Award Hardwood Floors, Wausau, WI; Baker's Creek Wood Floors, Inc., Edwards, MS; From the Forest, Weston, WI; Howell Hardwood Flooring, Dothan, AL; Mannington Mills, Inc., Salem, NJ; Nydree Flooring, Forest, VA; and Shaw Industries Group, Inc., Dalton, GA.

Participation in the investigations and public service list.—Persons (other than petitioners) wishing to participate in the investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in sections 201.11 and 207.10 of the Commission's rules, not later than seven days after publication of this notice in the **Federal Register**. Industrial users and (if the merchandise under investigation is sold at the retail level) representative consumer organizations have the right to appear as parties in Commission antidumping and countervailing duty investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to these investigations upon the expiration of the period for filing entries of appearance.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in these investigations available to authorized applicants representing interested parties (as defined in 19 U.S.C. 1677(9)) who are parties to the investigations under the APO issued in the investigations, provided that the application is made not later than seven days after the publication of this notice in the **Federal Register**. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Conference.—The Commission's Director of Investigations has scheduled a conference in connection with these investigations for 9:30 a.m. on November 12, 2010, at the U.S. International Trade Commission Building, 500 E Street, SW., Washington, DC. Parties wishing to participate in the conference should contact Fred Ruggles (202–205–3187) not later than November 9, 2010, to arrange for their appearance. Parties in support of the imposition of countervailing and antidumping duties in these investigations and parties in opposition to the imposition of such duties will each be collectively allocated one hour within which to make an oral presentation at the conference. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the conference.

Written submissions.—As provided in sections 201.8 and 207.15 of the Commission's rules, any person may submit to the Commission on or before November 16, 2010, a written brief containing information and arguments pertinent to the subject matter of the investigations. Parties may file written testimony in connection with their presentation at the conference no later than three days before the conference. If briefs or written testimony contain BPI, they must conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic

means, except to the extent permitted by section 201.8 of the Commission's rules, as amended, 67 FR 68036 (November 8, 2002). Even where electronic filing of a document is permitted, certain documents must also be filed in paper form, as specified in II (C) of the Commission's Handbook on Electronic Filing Procedures, 67 FR 68168, 68173 (November 8, 2002).

In accordance with sections 201.16(c) and 207.3 of the rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.12 of the Commission's rules.

By order of the Commission.

Issued: October 21, 2010.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 2010–27173 Filed 10–26–10; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

Summary of Commission Practice Relating to Administrative Protective Orders

AGENCY: U.S. International Trade Commission.

ACTION: Summary of Commission practice relating to administrative protective orders.

SUMMARY: Since February 1991, the U.S. International Trade Commission ("Commission") has issued an annual report on the status of its practice with respect to violations of its administrative protective orders ("APOs") in investigations under title VII of the Tariff Act of 1930, in response to a direction contained in the Conference Report to the Customs and Trade Act of 1990. Over time, the Commission has added to its report discussions of APO breaches in Commission proceedings other than under title VII and violations of the Commission's rules including the rule on bracketing business proprietary information ("BPI") (the "24-hour rule"), 19 CFR 207.3(c). This notice provides a summary of investigations completed during calendar year 2009 of breaches in proceedings under title VII and section 337 of the Tariff Act of 1930. In addition, there is a summary of rules violation investigations completed in 2009. The Commission intends that this report inform representatives of parties to Commission proceedings as to some specific types of APO breaches and rules violations encountered by the Commission and the corresponding types of actions the Commission has taken.

FOR FURTHER INFORMATION CONTACT: Carol McCue Verratti, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone (202) 205–3088. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal at (202) 205–1810. General information concerning the Commission can also be obtained by accessing its Web site (*http://www.usitc.gov*).

SUPPLEMENTARY INFORMATION: Representatives of parties to investigations or other proceedings conducted under title VII of the Tariff Act of 1930, sections 202 and 204 of the Trade Act of 1974, section 421 of the Trade Act of 1974, section 337 of the Tariff Act of 1930, and North American Free Trade Agreement (NAFTA) Article 1904.13, 19 U.S.C. 1516a(g)(7)(A), may enter into APOs that permit them, under strict conditions, to obtain access to BPI (title VII) or confidential business information ("CBI") (section 421, sections 201–204, and section 337) of other parties. *See* 19 U.S.C. 1677f; 19 CFR 207.7; 19 CFR 207.100, *et seq.;* 19 U.S.C. 2252(i); 19 U.S.C. 2451a(b)(3); 19 CFR 206.17; 19 U.S.C. 1337(n); 19 CFR 210.5, 210.34. The discussion below describes APO breach investigations and rules violation investigations that the Commission has completed during calendar year 2009, including a description of actions taken in response to these breaches and rules violations.

Since 1991, the Commission has published annually a summary of its actions in response to violations of Commission APOs and the 24-hour rule. *See* 56 FR 4846 (February 6, 1991); 57 FR 12335 (April 9, 1992); 58 FR 21991 (April 26, 1993); 59 FR 16834 (April 8, 1994); 60 FR 24880 (May 10, 1995); 61 FR 21203 (May 9, 1996); 62 FR 13164 (March 19, 1997); 63 FR 25064 (May 6, 1998); 64 FR 23355 (April 30, 1999); 65 FR 30434 (May 11, 2000); 66 FR 27685 (May 18, 2001); 67 FR 39425 (June 7, 2002); 68 FR 28256 (May 23, 2003); 69 FR 29972 (May 26, 2004); 70 FR 42382 (July 25, 2005); 71 FR 39355 (July 12, 2006); 72 FR 50119 (August 30, 2007); 73 FR 51843 (September 5, 2008); and 74 FR 54071 (October 21, 2009). This report does not provide an exhaustive list of conduct that will be deemed to be a breach of the Commission's APOs. APO breach inquiries are considered on a case-by-case basis.

As part of the effort to educate practitioners about the Commission's current APO practice, the Commission Secretary issued in March 2005 a fourth edition of *An Introduction to Administrative Protective Order Practice in Import Injury Investigations* (Pub. No. 3755). This document is available upon request from the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, tel. (202) 205–2000 and on the Commission's Web site at *http://www.usitc.gov.*

I. In General

The current APO form for antidumping and countervailing duty investigations, which was revised in March 2005, requires the applicant to swear that he or she will:

(1) Not divulge any of the BPI disclosed under this APO or otherwise obtained in this investigation and not otherwise available to him or her, to any person other than —

(i) Personnel of the Commission concerned with the investigation,

(ii) The person or agency from whom the BPI was obtained,

(iii) A person whose application for disclosure of BPI under this APO has been granted by the Secretary, and

(iv) Other persons, such as paralegals and clerical staff, who (a) are employed or supervised by and under the direction and control of the authorized applicant or another authorized applicant in the same firm whose application has been granted; (b) have a need thereof in connection with the investigation; (c) are not involved in competitive decision making for an interested party which is a party to the investigation; and (d) have signed the acknowledgment for clerical personnel in the form attached hereto (the authorized applicant shall also sign such acknowledgment and will be deemed responsible for such persons' compliance with this APO);

(2) Use such BPI solely for the purposes of the above-captioned Commission investigation or for judicial or binational panel review of such Commission investigation;

(3) Not consult with any person not described in paragraph (1) concerning BPI disclosed under this APO or otherwise obtained in this investigation without first having received the written consent of the Secretary and the party or the representative of the party from whom such BPI was obtained;

(4) Whenever materials *e.g.,* documents, computer disks, etc. containing such BPI are not being used, store such material in a locked file cabinet, vault, safe, or other suitable container (N.B.: Storage of BPI on so-called hard disk computer media is to be avoided, because mere erasure of data from such media may not irrecoverably destroy the BPI and may result in violation of paragraph C of this APO);

(5) Serve all materials containing BPI disclosed under this APO as directed by the Secretary and pursuant to section 207.7(f) of the Commission's rules;

(6) Transmit each document containing BPI disclosed under this APO:

(i) With a cover sheet identifying the document as containing BPI,

(ii) With all BPI enclosed in brackets and each page warning that the document contains BPI,

(iii) If the document is to be filed by a deadline, with each page marked "Bracketing of BPI not final for one business day after date of filing," and

(iv) If by mail, within two envelopes, the inner one sealed and marked "Business Proprietary Information—To be opened only by [name of recipient]", and the outer one sealed and not marked as containing BPI;

(7) Comply with the provision of this APO and section 207.7 of the Commission's rules;

(8) Make true and accurate representations in the authorized applicant's application and promptly notify the Secretary of any changes that occur after the submission of the application and that affect the representations made in the application (*e.g.,* change in personnel assigned to the investigation);

(9) Report promptly and confirm in writing to the Secretary any possible breach of this APO; and

(10) Acknowledge that breach of this APO may subject the authorized applicant and other persons to such sanctions or other actions as the Commission deems appropriate, including the administrative sanctions and actions set out in this APO.

The APO further provides that breach of an APO may subject an applicant to:

(1) Disbarment from practice in any capacity before the Commission along with such person's partners, associates, employer, and employees, for up to seven years following publication of a determination that the order has been breached;

(2) Referral to the United States Attorney;

(3) In the case of an attorney, accountant, or other professional, referral to the ethics panel of the appropriate professional association;

(4) Such other administrative sanctions as the Commission determines to be appropriate, including public release of, or striking from the record any information or briefs submitted by, or on behalf of, such person or the party he represents; denial of further access to business proprietary information in the current or any future investigations before the Commission, and issuance of a public or private letter of reprimand; and

(5) Such other actions, including but not limited to, a warning letter, as the Commission determines to be appropriate.

APOs in investigations other than those under title VII contain similar, though not identical, provisions.

Commission employees are not signatories to the Commission's APOs and do not obtain access to BPI through APO procedures. Consequently, they are not subject to the requirements of the APO with respect to the handling of CBI and BPI. However, Commission employees are subject to strict statutory and regulatory constraints concerning BPI and CBI, and face potentially severe penalties for noncompliance. *See* 18 U.S.C. 1905; title 5, U.S. Code; and Commission personnel policies implementing the statutes. Although the Privacy Act (5 U.S.C. 552a) limits the Commission's authority to disclose any personnel action against agency employees, this should not lead the public to conclude that no such actions have been taken.

An important provision of the Commission's title VII and safeguard rules relating to BPI/CBI is the "24-hour" rule. This rule provides that parties have one business day after the deadline for filing documents containing BPI/CBI to file a public version of the document. The rule also permits changes to the bracketing of information in the proprietary version within this one-day period. No changes—other than changes in bracketing—may be made to the proprietary version. The rule was intended to reduce the incidence of APO breaches caused by inadequate bracketing and improper placement of BPI/CBI. The Commission urges parties to make use of the rule. If a party wishes to make changes to a document other than bracketing, such as typographical changes or other corrections, the party must ask for an extension of time to file an amended document pursuant to section 201.14(b)(2) of the Commission's rules.

II. Investigations of Alleged APO Breaches

Upon finding evidence of an APO breach or receiving information that there is a reason to believe one has occurred, the Commission Secretary notifies relevant offices in the agency that an APO breach investigation has commenced and that an APO breach investigation file has been opened. Upon receiving notification from the Secretary, the Office of the General Counsel (OGC) prepares a letter of inquiry to be sent to the possible breacher over the Secretary's signature to ascertain the possible breacher's views on whether a breach has occurred.[1] If, after reviewing the response and other relevant information, the Commission determines that a breach has occurred, the Commission often issues a second letter asking the breacher to address the questions of mitigating circumstances and possible sanctions or other actions. The Commission then determines what action to take in response to the breach. In some cases, the Commission determines that although a breach has occurred, sanctions are not warranted, and therefore finds it unnecessary to issue a second letter concerning what sanctions might be appropriate. Instead, it issues a warning letter to the individual. A warning letter is not considered to be a sanction.

Sanctions for APO violations serve two basic interests: (a) Preserving the confidence of submitters of BPI/CBI that the Commission is a reliable protector of BPI/CBI; and (b) disciplining breachers and deterring future violations. As the Conference Report to the Omnibus Trade and Competitiveness Act of 1988 observed, "[T]he effective enforcement of limited disclosure under administrative protective order depends in part on the extent to which private parties have confidence that there are effective sanctions against violation." H.R. Conf. Rep. No. 576, 100th Cong., 1st Sess. 623 (1988).

The Commission has worked to develop consistent jurisprudence, not only in determining whether a breach has occurred, but also in selecting an appropriate response. In determining the appropriate response, the Commission generally considers mitigating factors such as the unintentional nature of the breach, the

[1] Procedures for inquiries to determine whether a prohibited act such as a breach has occurred and for imposing sanctions for violation of the provisions of a protective order issued during NAFTA panel or committee proceedings are set out in 19 CFR 207.100—207.120. Those investigations are initially conducted by the Commission's Office of Unfair Import Investigations.

lack of prior breaches committed by the breaching party, the corrective measures taken by the breaching party, and the promptness with which the breaching party reported the violation to the Commission. The Commission also considers aggravating circumstances, especially whether persons not under the APO actually read the BPI/CBI. The Commission considers whether there have been prior breaches by the same person or persons in other investigations and multiple breaches by the same person or persons in the same investigation.

The Commission's rules permit an economist or consultant to obtain access to BPI/CBI under the APO in a title VII or safeguard investigation if the economist or consultant is under the direction and control of an attorney under the APO, or if the economist or consultant appears regularly before the Commission and represents an interested party who is a party to the investigation. 19 CFR 207.7(a)(3)(B) and (C); 19 CFR 206.17(a)(3)(B) and (C). Economists and consultants who obtain access to BPI/CBI under the APO under the direction and control of an attorney nonetheless remain individually responsible for complying with the APO. In appropriate circumstances, for example, an economist under the direction and control of an attorney may be held responsible for a breach of the APO by failing to redact APO information from a document that is subsequently filed with the Commission and served as a public document. This is so even though the attorney exercising direction or control over the economist or consultant may also be held responsible for the breach of the APO.

The records of Commission investigations of alleged APO breaches in antidumping and countervailing duty cases are not publicly available and are exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552, and section 135(b) of the Customs and Trade Act of 1990, 19 U.S.C. 1677f(g). *See also* 19 U.S.C. 1333(h).

The two types of breaches most frequently investigated by the Commission involve the APO's prohibition on the dissemination of BPI or CBI to unauthorized persons and the APO's requirement that the materials received under the APO be returned or destroyed and that a certificate be filed indicating which action was taken after the termination of the investigation or any subsequent appeals of the Commission's determination. The dissemination of BPI/CBI usually occurs as the result of failure to delete BPI/CBI from public versions of documents filed with the Commission or transmission of proprietary versions of documents to unauthorized recipients. Other breaches have included the failure to bracket properly BPI/CBI in proprietary documents filed with the Commission, the failure to report immediately known violations of an APO, and the failure to adequately supervise non-lawyers in the handling of BPI/CBI.

In the past several years, the Commission completed APOB investigations that involved members of a law firm or consultants working with a firm who were granted access to APO materials by the firm although they were not APO signatories. In these cases, the firm and the person using the BPI mistakenly believed an APO application had been filed for that person. The Commission determined in all of these cases that the person who was a non-signatory, and therefore did not agree to be bound by the APO, could not be found to have breached the APO. Action could be taken against these persons, however, under Commission rule 201.15 (19 CFR 201.15) for good cause shown. In all cases in which action was taken, the Commission decided that the non-signatory was a person who appeared regularly before the Commission and was aware of the requirements and limitations related to APO access and should have verified his or her APO status before obtaining access to and using the BPI. The Commission notes that section 201.15 may also be available to issue sanctions to attorneys or agents in different factual circumstances in which they did not technically breach the APO, but when their actions or inactions did not demonstrate diligent care of the APO materials even though they appeared regularly before the Commission and were aware of the importance the Commission placed on the care of APO materials.

The Commission's Secretary has provided clarification to counsel representing parties in investigations relating to global safeguard actions, section 202(b) of the Trade Act of 1974; investigations for relief from market disruption, section 421(b) or (o) of the Trade Act of 1974; and investigations for action in response to trade diversion, section 422(b) of the Trade Act of 1974; and investigations concerning dumping and subsidies under section 516A and title VII of the Tariff Act of 1930 (19 U.S.C. 1303, 1516A and 1671–1677n). The clarification concerns the requirement to return or destroy CBI/BPI that was obtained under a Commission APO.

Counsel have been cautioned to be certain that each authorized applicant files within 60 days of the completion of an investigation or at the conclusion of judicial or binational review of the Commission's determination a certificate that to his or her knowledge and belief all copies of BPI/CBI have been returned or destroyed and no copies of such material have been made available to any person to whom disclosure was not specifically authorized. This requirement applies to each attorney, consultant, or expert in a firm who has been granted access to BPI/CBI. One firm-wide certificate is insufficient. This same information is also being added to notifications sent to new APO applicants.

In addition, attorneys who are signatories to the APO representing clients in a section 337 investigation should send a notice to the Commission if they stop participating in the investigation or the subsequent appeal of the Commission's determination. The notice should inform the Commission about the disposition of CBI obtained under the APO that was in their possession or they could be held responsible for any failure of their former firm to return or destroy the CBI in an appropriate manner.

III. Specific Investigations

APO Breach Investigations

Case 1: The Commission found that an attorney for the complainant in a section 337 investigation had violated the APO when he provided copies of partially redacted confidential versions of post-hearing briefs of three parties to the section 337 investigation to an attorney with another law firm who was not a signatory to the APO. This attorney in turn provided the briefs to the U.S. Patent and Trademark Office ("PTO"), and, pursuant to PTO service rules, served a copy on another non-signatory attorney. One of the briefs was viewable through the PTO database for approximately two weeks.

The respondent in the section 337 investigation filed a motion requesting that five sanctions be imposed on complainant and complainant's counsel. The Commission denied this motion in its entirety, but issued a private letter of reprimand to the breaching attorney and sent a letter to the General Counsel of the PTO requesting assistance in the destruction or return of documents containing the CBI.

There were several mitigating factors. The breach was inadvertent, as the attorney believed he was submitting the public versions of the parties' briefs. The attorney had requested the public version of the briefs from one paralegal, who asked a paralegal in another of the

firm's offices to retrieve the briefs. That paralegal provided partially redacted versions. However, because the paralegal providing the briefs to the attorney believed they were public versions, she changed the marking from confidential to public without informing the attorney. Consequently, the attorney submitted the partially redacted confidential versions, at least in part, due to a paralegal error. The attorney's firm subsequently provided training and instruction on the proper handling of CBI.

This was also the attorney's first APO breach. Upon learning of his breach, he promptly reported it and initiated corrective action. However, the Commission questioned the sufficiency of the attorney's follow-up attempts to cure the breach. The petition to expunge the briefs from the PTO database was filed 17 months before the public versions of the three briefs were submitted in their place.

The attorney contended that there was no evidence that non-signatories to the APO actually viewed the partially redacted briefs. The Commission found, however, that the briefs were provided to the PTO and PTO personnel are not APO signatories; the briefs were not recovered until more than two years after they were filed with the PTO; and at least one of the briefs could be viewed for two weeks on the PTO Patent Application Informal Retrieval Database, which is connected to the Internet. The Commission therefore presumed the CBI was reviewed by a non-signatory, and found that to be an aggravating factor.

Case 2: A lead attorney and an associate attorney breached the APO when they failed to redact BPI from the public version of an appendix to a brief filed in the Court of International Trade ("CIT"). The law firm informed the CIT and the Commission of the error once it became aware that the appendix contained BPI. The Commission issued a warning letter to the lead attorney and a private letter of reprimand to the associate.

There were several mitigating factors. The breach was inadvertent, and the law firm took relatively prompt action to remedy the breach. In addition, although the appendix was publicly available at the CIT, a CIT investigation showed that only signatories to the Commission APO and law clerks to the CIT judge had accessed the appendix. Thus, no unauthorized person had read the BPI. In addition, the lead attorney did not have a prior breach within the previous two years generally examined by the Commission for purposes of determining sanctions.

With respect to aggravating factors, the associate was found to have breached the APO in another Commission investigation within the previous two years, and was therefore, given a private letter of reprimand in spite of the mitigating circumstances. The Commission found that the lead attorney failed to supervise the associate adequately in the task of preparing the appendix for filing.

Case 3: The Commission found that an associate attorney and an international trade specialist breached the APO when they filed a public version of a prehearing brief that erroneously contained BPI in a title VII five-year review. Both individuals received private letters of reprimand.

The BPI consisted of cumulative data concerning nonsubject imports and combined export numbers for the domestic industry. The release of this information, when combined with other publicly available information on the record, made it possible to calculate the volume of nonsubject imports and estimate two domestic producers' exports during the original title VII investigation.

There were two mitigating factors. The breach was inadvertent, and the individuals involved had not been sanctioned for an APO breach within the past two years.

The parties argued that the Commission itself was partly responsible for the dissemination of the BPI because it distributed the confidential staff prehearing report containing unbracketed BPI to party representatives who were under the APO. However, the Commission found that this was not a mitigating factor because the cover page of the prehearing staff report clearly indicated that only the public version of the report should be used as a guide for confidentiality. The law firm received the public version of the staff report nine days before it filed the public version of its prehearing brief, and had ample time to refer to it and prevent the breach. The Commission also declined to accept the argument of the associate and international trade specialist that the "tight" time frame of sunset reviews justified their failure to properly rely on the public version.

There were also aggravating factors. The Commission staff, and not the law firm, discovered the possible breach. Without information to the contrary presented by the breaching individuals, the Commission presumed that the BPI was read by unauthorized personnel because it had been in the possession of unauthorized parties for over two months.

Case 4: The Commission found that a paralegal breached the APO when he prepared and filed a public version of a brief containing BPI in a title VII investigation without informing any attorneys in his firm. The paralegal was instructed by the supervisory attorney to prepare the confidential version of the brief for filing. The paralegal had extensive experience in Commission investigations and in preparing documents containing confidential information. While the paralegal was preparing the confidential brief, he misread the Commission's rules and believed the public version was also due for filing that day. Because it was late in the day, he immediately prepared the public version and filed it with the confidential version. In so doing, he failed to follow the firm's procedures for handling and filing documents containing BPI and failed to remove all BPI from the public version of the brief. The Commission issued a warning letter to the paralegal. The Commission found that the supervising attorney, whom the paralegal did not inform of his action, was not responsible for the breach.

There were several mitigating factors. The breach was unintentional, the BPI was not read by any person not subject to the APO, the firm moved to remedy the breach expeditiously after being informed of it by the Commission staff, and this was the paralegal's only breach in the prior two years generally examined by the Commission for the purpose of determining sanctions.

There were also aggravating factors. Commission staff, rather than the firm, discovered the breach, and the paralegal failed to follow the firm's procedures requiring attorney review of any filing for BPI.

Case 5: The Commission found that a secretary in a law firm breached the APO by mistakenly sending the confidential version of a title VII brief to an attorney who was opposing the law firm in a different investigation and who was not a signatory to the title VII investigation's APO. The Commission concluded that the firm's attorneys did not breach the APO. The secretary had been given a purely ministerial task of preparing a mailing envelope and, acting on her own, had inadvertently placed the title VII brief in the wrong mailing envelope. The Commission issued a warning letter to the secretary.

There were several mitigating factors. The secretary had no prior breaches within the prior two years generally examined by the Commission for purposes of determining sanctions; the breach was unintentional; relatively prompt action was taken to remedy the breach; and the record in this APOB

investigation suggests that the BPI was not viewed by unauthorized persons.

Case 6: The Commission found that two attorneys breached the APO when they submitted a postconference brief comparing the prices of various firms' imports. The attorneys deliberately declined to bracket a passage providing a description of the degree by which prices reported by one importer were lower than those reported by other importers, on the grounds that Commission Rule 201.6(a)(1) allows parties to make "nonnumerical characterization" of trends in public submissions. In the **Federal Register** notice of final rulemaking for section 201.6(a)(1), the preamble stated that any discussion of the degree or absolute level of a decline or increase was not a "nonnumerical characterization." The Commission concluded that, although the phrases were not literally numerical, they conveyed as much specificity as a strictly numerical characterization. Accordingly, the Commission found that the information in question was BPI and that it should have been bracketed. The attorneys argued that the BPI was information they acquired from their client and not from the questionnaire responses that had been cited in the brief. To support their argument, they cited exhibits that were included with the brief. The Commission found that these exhibits did not support their allegations that the information came from their client. The Commission issued private letters of reprimand to both attorneys.

There were two mitigating factors. Neither attorney had been found to have breached an APO in the two years the Commission typically considers for determining sanctions. In addition, the record showed that the attorneys had responded promptly to the request by the Commission's staff to provide a replacement page for the page containing the unbracketed BPI, although the Commission's Dockets staff never actually received it.

There were also several aggravating factors. First, the Commission found that the breach was not inadvertent. The attorneys were aware of Commission rule 201.6(a)(1), but they made either no effort or an inadequate effort to ascertain the Commission's published interpretation of the regulation, notwithstanding the fact that it was readily available, easily located, and expressly addressed the question of whether the information should be treated as BPI. Instead they adopted their own interpretation of the regulation without consulting the Commission's staff. Thus, they made a conscious decision not to bracket material that was BPI.

Second, the Commission presumed that an individual not subject to the APO read the unbracketed BPI in the public version of the brief. The brief was sent to counsel for the opposing side, who was not subject to the APO. The replacement page was not sent to him until the next day. The attorneys did not address whether the counsel had viewed the BPI even after being specifically asked by the Commission's Secretary. In the absence of any contrary representation by the attorneys, the Commission presumed that opposing counsel read the brief, including the BPI, at the time he received it.

Third, the breach was discovered by the Commission's staff. In addition, although the attorneys initially provided the replacement page promptly, they did not respond to the second request for a replacement page, which was necessitated by the fact that Dockets staff did not receive the original replacement page. The attorneys did respond to the third request.

APO Breach Investigation in Which No Breach Was Found

Case 1: Counsel for respondents in a title VII investigation transmitted to their clients copies of a draft public version of a prehearing brief. The draft brief contained information that had been derived from information in the Commission's prehearing report. In the report, the information was treated as BPI and was bracketed. The Commission determined that counsel did not breach the APO because at the time the brief was prepared, the substance of the material in the draft prehearing brief was available in the public domain.

Rules Violations

Case 1: The Commission found that an attorney violated 19 CFR 207.3(b) by serving a postconference brief in a title VII investigation by first-class mail. The Commission issued a warning letter. There were two mitigating factors: (1) Rhis was the attorney's first rules violation within the prior two years generally examined by the Commission for purposes of determining sanctions, and (2) the violation was unintentional.

Investigation in Which No Rules Violation Was Found

Case 1: An associate and lead attorney filed an *in camera* hearing request in a title VII five year review which did not meet the content requirements of 19 CFR 207.24(d), was not timely filed, and did not provide good cause for the untimeliness as required under 19 CFR 201.14 and 207.24(d). It was also improperly served contrary to 19 CFR 207.3(b). The attorneys filed a second letter s*ee*king leave to file an untimely request and providing the subjects to be covered during the *in camera* session. This letter did not provide the time necessary to cover the subjects and was also improperly filed. Consequently, the Commission rejected the request for the *in camera* session as untimely. After consideration of the attorneys' responses in this rules violation investigation, the Commission determined that they failed to exercise due diligence in filing the two submissions, but decided not to sanction them. This decision was reached after giving consideration to the facts that their actions were not intentional and that no party was prejudiced by their actions. In addition, this was the associate's first appearance before the Commission.

By order of the Commission.

Issued: October 21, 2010.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 2010–27172 Filed 10–26–10; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

[CPCLO Order No. 005–2010]

Privacy Act of 1974; System of Records

AGENCY: Federal Bureau of Investigation, Department of Justice.

ACTION: Notice of a Modification of a System of Records.

SUMMARY: Pursuant to the Privacy Act of 1974 (5 U.S.C. 552a), the Federal Bureau of Investigation (FBI), Department of Justice, proposes to modify an existing system of records entitled "Data Integration and Visualization System," JUSTICE/FBI–021, which describes the Data Integration and Visualization System (DIVS), to revise the System Location section to clarify locations where the records may be directly accessed and by whom the records may be directly accessed. A new sentence has been added at the end of the System Location section to reflect this information. This system notice was last published on August 31, 2010 (75 FR 53342).

DATES: In accordance with 5 U.S.C. 552a(e)(4) and (11), the public is given a 30-day period in which to comment. Therefore, please submit any comments by November 26, 2010.

ADDRESSES: The public, OMB, and Congress are invited to submit any comments to the Department of Justice, ATTN: Privacy Analyst, Office of Privacy and Civil Liberties, Department of Justice, National Place Building, 1331 Pennsylvania Avenue NW., Suite 940, Washington, DC 20530–0001, or by facsimile at 202–307–0693.

FOR FURTHER INFORMATION CONTACT: Erin Page, Assistant General Counsel, Privacy and Civil Liberties Unit, Office of the General Counsel, FBI, Washington, DC 20530–0001, telephone 202–324–3000.

In accordance with 5 U.S.C. 552a (r), the Department has provided a report to OMB and the Congress on the modified system of records.

Dated: October 4, 2010.

Nancy C. Libin,

Chief Privacy and Civil Liberties Officer.

JUSTICE/FBI–021

SYSTEM NAME:

Data Integration and Visualization System.

* * * * *

SYSTEM LOCATION:

[Revise the previously published System Location by adding a new sentence at the end of the paragraph.]

Records may be maintained at any location at which the Federal Bureau of Investigation (FBI) operates or at which FBI operations are supported, including: J. Edgar Hoover Building, 935 Pennsylvania Ave., NW., Washington, DC 20535–0001; FBI Academy and FBI Laboratory, Quantico, VA 22135; FBI Criminal Justice Information Services (CJIS) Division, 1000 Custer Hollow Rd., Clarksburg, WV 26306; and FBI field offices, legal attaches, information technology centers, and other components listed on the FBI's Internet Web site, *http://www.fbi.gov.* Some or all system information may also be duplicated at other locations for purposes of system backup, emergency preparedness, and/or continuity of operations. Additionally, appropriate offices/employees within the Department of Justice that have an official need to know the information contained in DIVS in order to perform their duties, may also be granted direct access to DIVS. Further, employees in other government agencies who are under FBI supervision, in offices where FBI operations are supported, and who have an official need to know the information contained in DIVS in order to perform their duties may also be granted direct access to DIVS.

* * * * *

[FR Doc. 2010–27101 Filed 10–26–10; 8:45 am]

BILLING CODE 4410–02–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0074]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60-Day Notice of Information Collection Under Review: List of Responsible Persons.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for "sixty days" until December 27, 2010. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact William Miller, Chief, Explosives Industry Programs Branch, Room 6E405, 99 New York Avenue, NE., Washington, DC 20226.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies 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:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* List of Responsible Persons.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number:* None. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. *Other:* Business or other-profit. All persons holding ATF explosives licenses or permits must report any change in responsible persons or employees authorized to possess explosive materials to ATF. Such report must be submitted within 30 days of the change and must include appropriate identifying information for each responsible person.

(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 50,000 respondents will take 1 hour to complete the report.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 100,000 annual total burden hours associated with this collection.

If additional information is required contact: Lynn Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, Department of Justice, Two Constitution Square, Room 2E–502, 145 N Street NE., Washington, DC 20530.

Dated: October 21, 2010.

Lynn Murray,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2010–27113 Filed 10–26–10; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0079]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60-Day Notice of Information Collection Under Review: Transactions Among Licensee/Permittees and Transactions Among Licensees and Holders of User Permits.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for "sixty days" until December 27, 2010. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact William Miller, Chief, Explosives Industry Programs Branch, Room 6E405, 99 New York Avenue, NE., Washington, DC 20226.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Transactions Among Licensee/Permitees and Transactions Among Licensees and Holders of User Permits.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: None. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit. Other: None. The Safe Explosives Act requires an explosives distributor must verify the identity of the purchaser; an explosives purchaser must provide a copy of the license/permit to distributor prior to the purchase of explosive materials; possessors of explosive materials must provide a list of explosives storage locations; purchasers of explosive materials must provide a list of representatives authorized to purchase on behalf of the distributor; and an explosive purchaser must provide a statement of intended use for the explosives.

(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 50,000 respondents will take 30 minutes to comply with the required information.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 25,000 annual total burden hours associated with this collection.

If additional information is required contact: Lynn Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, Department of Justice, Two Constitution Square, Room 2E–502, 145 N Street, NW., Washington, DC 20530.

Dated: October 21, 2010.

Lynn Murray,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2010–27112 Filed 10–26–10; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0080]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60-Day Notice of Information Collection Under Review: Notification of Change of Mailing or Premise Address.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for "sixty days" until December 27, 2010. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact William Miller, Chief, Explosives Industry Programs Branch, Room 6E405, 99 New York Avenue, NE., Washington, DC 20226.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies 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:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Notification of Change of Mailing or Premise Address.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: None. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Not-for-profit-institutions. Other: Business or other for-profit. Licensees and permittees whose mailing address will change must notify the Chief, Federal Explosives Licensing Center, at least 10 days before the change. The information is used by ATF to identify correct locations of storage of explosives licensees/permittees and location of storage of explosive materials for purposes of inspection, as well as to notify permittee/licensees of any change in regulations or laws that may affect their business activities.

(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 1,000 respondents will take 10 minutes to respond via letter to the Federal Explosives Licensing Center.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 170 annual total burden hours associated with this collection.

If additional information is required contact: Lynn Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, Department of Justice, Two Constitution Square, Room 2E–502, 145 N Street, NE., Washington, DC 20530.

Dated: October 21, 2010.

Lynn Murray,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2010–27111 Filed 10–26–10; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1440–0082]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60-Day Notice of Information Collection Under Review: Certification of Knowledge of State Laws, Submission of Water Pollution Act.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for "sixty days" until December 27, 2010. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact William Miller, Chief, Explosives Industry Programs Branch, Room 6E405, 99 New York Avenue, NE., Washington, DC 20226.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies 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:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Certification of Knowledge of State Laws, Submission of Water Pollution Act.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: None. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. Other: None. Persons who apply for a permit to purchase explosives intrastate must certify in writing that he is familiar with and understands all published State laws and local ordinances relating to explosive materials for the location in which he intends to do business; and submit the certificate required by section 21 of the Federal Water Pollution Control Act.

(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 50,000 respondents will take a estimated time of 30 seconds to submit the required information.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 416 annual total burden hours associated with this collection.

If additional information is required contact: Lynn Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, Department of Justice, Two Constitution Square, Room 2E–502, 145 N Street, NE., Washington, DC 20530.

Dated: October 21, 2010.

Lynn Murray,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2010–27110 Filed 10–26–10; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0083]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60-Day Notice of Information Collection Under Review: Application for Limited Permit.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for "sixty days" until December 27, 2010. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact William Miller, Chief, Explosives Industry Programs Branch, Room 6E–405, 99 New York Avenue, NE., Washington, DC 20226.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
—Evaluate the accuracy of the agencies 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:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Application for Limited Permit.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: None. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit. Other: None. Any person who intends to acquire explosive materials from a licensee or permittee in the State in which that person resides on no more that 6 occasions per year, must obtain a limited permit from ATF.

(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 40,000 respondents will take 30 seconds to submit the required information.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 2,000 annual total burden hours associated with this collection.

If additional information is required contact: Lynn Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, Department of Justice, Two Constitution Square, Room 2E–502, 145 N Street NE., Washington, DC 20530.

Dated: October 21, 2010.

Lynn Murray,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2010–27109 Filed 10–26–10; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0089]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60-Day Notice of Information Collection Under Review: Open Letter to States With Permits That Appear To Qualify as Alternatives to NICS Checks.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for "sixty days" until December 27, 2010. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Adam Rogers, Chief, Firearms Industry Programs Branch, 99 New York Avenue, NE., Washington, DC 20226.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
—Evaluate the accuracy of the agencies 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:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Open Letter to States With Permits That Appear to Qualify as Alternatives to NICS Checks.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: None. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: State, Local, or Tribal

Government. Other: None. The purpose of this information collection is to ensure that only State permits that meet the statutory requirements contained in the Gun Control Act qualify as alternatives to a National Instant Criminal Background Check System (NICS) check.

(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 21 respondents will take 1 hour to prepare a written response to ATF.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 21 annual total burden hours associated with this collection.

If additional information is required contact: Lynn Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, Department of Justice, Two Constitution Square, Room 2E–502, 145 N Street, NE., Washington, DC 20530.

Dated: October 21, 2010.

Lynn Murray,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2010–27108 Filed 10–26–10; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OMB Number: 1121–0312]

Agency Information Collection Activities: Reinstatement, With Change, of a Previously Approved Collection for Which Approval has Expired; Comments Requested

ACTION: 30-Day Notice of Information Collection Under Review: Survey of State Criminal History Information Systems.

The Department of Justice (DOJ), Office of Justice Programs, Bureau of Justice Statistics (BJS), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information was previously published in the **Federal Register** Volume 75, Number 163, page 52099, on August 24, 2010, allowing for a 60-day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until November 26, 2010. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Devon Adams, Bureau of Justice Statistics, 810 Seventh St., NW., Washington, DC 20531.

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 agencies 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:* Reinstatement, with change, of a previously approved collection for which approval has expired.

(2) *Title of the Form/Collection: Survey of State Criminal History Information Systems.*

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Not applicable.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* State Government. This information collection is a survey used to collect complete, comprehensive, and relevant data on the number and status of state-maintained criminal history records and on the increasing number of operations and services provided by state repositories.

(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 56 respondents will expend approximately 6.3 hours to complete the survey once every two years.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 353 total annual burden hours associated with this collection.

If additional information is required contact: Lynn Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street, NE., Suite 2E–502, Washington, DC 20530.

Dated: October 21, 2010.

Lynn Murray,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2010–27107 Filed 10–26–10; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OMB Number: 1121–0314]

Agency Information Collection Activities: Reinstatement, With Change, of a Previously Approved Collection for Which Approval Has Expired; Comments Requested

ACTION: 30-Day Notice of Information Collection Under Review: Firearms Inquiry Statistics (FIST) Program.

The Department of Justice (DOJ), Office of Justice Programs, Bureau of Justice Statistics (BJS), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 75, Number 163, page 52026, on August 24, 2010, allowing for a 60-day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until November 26, 2010. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Allina D. Boutilier, Bureau of Justice Statistics, 810 Seventh St., NW., Washington, DC 20531.

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 agencies 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:* Reinstatement, with change, of a previously approved collection for which approval has expired.

(2) *Title of the Form/Collection:* Firearms Inquiry Statistics (FIST) Program.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Not applicable. As applicable, tally sheets and an Excel spreadsheet are sent to relevant State and local agencies for reporting purposes. These data collection forms have not been assigned an agency form number but will be labeled with the appropriate OMB number as required.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: State and Local Governments. This information collection is a survey of State and local agencies that conduct background checks on individuals applying to purchase firearms from federally licensed firearm dealers. The information will provide national statistics on the total number of applications and rejections annually, reasons for rejection, and arrest and appeal information.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The survey will be sent to an estimated 816 state and local agencies. It is estimated that 653 respondents (80 percent of the sample) will spend a cumulative total of 15 minutes annually responding to the survey and/or verifying information.

(6) *An estimate of the total public burden (in hours) associated with the collection:*

There are an estimated 163.25 total annual burden hours associated with this collection. This estimate is higher than the figure reported on the 60 day notice (139.75 hours). The figure listed in the 60 day notice assumed a response rate of 70 percent. However, BJS and the data collection agent will continue to identify ways to encourage a higher response rate in future data collections and, as will be set forth in the FY2011 funding announcement for the FIST program, BJS has established as a performance measure a goal of achieving an overall response rate of 80 percent. To calculate the current estimated public reporting burden for this information collection, the estimated response rate submitted previously was reassessed and revised to reflect the current performance measure established for the data collection agent.

This revised estimate remains lower than the estimated public burden approved in 2007 (341.5 hours). The decreased burden is associated with a change in data collection schedule from twice to once annually. BJS determined that the relevant data could be effectively obtained by administering the survey once a year, and this schedule is anticipated to continue in subsequent information collections.

If additional information is required contact: Lynn Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street, NE., Suite 2E–502, Washington, DC 20530.

Dated: October 21, 2010.

Lynn Murray,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2010–27105 Filed 10–26–10; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0055]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60-Day Notice of Information Collection Under Review: Identification of Explosive Materials.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for "sixty days" until December 27, 2010. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact William Miller, Chief, Explosives Industry Programs Branch, Room 6E405, 99 New York Avenue, NE., Washington, DC 20226.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies 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:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Identification of Explosive Materials.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number:* None. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Business or other for-profit. *Other:* None. The regulations of 27 CFR 55.109 require that manufacturers of explosive materials place marks of identification on the materials manufactured. Marking of explosives enables law enforcement entities to more effectively trace explosives from the manufacturer through the distribution chain to the end purchaser. This process is used as a tool in criminal enforcement activities.

(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 1,563 respondents will respond to this information collection. Estimated time for a respondent to respond is none. Because the manufacturers are required to place markings on explosives, the burden hours are considered usual and customary. 5 CFR 1320.3(b)(2) states, there is no burden when the collection of information is usual and customary.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The estimated annual total burden hours associated with this collection is 1 hour.

If additional information is required contact: Lynn Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitution Square, Room 2E–502, 145 N Street NE., Washington, DC 20530.

Dated: October 21, 2010.

Lynn Murray,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2010–27115 Filed 10–26–10; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 06–8]

George Mathew, M.D.; Denial of Application

On September 19, 2005, I, the Deputy Administrator of the Drug Enforcement Administration, issued an Order to Show Cause and Immediate Suspension of Registration to George Mathew, M.D. (Respondent), of Seattle, Washington. The Order proposed the revocation of Respondent's DEA Certificate of Registration, BM5009065, which authorized him to dispense controlled substances in schedules II through V as a practitioner, and the denial of any pending applications to renew or modify his registration on the ground that his "continued registration is inconsistent with the public interest, as that term is used in 21 U.S.C. 823(f) and 824(a)(4)." Show Cause Order at 1.

The Show Cause Order alleged that Respondent had participated in a criminal scheme run by Johar Saran, the owner of Carrington Healthcare Systems/Infiniti Services Group (CHS/ISG) of Arlington, Texas, which used numerous pharmacies owned by "sham corporations" to obtain the DEA registrations necessary to "purchase and dispense large quantities of controlled substances via the Internet." *Id.* at 5. As for Respondent's involvement, the Order alleged that between May 1, 2005 and June 17, 2005, Respondent, who was licensed in the State of Washington, had authorized 136 prescriptions for residents of "at least 27 different states" and that "[n]inety-three percent of the [prescriptions] were for hydrocodone," a schedule III controlled substance. *Id.* at 6. The Order further alleged that Respondent "did not see [the] customers, had no prior doctor-patient relationships with the Internet customers, did not conduct physical exams, * * * did [not] create or maintain patient records," and that "[t]he only information usually reviewed prior to issuing [the] drug orders was the customer's online questionnaire." *Id.* The Order thus alleged that Respondent "participated" in a scheme to "facilitate [the] circumvention of legitimate medical practice" by "prescribing controlled substances to Internet customers despite never establishing a genuine doctor-patient relationship with the Internet customer." *Id.* at 5.

Next, the Show Cause Order alleged that a DEA Diversion Investigator (DI) had accessed a Web site, *http://www.heynowmeds.com,* and, after providing his name, address, phone number, date of birth, gender, and filling out a brief medical questionnaire, purchased hydrocodone. *Id.* at 6. The Order further alleged that the DI received the drug three days later, that he had not been contacted by any one affiliated with the Web site, and that the bottle's label listed Respondent as the prescriber and Southwest Fusion, an entity in Fort Worth, Texas, as the dispensing pharmacy. *Id.*

The Show Cause Order thus alleged that Respondent "did not establish legitimate physician-patient relationships with the Internet customers to whom [he] prescribed controlled substances" and that "such prescriptions [were] not [issued] for a legitimate medical purpose in the usual course of professional practice." *Id.* at 7. The Order thus alleged that the prescriptions violated 21 CFR 1306.04(a).[1]

On September 22, 2005, Respondent requested a hearing on the allegations, which he denied, maintaining that he had been the victim of identity theft, ALJ Ex. 2; the matter was then placed on the docket of the Agency's Administrative Law Judges (ALJ). Moreover, on October 7, 2005, Respondent requested a stay of the immediate suspension based on his contention of identity theft. *See ALJ* Ex. 4. On October 14, 2005, I stayed the suspension pending resolution of his claim. *Id.*

Thereafter, on October 19, 2005, the parties filed a Joint Motion to Stay the Proceedings, ALJ Ex. 3, and on October 26, 2005, the ALJ granted a stay. ALJ Ex. 5. On December 4, 2006, the parties filed a joint status report. ALJ Ex. 6. Therein, the parties notified the ALJ of their inability to reach a resolution of the matter and requested that the stay of the proceedings be lifted and that the hearing be held as soon as possible. *Id.*

In its prehearing statement of January 5, 2007, the Government notified Respondent that it also intended to present evidence regarding statements he made during an interview with DEA Investigators on September 22, 2005. Gov. Prehearing Statement at 7. More specifically, the Government alleged that Respondent had contracted with EDrugs, an entity which operated a Web site (*http://www.eDrugstore.com*), and that "on a daily basis" "for about 6

[1] While I also immediately suspended Respondent's registration based on my conclusion that his continued registration during the pendency of the proceeding "would constitute an immediate danger to public health and safety," Show Cause Order at 7, on October 14, 2005, I subsequently stayed the suspension after Respondent maintained that he was the victim of identity theft. ALJ Ex. 4.

months between July 2003 and February 2004," he would go to the "company webpage and review a list" which "contain[ed] patient names and suggested prescription drugs." *Id.* at 7–8. The Government also alleged that Respondent "stated that he approved prescriptions for non-controlled substances and diet medications," that "[h]e was paid $3.00 for each non-controlled prescription and $10.00 for each diet prescription," and that he "received approximately $30,000 from EDrugs for his services." *Id.* at 8.

After delays authorized by the ALJ, a hearing was held in Seattle, Washington on July 24–26, 2007. At the hearing, both parties called witnesses to testify and introduced documentary evidence. After the hearing, both parties submitted Proposed Findings of Fact, Conclusions of Law and Arguments.

On September 22, 2008, the parties filed a Joint Motion to Stay the Administrative Proceedings until March 31, 2009. ALJ Ex. 12. The basis of the motion was that on July 8, 2008, the Washington Medical Quality Assurance Commission (MQAC) had summarily suspended Respondent's State medical license and that his hearing on that matter was not scheduled until March 6, 2009. ALJ Ex. 12. On September 26, 2008, the ALJ granted the motion and directed the parties to file a joint status report by March 31, 2009. ALJ Ex. 13.

On March 30, 2009, the parties filed a Joint Status Report, Motion to Lift Stay of Proceedings and Motion to Reopen the Record. ALJ Ex. 15. Therein, the parties noted that the MQAC had entered an Agreed Order which allowed Respondent to resume practicing medicine provided he satisfied various terms and conditions set forth therein; the parties also sought to supplement the record with various documents related to the MQAC proceeding and to file supplemental briefs. *Id.* On April 1, 2009, the ALJ lifted the stay, reopened the record to admit the MQAC documents, granted the parties additional time to file supplemental post-hearing briefs, and then closed the record. ALJ Ex. 16. On July 22, 2009, the ALJ also reopened the record on Respondent's motion to admit an exhibit and then closed the record again. ALJ Ex. 18. Finally, on July 29, 2009, the ALJ reopened the record *sua sponte* to admit various documents related to the matter's procedural history and then finally closed the record. ALJ Ex. 17.

On October 2, 2009, the ALJ issued her recommended decision (ALJ). Therein, the ALJ concluded that the Government had made a *prima facie* showing that Respondent had committed acts which render his registration inconsistent with the public interest, finding that the evidence under factors two (Respondent's experience in dispensing controlled substances) and four (Respondent's compliance with State and Federal laws related to controlled substances) supported the revocation of Respondent's registration. ALJ at 29 & 31.

The ALJ found that Respondent had contracted with eDrugstore, an internet pharmacy, and that from July 2003 through early 2004, Respondent had issued over 300 controlled substance prescriptions. *Id.* at 26. The ALJ also found that Respondent had issued prescriptions after reviewing online questionnaires and that he did not keep any medical records for the individuals to whom he prescribed the controlled substances. *Id.*

With respect to these prescriptions, she further found that Respondent, who is only licensed to practice medicine in Washington, "prescribed controlled substances to individuals in other states, to include California, Indiana, Massachusetts, Texas, and Virginia," which require a physician to be licensed by them prior to issuing prescriptions to a State resident, and that this conduct violated the Controlled Substances Act (CSA) because he engaged in the unauthorized practice of medicine and thus acted outside of the usual course of professional practice. *Id.* at 27, 28 (collecting cases). She also concluded that Respondent violated the CSA in issuing these prescriptions because he did not have "a face-to-face meeting" with the patient and "violate[d] the standard of care * * * for prescribing controlled substances" and thus did not establish "a valid doctor-patient relationship." *Id.* at 29.

Based on an undercover purchase, the ALJ found that "Respondent's name and DEA number were used to authorize prescriptions through the Heynowmeds website." *Id.* While the ALJ acknowledged Respondent's contention that he did not issue prescriptions for this Web site, she concluded that because Respondent had "allow[ed] such a website to gain access and to use his DEA registration number," he "remains responsible for the outcome of that use." *Id.* She further reasoned that Respondent's failure to safeguard his registration from unauthorized use "create[d] a risk of diversion" and "a risk to the public health and safety" because it allowed persons "without a legitimate need for * * * controlled substances" to obtain them and thus was relevant conduct under factor five (such other conduct which may threaten public health and safety).[2] *Id.* at 30.

The ALJ then turned to other facts which she deemed relevant in the public interest determination. The ALJ found that "Respondent was cooperative and truthful" in his interview with DEA. *Id.* She also found significant the MQAC's 2007 finding "that there was no evidence that the Respondent mishandled controlled substances during the Board's" 2005 investigation. *Id.* at 30–31. She further found it "significant" that, under the most recent MQAC order, Respondent is being supervised by a mentoring physician who is required to report to the Board. *Id.*

While the ALJ concluded that the Government had made out its *prima facie* case, and that Respondent had violated both the CSA and State laws "in prescribing controlled substances over the Internet" and by his failure to safeguard his registration, she also noted that since the initiation of the proceedings, "Respondent has had approximately four years to handle controlled substances without any adverse action being taken or evidence being seized by the DEA" and that the "Medical Board is very diligent in monitoring [his] medical practice and will continue to do so in the future." *Id.* at 31–32. Believing that "this proceeding has instilled in * * * Respondent a grave respect for the authority and responsibilities which attach to his DEA registration," the ALJ apparently recommended that I grant Respondent a new registration subject to the condition that he file his mentor's reports with this Agency and that he take the additional medical education courses order by the MQAC. *Id.* at 32.

Neither party filed exceptions to the ALJ's decision. Thereafter, on November 3, 2009, the ALJ forwarded the record to me for final agency action.

Having considered the record as a whole, I adopt the ALJ's findings of fact

[2] With respect to factor one (the recommendation of the State board), the ALJ noted that the State Board "has not made a direct recommendation concerning [his] DEA registration." ALJ at 25. The ALJ further found, however, that the State "Board has engaged in considerable oversight of the Respondent's medical practice" which included summarily suspending his license after finding that his "continued practice of medicine constitute an immediate danger to the public health and safety" and that he had committed unprofessional conduct on two occasions (2007 and March 2009). *Id.* at 25–26. The ALJ did not, however, state whether this factor supported a finding that his continued registration is inconsistent with the public interest.

With respect to factor three (Respondent's conviction record of offenses related to controlled substances), the ALJ found that there was "no evidence of [his] having a conviction record." *Id.* at 30.

and legal conclusions except as noted herein. However, I further find that Respondent prescribed controlled substances for Heynowmeds.com. While I also agree with the ALJ that the Government made out a *prima facie* case for revocation, I reject the ALJ's conclusion that the other facts and circumstances support granting him a new registration. As explained below, the ALJ ignored the extensive Agency precedent which holds that an applicant is not entitled to be registered unless he accepts responsibility for his misconduct. Because Respondent did not testify in this proceeding and continues to maintain that "he ha[s] done nothing wrong," Tr. 645, he has not satisfied the Agency's rule for regaining his registration and his application must be denied. I make the following findings.

Findings of Fact

Respondent's Registration and License Status

Respondent is a physician who previously held DEA Certificate of Registration, BM5009065, which authorized him to dispense controlled substances in schedules II through V as a practitioner; his registered location was in Seattle, Washington, and his registration expired on January 31, 2008. GX 1, at 1–2. Respondent did not, however, file a renewal application until January 24, 2008. ALJ Ex. 12, Appendix I, at 1 (Joint Stipulation). The parties also agree that Respondent's registration "did not continue in effect after January 31, 2008." *Id.* While Respondent no longer holds a registration, he does have an application for a new registration currently pending.

Respondent is board-certified in internal medicine and holds a medical license issued by the State of Washington. RX 4, at 1. While Respondent has a current license, he has been the subject of two recent disciplinary proceedings before the Washington Medical Quality Assurance Commission (MQAC).

On June 24, 2005, the MQAC filed a statement of charges which alleged that in July 2003, Respondent contracted with eDrugstore.md "to prescribe legend drugs to patients that were referred to him though the website," and was paid by the Web site and "not the patients." GX 27, at 1–2. The MQAC alleged that its "investigation included a portion of [his] prescriptions," and that "[f]rom August 2003, through approximately February 2004, Respondent authorized approximately 2,700 prescriptions in the sample obtained in the investigation." *Id.* at 2. The MQAC further alleged that:

> Respondent did not conduct a history and physical on any of these patients. He did not have face-to-face contact with any patient to evaluate them. Respondent did not have the patient's medical records available for review, and he did not have any way to verify any of the information provided to him via the online consultation form, nor did he attempt to do so. Respondent did not have a pre-existing physician-patient relationship with any of these patients. Respondent did not attempt to verify any pre-existing or underlying conditions, contraindications, or other medications that the patient was taking, other than via the online consultation form, filled out by the patient or through email. Nonetheless, Respondent undertook to provide diagnosis and treatment of every one of these patients.

Id. at 2.

In addition, the MQAC alleged that Respondent had prescribed controlled substances to three State residents and that he had no medical records for these persons. *Id.* at 3–4. More specifically, the MQAC alleged that "Respondent provided prescriptions for Percocet, Hydrocodone, and Amphetamine" to Patient 1, that he "prescribed Oxycodone and Alprazolam for Patient 2," and that he "prescribed Hydrocodone and Cyclobenzaprine for Patient 3." *Id.* at 3. With respect to each of these three patients, the MQAC also alleged that Respondent "has no record of a history and physical for this patient, and no information to explain this patient's diagnosis and treatment. There are no medical records, no test results, or documentation of any kind to support this patient's diagnosis and treatment." *Id.* at 3–4.

The MQAC thus alleged that Respondent's conduct with respect to both his prescribing over the Internet and his prescribing to the three patients constituted unprofessional conduct in violation of State law. *Id.* at 4. More specifically, the MQAC alleged that Respondent's prescribing violated Washington law prohibiting: (1) "[i]ncompetence, negligence, or malpractice which results in injury to a patient or which creates an unreasonable risk that a patient may be harmed," *id.* (quoting Wash. Rev. Code § 18.130.180(4)), and (2) "[t]he possession, use, prescription for use, or distribution of controlled substances or legend drugs in any way other than for legitimate or therapeutic purposes, diversion of controlled substances or legend drugs, the violation of any drug law, or prescribing controlled substances for oneself." *Id.* (quoting Wash. Rev. Code § 18.130.180(6)).

On January 18, 2007, following a hearing, the MQAC issued a Final Order on the allegations. GX 28. Therein, the MQAC found proved the allegations that Respondent had contracted with eDrugstore.md "to prescribe legend drugs to patients that were referred to him through the web site" and that he "was compensated by eDrugstore.md [and] not by the patients." *Id.* at 5. The MQAC further found that Respondent used his DEA registration to prescribe medications and that "[f]rom August 2003 through March 2004, [he] authorized approximately 2,700 prescriptions." *Id.* at 6. The Board further found that:

> The Respondent did not conduct a history and physical on any of these patients. He did not have a face-to-fac[e] contact with any patient to evaluate them. The Respondent did not have the patient's medical records available for review, and he did not have any way to verify any of the information provided to him via the online consultation form, nor did he attempt to do so. The Respondent did not have pre-existing or underlying conditions, contraindications, or other medications that the patient was taking, other than via the online consultation form filled out by the patient or through email. Nonetheless, Respondent undertook to provide diagnosis and treatment of every one of these patients.

Id.

The MQAC further found that, because "Respondent did not physically see, interview, or examine the patients he treated through eDrugstore.md, [he] could not verify their identity and could not establish a diagnosis through the use of accepted medical practices to justify prescribing medications" and that "[t]hrough eDrugstore.md, [he] prescribed [p]hentermine, a diet medication to treat obesity." *Id.* at 7. Continuing, the MQAC found that "[b]y prescribing" phentermine "over the Internet without proper counseling, follow up, and treatment plan, the Respondent failed to comply with standards of care from the perspective of managing obesity." *Id.* The MQAC also found that his prescribing of phentermine "over the Internet was negligent and such conduct created [an] unreasonable risk that the patients may be harmed." *Id.*

The MQAC further found that Respondent's internet prescribing "was contrary to [its] Guidelines for the Appropriate Use of the Internet in Medical Practice," which it had issued on October 11, 2002. *Id.* at 6. *See also* GX 24. The MQAC noted that the Guidelines:

> Provide that treatment that is based solely on online questionnaires or online consultations do[es] not constitute an acceptable standard of care. Specifically, patient evaluation must be obtained prior to

providing treatment, including issuing prescriptions, electronically or otherwise. A patient evaluation includes a history and physical examination adequate to establish a diagnosis and to identify underlying conditions and/or contraindications to the treatment being recommended or provided.

GX 28, at 6; *see also* GX 24, at § 5.[3]

With respect to the three patients who were State residents, the MQAC found that Respondent had prescribed controlled substances to them and had "failed to keep any medical records for these patients." GX 28, at 7. The MQAC also found that Respondent ha[d] no record of a history and physical exam for these patients and no information to explain the patients' diagnosis and treatment. There are no medical records, no test results, or documentation of any kind to support the patient's diagnosis and treatment." *Id.* The MQAC further found that Respondent's treatment of these patients "was below the standard of care for a physician in the state of Washington, and [that] his conduct created an unreasonable risk of harm." *Id.* at 8.

The MQAC ultimately concluded that the State had "proved by clear and convincing evidence that * * * Respondent's conduct constituted unprofessional conduct in violation of" Wash. Rev. Code § 18.130.180(4). *Id.* at 9. However, apparently because the State produced no evidence showing that Respondent prescribed controlled substances "for use other than for therapeutic purposes," *id.* at 8, the MQAC concluded that the State had "failed to prove by clear and convincing evidence that * * * Respondent's conduct constituted unprofessional conduct in violation of" Wash. Rev. Code § 18.130180(6).[4] *Id.* at 9.

On July 3, 2008, the MQAC filed another Statement of Charges against Respondent, alleging that he had committed unprofessional conduct in providing treatment (or lack thereof) of four emergency room patients. ALJ Ex. 15, at 2; Jt. Ex. 1, at 1, 4. However, none of the allegations involved the prescribing of controlled substances. Five days later, on July 8, 2008, the Commission entered an Ex Parte Order of Summary Suspension. ALJ Ex. 15, at 2; Jt. Ex. 2, at 1, 3.

On March 5, 2009, Respondent entered into a Stipulated Findings of Fact, Conclusions of Law and Agreed Order with the Commission in which Respondent agreed that he had committed unprofessional conduct in his treatment of the patients in question in violation of Wash. Rev. Code § 18.130.180(4). The Commission permitted Respondent to return to the practice of medicine pursuant to terms and conditions of the Agreed Order. ALJ Ex. 15, at 2; Jt. Ex. 3, at 1, 3. On the same date, finding that the Agreed Order superseded and appropriately incorporated all the outstanding terms and conditions of the January 2007 Final Order, the Commission released Respondent from that Order. ALJ Ex. 15, at 2; Jt. Ex. 4, at 2.

Under the Agreed Order, which is to remain in effect for at least three years, Respondent is limited to "office-based family and internal medicine group practice." Jt. Ex. 3, at 4. In addition to some continuing education and medical proficiency requirements, Respondent must "arrange for another physician to serve as a mentor at all times prior to termination of these practice conditions." *Id.* at 5. Among other matters, under the Agreed Order, the mentor must make periodic reports to the Commission, exercise oversight of the office-based practice, and review all of Respondent's charts and entries "until otherwise directed by the Commission."[5] *Id.* at 5–6.

The DEA Investigation of Respondent

In June 2004, DEA began investigating a criminal conspiracy run by Mr. Johar Saran and various associates, which among other crimes, unlawfully distributed controlled substances in violation of 21 U.S.C. 841(a)(1)(a) & (b)(1)(D), 846. *See generally* GX 23. More specifically, the Saran conspiracy controlled more than twenty corporate entities (including Carrington Health Services (CHS) and Infiniti Services Group (ISG)) which were used to fraudulently obtain the DEA pharmacy registrations that are legally necessary to purchase controlled substances from registered manufacturers and distributors. GX 24, Factual Resume at 5–6; Tr. 24–25. Saran and his co-conspirators purchased the controlled substances and then distributed them to customers who sought them through over 100 Web sites. GX 24, Factual Resume at 8. As Johar Saran admitted in his plea agreement, he and his co-conspirators "agreed to distribute and possess with the intent to distribute, controlled substances to Internet drug seeking customers without legitimate prescriptions. [He] knew that controlled substances would be distributed to Internet customers without the existence of a doctor patient relationship [and that] the Internet controlled substance distributions were outside the scope of professional practice and not for a legitimate medical purpose." *Id.*

As part of the investigation, on December 9, 2004, DEA investigators conducted a "trash run" at CHS/ISG. Tr. 24. Among the evidence recovered were a dozen prescription labels for controlled substances (including phentermine, hydrocodone/apap, and alprazolam), which "appear[ed] to be the portion of a multi-part printout that should have been filed by the pharmacy as a record of the transaction or the prescription being filed." *Id.* at 33–34; GX 37. The labels indicated that "George Mathew, M.D." was the prescribing physician, gave his registered address in Seattle, Washington (albeit without the suite number and having a one-digit mistake in the zip code), and listed his DEA registration number. GXs 1 & 37. According to a DI, the pharmacy listed

[3] On April 27, 2001, DEA published a guidance document, *Dispensing and Purchasing Controlled Substances over the Internet,* 66 FR 21181. Therein, the Agency explained that "Federal law requires that '[a] prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice' " and that "[u]nder Federal and state law, for a doctor to be acting in the usual course of professional practice, there must be a bona fide doctor/patient relationship." *Id.* at 21182. The Agency further noted that "many state authorities" look to "four elements as an indication that a legitimate doctor/patient relationship has been established." *Id.* These are: (1) "[a] patient has a medical complaint"; (2) "[a] medical history has been taken"; (3) "[a] physical examination has been performed"; and (4) "[s]ome logical connection exists between the medical complaint, the medical history, the physical examination, and the drug prescribed." *Id.* at 21182–83. The Document then noted that "[c]ompleting a questionnaire that is then reviewed by a doctor hired by the Internet pharmacy could not be considered the basis for a doctor/patient relationship. * * * It is illegal to receive a prescription for a controlled substance without the establishment of a legitimate doctor/patient relationship, and it is unlikely for such a relationship to be formed through Internet correspondence alone." *Id.* at 21183.

[4] Based on its findings that Respondent had committed unprofessional conduct, the MQAC imposed various sanctions on Respondent including a suspension (which was stayed), a restriction that he could only practice as an emergency medicine physician, and a fine of $2500. *Id.* at 10–119. The MQAC also ordered him to complete an approved education and assessment course and six hours of continuing medical education in ethics and professionalism, to file a declaration each quarter stating that he was in compliance with the Order, and to appear before the Commission for compliance hearings. *Id.* at 11–12.

[5] By letter of June 15, 2009, Dr. David Lush indicated that he was Respondent's mentor physician for purposes of the Agreed Order. RX 37, at 1. Dr. Lush further indicated that Respondent had commenced to work under his supervision at his community clinic in Raymond, Washington. *Id.* at 1, 2. Dr. Lush requested that "the DEA permit [Respondent] to hold a registration number so that he will be able to make the most constructive possible contribution to the operations of [the] clinic." *Id.* at 2. He averred that, given the Commission's restrictions on Respondent's license, "there would be no danger to the public as a result of permitting [Respondent] to continue to hold a DEA registration number." *Id.*

on the labels (Anchor Services, Inc. of Fort Worth, Texas) was a Saran-affiliated pharmacy; however, drug orders were not filled there but rather at the CHS location.[6] Tr. 36; *see* GX 22, at 3–4.

DEA Investigators also obtained a court order authorizing them to intercept electronic communications (including e-mail and downloads) to and from CHS/ISG from April 17, 2005 through the ensuing 90 days. Tr. 50–51; GX 36, at 2. The intercept yielded 136 prescriptions for controlled substances which were filled between May and June 17, 2005 by Southwest Infusion, one of Saran's sham pharmacies, and which bore Respondent's name as the prescribing doctor, his DEA number, and his signature. *See generally* GX 4. The prescriptions listed the same street address, suite number and city as Respondent's registered location but indicated the State as Massachusetts, rather than Washington, and a zip code of 98104, rather than 98121. *See* GXs 1 & 4.

The vast majority of the prescriptions were for schedule III controlled substances containing hydrocodone (typically containing 10 mg. of this controlled substance); other prescriptions were for the schedule IV controlled substances alprazolam and diazepam. *See generally* GX 4. The prescriptions were sent to patients throughout the United States (and outside of Washington State) and included the UPS shipping labels. *Id.*

DEA also executed search warrants for Saran's business and the residence of Ted Solomon, one of Saran's co-conspirators, who ran several of his own Web sites. Among the items seized at both CHS/ISG and at Solomon's home was a spreadsheet which listed persons who were identified as the "lead[s]," [7] the names of various companies and their Web sites, a contact for the companies, and various physician names. GX 33, at 3–4. Under the lead of "Heather," the spreadsheet listed several companies and their Web sites including Pacific Blue Rx (PacifcBlueRx.com) and FMS (rxmetro.com); the spreadsheet also listed Heynowmeds.com.[8] Tr. 98–100; GX 33, at 3–4. The spreadsheet listed Respondent as the Dr. for both PacificBlueRx and FMS. GX 33, at 3.

According to a DI, these three Web sites (as well as FMS) were owned by Michael Schwerdt, whose father-in-law was Abel Rodriguez.[9] Tr. 100 & 111. Heather Elliot managed their accounts for Saran. *Id.* at 102. According to the DI, Elliot would access the Internet and download approximately 50 prescriptions and print out their labels, which she then gave to people in the pharmacy who filled the vials and readied the drugs for shipping. *Id.* at 103. Elliot was eventually indicted and pled guilty to several Federal felony offenses. RX 27.

On May 23, 2005, a DI went to Heynowmeds.com, which he selected because it was one of the busier Web sites, to purchase hydrocodone. Tr. 67; GX 3, at 1. The Web site listed various types of medicine available, and the DI clicked on "pain relief." *Id.* at 73. The DI then ordered 90 tablets of hydrocodone/acetaminophen 10/325. *Id.* at 74. The DI selected this drug based on its popularity with drug abusers, which the DI explained was because "you can get the strongest strength of hydrocodone and the smallest strength of additives, like acetaminophen." *Id.*

While the Web site prompted the DI to provide some medical information, it did so only after asking for his contact and payment information. *Id.* at 77–78. The Web site also asked for contact information for his physician; the DI entered the name and cell phone of a DEA Special Agent. *Id.* at 79–80. The DI paid $265.84 for the drugs using a money order.[10] GX 3, at 2 & 5.

Two days later, on May 25, the DI received the hydrocodone that he had ordered. *Id.* at 82. The label indicated that the filling pharmacy was SouthWest Infusion, one of Saran's pharmacies; [11] the prescriber was listed as "George Mathew, M.D." *Id.* at 61; GX 3, at 3.

The DI testified that Respondent was "the contracting physician" for Heynowmeds, PacificBlueRx, and Rx Metro, Tr. 100, in that he was "the physician that [wa]s approving the drug orders and [was]s being compensated by these websites for doing so." *Id.* at 102–03. The DI also testified that while he had "no knowledge" as to whether Respondent had personally approved his order for hydrocodone, *id.* at 110, Respondent had "entered into a contract with Abel Rodriguez" and made both his DEA registration and his State license available to Rodriguez. *Id.* at 111.

The DI then admitted that he had not found any contract between Respondent and the three Web sites. *Id.* at 114. Moreover, the DI further testified that during the Title III search, the Investigators found no evidence of personal contact between Respondent and the Saran pharmacies. *Id.* at 62–63. The DI explained, however, that "when a physician enters into a contract with a Web site owner, the Web site owner arranges for the fill pharmacy" and there is "no reason for the physician to contact that fill pharmacy unless he's * * * following up on any questions or concerns that there might be about the drugs." *Id.* at 63. The DI further testified that because Respondent's case was an "administrative" matter, the Investigators "did not follow the money trail" with respect to him. *Id.* Moreover, the Investigators did not have evidence of e-mails which Respondent may have sent to the three Web sites and which the Web sites may have sent to him.[12] *Id.* at 158 & 164.

On September 20, 2005, a Grand Jury indicted Johar Saran, 18 of his co-conspirators, and Saran's corporations for multiple felony offenses under Federal law. GX 22; Tr. 26. Thereafter, on September 22, 2005, DEA Investigators from the Seattle Division Office served the Order to Show Cause and Immediate Suspension on Respondent. Tr. 147, 149, 595, 597–98.

Later that day, the DIs met with Respondent and his attorney at the latter's office. *Id.* at 598. According to one of the DIs, during the interview Respondent told the DIs that "everything" in the Show Cause Order

[6] The ALJ observed that the record contained no evidence that the medications reflected in the documents seized during the trash runs were actually sent to the individuals whose names appear on the seized documents. *See also* ALJ at 6. Ordinarily, a pharmacy would not go to the trouble of creating these documents unless it was dispensing a drug.

[7] The testimony established that the "lead" was an employee of Saran who managed various companies' accounts.

[8] The document does not, however, list a physician for heynowmeds.com. *See* GX 33, at 4.

[9] A July 6, 2005, "Affidavit for Arrest" for Abel Rodriguez identified Michael Schwerdt as Abel Rodriguez's son-in-law. RX 22, at 28. It also indicated that documents printed from Florida Corporations Online and seized at the time of a search warrant for certain business properties listed Abel Rodriguez as the registered agent for La Familia Pharmacy III, Inc. *Id.* at 32.

[10] The instructions sent to the DI about payment for the shipment indicated that he should make his money order payable to Adserv, but the DI made the money order payable to SouthWest Infusion in order to track the payment back to the "fill" pharmacy. Tr. 86–87. Adserv employed Craig Schwerdt, the brother of Michael Schwerdt; the latter sent the former to Saran's headquarters "to make sure that [Heynowmed's] orders were going out in a timely fashion." *Id.* at 104; *see also id.* at 137; RX 24, at 47.

[11] The DI testified that "at one point" Johar Saran had "23 pharmacies" but that the number "dwindled down to 19 by the end." Tr. at 61.

[12] The ALJ noted that Government did not produce any testimony or statements from individuals associated with Saran including Johar Saran (and Heather Elliot) implicating Respondent. *See* ALJ at 5. However, this is hardly dispositive given that the Government did not allege that Respondent worked directly for a Saran-owned Web site. Moreover, given that this was a blatantly criminal scheme, it is not clear why Ms. Elliot would have needed to speak with Respondent rather than the Web site owners.

was "false." *Id.* at 599. Respondent admitted, however, that "he had at one time * * * authorized some prescriptions on the Internet," which was between "July 2003 and early 2004," when he had a "contract with a company called eDrugs or eDrugstore." *Id.* at 599, 600.

Respondent told Investigators that he approved drug orders for eDrugstore by reviewing an online questionnaire and a drug recommendation; if he agreed with the recommendation, he would authorize the drug order. *Id.* at 609. He further stated that the prescriptions he authorized were for "mainly non-controlled substances" and that, while he had authorized some prescriptions for "diet medications," he "had not authorized any narcotic controlled substances." *Id.* at 599. Respondent further maintained "that the quantity of the controlled substance prescriptions versus the non-controlled substance prescriptions was very small." *Id.* at 606. Respondent did not have medical records pertinent to his prescribing for eDrugstore. *Id.* at 606–07.

Respondent told the DIs that he had been paid $30,000 by eDrugstore during the six- month period he prescribed for it. *Id.* at 599–600, 605–06. He also stated that he was paid $3 for non-controlled substances and $10 for the diet drugs, which he admitted were controlled substances. *Id.* at 606. While Respondent further told the DIs that he would provide them with bank records regarding the payments he received from eDrugstore, he never did. *Id.* at 606–07.

However, his contention that he wrote only a "very small" number of controlled substance prescriptions cannot be reconciled with the MQAC's finding that Respondent authorized 2,700 prescriptions for eDrugstore, the total amount of the compensation ($30,000) he admitted to having received from eDrugstore, and the respective amounts eDrugstore paid him for the controlled ($10) and non-controlled prescriptions ($3). Indeed, this evidence suggests that the great majority of the prescriptions he wrote for eDrugstore were for controlled substances.[13]

With respect to the allegations of the Show Cause Order, Respondent stated that while he was prescribing for eDrugstore, he received a telephone call from Abel Rodriguez, who "had obtained his name from a faxed prescription that he had received from eDrugstore." *Id.* at 602. Respondent told the DIs that eDrugstore used Rodriguez's pharmacy, La Familia Pharmacy, to fill some of its prescriptions, and that that was how Rodriguez received the prescription (which contained his DEA registration number).[14] *Id.* at 624, 629. Rodriguez solicited Respondent to write prescriptions for his Web site; Respondent told the DIs that Rodriguez offered to pay him $30 to $35 for each controlled substance prescription. *Id.* at 611. After the phone call, Respondent went to Florida to visit Rodriguez and his pharmacy because he did not know Rodriguez, and Rodriguez came to Seattle. *Id.* at 612.

During the interview, Respondent maintained that he had written only about 100 prescriptions for non-controlled substances for Rodriguez's Web site. *Id.* at 614. He also denied having written any controlled substance prescriptions for him. *Id.* He denied receiving any money from Johar Saran. *Id.* at 601. He also denied knowing any of the individuals or entities listed in the Order to Show Cause and "said that someone else had provided [his] DEA number to them because he had not provided anything to any of these people" because he did not "know any of these people." *Id.* at 604.

The Supervisory DI present at Respondent's interview testified that Respondent was cooperative, supportive of the DEA, and that "[h]e appeared truthful." *Id.* at 604, 628. In a report submitted to the DEA Fort Worth office, she described Respondent's demeanor during the interview as candid and cooperative. *Id.* at 150.

In support of his contention that Rodriguez had used his registration number without his permission, Respondent offered into evidence an affidavit prepared by Special Agents of the Florida Department of Law Enforcement in support of an application for a warrant to arrest Rodriguez. RX 22, at 12 *et seq.* According to Respondent, the affidavit stated that "Rodriguez had forged the name of a physician, Miguel Mora, by 'rubber-stamping' Dr. Mora's name to prescriptions filled by the La Familia group, even though he was not actually involved in prescribing the medications." Resp. Br. at 17 (quoting RX 22, at 49). However, the affidavit does not identify Respondent as a physician whose name and registration were used to prescribe controlled substances without his authorization.[15] *See generally* RX 22.

Respondent did not testify in this proceeding. Instead, to bolster the credibility of his statement to the investigators that he did not authorize controlled prescriptions pursuant to his arrangement with Abel Rodriguez, he offered evidence that, in May 2007, he took and passed a polygraph examination which was arranged by his attorney. Tr. 505–07; RXs 6 & 33. The ALJ admitted this evidence over the objection of the Government. Tr. 641.

In *United States* v. *Scheffer,* 523 U.S. 303 (1998), the Supreme Court upheld a rule of evidence, which renders polygraph evidence inadmissible in a criminal proceeding, against a constitutional challenge. Fundamental to the Court's holding was its conclusion that polygraph evidence is not reliable. As the Court explained, "there is simply no consensus that polygraph evidence is reliable," and "[t]o this day, the scientific community remains extremely polarized about the reliability of polygraph techniques." *Scheffer,* 523 U.S. at 309 (citations omitted).

Under the Administrative Procedure Act (APA), the Agency's order must be "supported by and in accordance with *the reliable,* probative, and substantial evidence." 5 U.S.C. 556(d) (emphasis added). Respondent has made no showing that the scientific community and the courts consider this evidence any more reliable today than they did when *Scheffer* was decided. While Respondent argues that several Agencies (including this one) use polygraphs for a variety of administrative and investigatory purposes, the *Scheffer* Court rejected the same argument, noting, most significantly, that these uses "do not establish the reliability of polygraphs as trial evidence." 523 U.S. at 312 n.8.[16] Accordingly, I conclude

[13] To demonstrate, even if half of the 2,700 prescriptions (1,350) were for controlled substances, he would have earned less than $18,000 based on the amounts he received for the controlled ($10) and non-controlled ($3) prescriptions. Given the number of prescriptions, the only way that Respondent would have earned $30,000 was if nearly all the prescriptions were for controlled substances.

[14] Respondent denied having provided Rodriguez with his DEA number. *Id.* at 628.

[15] Earlier, the affidavit noted that during a search, officers had found in a personnel file of one of Abel Rodriguez's associates "[a]n entry labeled 'George Matthew, 121 Vine St, Seattle WA, 98122," which also included his DEA number). RX 22, at 38. In parentheses, the affidavit stated that Respondent "has previously been identified as a doctor writing prescriptions for the internet pharmacy operation." *Id.*

[16] Even were I to hold Respondent's polygraph evidence admissible, I would give it no weight as each of the questions was compounded. More specifically, the examiner asked Respondent if he had: (1) "ever done business with Johar Saran, CHS/HIS [sic], or *http://www.heynowmeds.com,*" (2) "ever personally prescribed controlled substances for customers of Johar Saran, CHS/HIS [sic], or *http://www.heynowmeds.com,* and (3) "ever received any payment and/or money from Johar Saran, CHS/ISH [sic] or *http://www.heynowmeds.com*." Tr. 506–07.

Continued

that the evidence should not have been admitted and I decline to rely on it.[17]

The Government also called Dr. George Van Komen, who was qualified as an expert witness in the prescribing of controlled substances including prescribing over the Internet. Tr. 284. Dr. Van Komen holds board certification in internal medicine, is a fellow of the American College of Physicians, and is an assistant professor of clinical medicine at the University of Utah School of Medicine, where he teaches a course in medical ethics and professionalism. GX 10, at 1; Tr. 261–63. Previously, Dr. Van Komen was a member and chairman of the Utah Physicians Licensing Board as well as a member of the Board of Directors and President of the Federation of State Medical Boards (FSMB); currently, he is the chairman of the Utah Medical Association's Committee for Controlled Substances. GX 10, at 2–3. Dr. Van Komen was also a member of the committee which drafted the FSMB's *Model Guidelines for the Appropriate Use of the Internet in Medical Practice* (2002). Tr. 290; *see also* GX 18.

Dr. Van Komen testified that there is "a well defined standard of care" for prescribing controlled substances and establishing a legitimate doctor patient relationship. Tr. 295. He further noted that the standards for Internet prescribing adopted by the MQAC (GX 24), closely follow the FSMB's guidelines and "outline for physicians in very clear language what's appropriate and what's not appropriate." Tr. 297. Dr. Van Komen then testified that the standard of care for prescribing a controlled substance requires that a doctor-patient relationship be established. *Id.* at 304–05. More specifically, Dr. Van Komen testified that this begins with the patient presenting with an ailment or medical problem and that the physician must then: (1) Meet the patient face-to-face to take a history and perform a physical examination; (2) order appropriate tests to confirm or eliminate a potential diagnosis; (3) make a diagnosis; (4) discuss the diagnosis and treatment options with the patient; and (5) discuss the risks and benefits of specific treatment choices. *Id.* at 304–06. The standard of care for prescribing a controlled substance also requires that the physician maintain patient files documenting "what has occurred in the doctor/patient relationship" and following up with the patient to make sure that the treatment is having the intended effect and not causing side effects. *Id.* at 307–08, 344.

Dr. Van Komen subsequently explained that reviewing an online questionnaire or engaging in a telephone consultation does not provide "the same information" regarding a patient's potential drug dependency as does "a face-to-face meeting." Tr. 334–35. Moreover, after writing a prescription, a doctor can reassess the patient when he comes back to the office. *Id.* at 334.

Based on his review of the MQAC's 2005 Statement of Charges (GX 27) and its 2007 Final Order (GX 28), Dr. Van Komen opined that Respondent "prescribe[d] outside the standard of care usually accepted or as is accepted by the medical community." Tr. 328. He also opined that the DVD which showed how the DI obtained hydrocodone through the Heynowmeds Web site, as well as the prescriptions that were listed on the spreadsheet of intercepted data, supported his conclusion. *Id.* at 329–30.

The Government then asked Dr. Van Komen whether he had an opinion as to whether Respondent's prescriptions were issued for "a legitimate medical purpose." *Id.* at 330. Dr. Van Komen explained that there was no "way of knowing if any of the prescriptions are for a legitimate medical purpose because there's no contemporaneous medical records on any of the patients." *Id.* Continuing, Dr. Van Komen explained that the failure to maintain medical records is "a huge breach of the responsibility of a physician when he's prescribing any medication * * * especially with controlled drugs." *Id.*

As for the MQAC's finding that Respondent had violated State law in prescribing phentermine, Dr. Van Komen testified that this drug is a schedule IV controlled substance which "can be abused and that the physician needs to [engage in] very close monitoring of patients," and that "it makes no sense at all to prescribe phentermine without a doctor/patient relationship." *Id.* at 331. He further testified that phentermine is a stimulant, and that "[o]f all of the drugs that we prescribe, stimulants are by far the most addictive." *Id.* at 343.

With respect to hydrocodone, Dr. Van Komen testified that a physician has to have "a real interaction" with "the patient before" deciding to "use opioid medication in the treatment of [the patient's] pain" and that once the physician prescribes the drug, he has to "have the patient come back" to "make sure that [the patient is] using the medication appropriately." *Id.* at 337. Dr. Van Komen also explained that hydrocodone is "very abused" and is "one of the leading cause[s] of drug overdose deaths in the United States." *Id.* at 338.

On cross-examination, Dr. Van Komen further explained that even if he did not consider the evidence that the Government obtained in the Saran investigation, his "opinion" regarding the medical propriety of Respondent's prescribing "would be the same as the [MQAC] found." *Id.* at 360. Continuing, Dr. Van Komen opined that Respondent "abuse[d] his authority as a physician by prescribing on the Internet without bonafide doctor/patient relationships." *Id.* at 360–61. He further noted that Respondent "did allow his DEA number and his medical license to remain with the Internet company" and "[h]e did very little after his initial stopping of prescribing in 2004 to try and get back the information from the Internet company." *Id.* at 361.

Discussion

Pursuant to Section 303(f) of the Controlled Substances Act (CSA), "[t]he Attorney General may deny an application for [a practitioner's] registration if he determines that the issuance of such registration would be inconsistent with the public interest." *Id.* § 823(f). With respect to a practitioner, the Act requires the consideration of the following factors in making the public interest determination:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing * * * controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

After the hearing, the Government submitted an affidavit by a DEA Supervisory Special Agent (SSA) who was also the Polygraph Staff Coordinator. GX 38. The SSA reviewed the testimony of Respondent's polygraph examiner as well as Respondent's Exhibits 33 (pre-polygraph interview notes), 34 (Polygraph examination agreement), and 35 (Backster Zone Comparison Test Variations). *Id.* at 2. The SSA concluded that all three target questions in the polygraph exam were compounded, which "could *substantially* diminish the accuracy of" the exam results, as the questions could have been truthfully answered either yes or no. *Id.* (emphasis in original). To avoid this result, the questions should have been asked individually as to Johar Saran, CHS/ISG, and *http://www.heynowmeds.com*. *Id.* The SSA further stated that the Respondent's exam would be deemed an "Administrative Opinion," because the results were not based upon the physiological responses to applied stimuli. *Id.* at 3.

[17] Respondent also called an expert witness in information technology, who attempted to trace the source and destination Internet Protocol addresses identified in the intercepted prescriptions to show that Respondent did not have a connection with, or own, the addresses. Tr. 397–405. The witness, however, acknowledged that his "research was inconclusive." *Id.* at 405; *see also id.* at 413. He further acknowledged that he was not asked to research whether Respondent had accessed the IP addresses and that his research did not establish that Respondent had not accessed them. *Id.* at 422.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety. *Id.* § 823(f).

"These factors are considered in the disjunctive." *Robert A. Leslie, M.D.,* 68 FR 15227, 15230 (2003). I may rely on any one or a combination of factors, and may give each factor the weight I deem appropriate in determining whether to deny an application or revoke an existing registration. *Id.* Moreover, I am "not required to make findings as to all of the factors." *Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005); *see also Morall* v. *DEA,* 412 F.3d 165, 173–74 (DC Cir. 2005).

With respect to a practitioner's registration, the Government bears the burden of proving (by a preponderance of the evidence) that granting the application would be inconsistent with the public interest. 21 CFR 1301.44(d). However, where the Government satisfies its *prima facie* burden, as for example, by showing that an applicant, who was previously registered, committed acts which are inconsistent with the public interest, the burden then shifts to the applicant to demonstrate why he can be entrusted with a registration.

In this matter, I agree with the ALJ that the Government has satisfied its *prima facie* burden by showing that Respondent committed acts which render his registration inconsistent with the public interest. *See* ALJ at 31 ("The Government clearly met its burden of proving that justification exists for revoking the Respondent's DEA registration."). However, I reject the ALJ's implicit conclusion that Respondent has rebutted the Government's *prima facie* case and her recommendation that Respondent "be given an opportunity to demonstrate," while he is being mentored, "his continuing ability and willingness to comply with the statutory and regulatory provisions that adhere to a DEA registration." *Id.* at 32.

As explained below, the ALJ disregarded the extensive body of Agency precedent holding that an applicant must acknowledge his prior misconduct and accept responsibility for it. *See, e.g., Medicine Shoppe-Jonesborough,* 73 FR 364, 387 (2008) (collecting cases). Respondent did not testify in this proceeding and continues to assert that he has "done nothing wrong." Tr. 645 (closing argument); *see also* Resp. Br. at 46. Accordingly, Respondent has not shown that he is entitled to a new registration.

Factor One—The Recommendation of the State Licensing Board

Respondent has twice been subjected to disciplinary proceedings brought by the MQAC. The latter MQAC case, which included a summary suspension for his failure to properly treat emergency room patients, did not involve his prescribing of controlled substances.

However, the first case was based on his internet prescribing of phentermine to patients he never physically examined, as well as his prescribings of controlled substances to three other patients on whom he did not maintain medical records. Based on this conduct, the MQAC found Respondent guilty of unprofessional conduct and imposed a suspension, which it stayed, as well as restrictions on his practice.

Notably, in this matter, the MQAC has not made a recommendation that he retain his DEA registration. Respondent nonetheless argues that its decision reflects its conclusion that permitting him to continue to practice "would not create a danger to public health and safety." Resp. Br. at 29. In his closing argument, Respondent further maintained that this Agency is required to defer to the MQAC's decision allowing him to continue to practice under conditions. Tr. 655.

While the MQAC's reinstatement of his medical license (following the second proceeding) now makes him eligible to hold a DEA registration, *see* 21 U.S.C. 823(f), this Agency has repeatedly held that possessing a valid State license is not dispositive of the public interest inquiry. *See Patrick W. Stodola,* 74 FR 20727, 20730 n.16 (2009); *Robert A. Leslie,* 68 FR at 15230. DEA has long held that "the Controlled Substances Act requires that the Administrator * * * make an independent determination as to whether the granting of controlled substances privileges would be in the public interest." *Mortimer Levin,* 57 FR 8680, 8681 (1992).[18] Accordingly, I am not required to defer to the MQAC's decision to allow Respondent to practice medicine, and I conclude that this factor is not dispositive either for, or against, granting Respondent's application.

[18] For reasons explained in my discussion of the sanction, I conclude that the conditions imposed by the MQAC do not adequately protect the public interest.

Factors Two and Four—Respondent's Experience in Dispensing Controlled Substances and His Record of Compliance With Laws Related to Controlled Substances

Under a longstanding DEA regulation, a prescription for a controlled substance is not "effective" unless it is "issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." 21 CFR 1306.04(a). This regulation further provides that "an order purporting to be a prescription issued not in the usual course of professional treatment * * * is not a prescription within the meaning and intent of [21 U.S.C. 829] and * * * the person issuing it, shall be subject to the penalties provided for violations of the provisions of law related to controlled substances." *Id. See also* 21 U.S.C. 802(10) (defining the term "dispense" as meaning "to deliver a controlled substance to an ultimate user by, or pursuant to *the lawful order of, a practitioner,* including the prescribing and administering of a controlled substance") (emphasis added).

As the Supreme Court recently explained, "the prescription requirement * * * ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse. As a corollary, [it] also bars doctors from peddling to patients who crave the drugs for those prohibited uses." *Gonzales* v. *Oregon,* 546 U.S. 243, 274 (2006) (citing *United States* v. *Moore,* 423 U.S. 122, 135, 143 (1975)).

Under the CSA, it is fundamental that a practitioner must establish and maintain a bonafide doctor-patient relationship in order to act "in the usual course of * * * professional practice" and to issue a prescription for a "legitimate medical purpose." *Laurence T. McKinney,* 73 FR 43260, 43265 n.22 (2008); *see also Moore,* 423 U.S. at 142–43 (noting that evidence established that physician "exceeded the bounds of 'professional practice,' " when "he gave inadequate physical examinations or none at all," "ignored the results of the tests he did make," and "took no precautions against * * * misuse and diversion"). At the time of the events at issue here, the CSA generally looked to State law to determine whether a doctor and patient had established a bonafide doctor-patient relationship. *See Kamir Garces-Mejias,* 72 FR 54931, 54935 (2007); *United Prescription Services, Inc.,* 72 FR 50397, 50407 (2007).[19]

[19] On October 15, 2008, the President signed into law the Ryan Haight Online Pharmacy Consumer

Continued

It is undisputed that Respondent prescribed for the eDrugstore Web site and issued numerous prescriptions for phentermine, a schedule IV controlled substance, to persons located throughout the United States. As the MQAC found, Respondent did not take a medical history on any of these persons and did not perform physical examinations of them. As the MQAC further found, he did not obtain each person's medical records and did not attempt to verify (and had no way to verify) the information which these persons provided. Yet as the MQAC found, he diagnosed each person and prescribed to them. As the MQAC found, and as Dr. Van Komen testified, Respondent failed to comply with the standard of care for prescribing phentermine.[20]

It is acknowledged that the MQAC found that there was no evidence that Respondent "diverted controlled substances * * * for illegitimate purpose in violation of any drug law." GX 28, at 8. However, the MQAC did not explain what legal standard it applied in making this finding. While the State of Washington can, of course, apply any standard it chooses in defining diversion for purposes of State law, the State has no authority to definitively interpret the CSA and determine what constitutes diversion under Federal law.

Several Federal courts of appeals have held that conduct similar to what the MQAC found Respondent to have engaged in by prescribing phentermine over the Internet violates the prescription requirement of Federal law and constitutes an unlawful distribution under 21 U.S.C. 841(a). *See United States* v. *Nelson,* 383 F.3d 1227, 1231–32 (10th Cir. 2004) (upholding physician's conviction for conspiracy to distribute prescription controlled substances "outside the usual course of professional practice" through internet scheme when physician approved "prescription drug requests * * * without ever examining his purported patient"); *see also United States* v. *Smith,* 573 F.3d 639, 657–58 (8th Cir. 2009) (upholding conviction of operator of internet drug distribution scheme for violations of 21 U.S.C. 841(a)(1) where " '[t]here was never an established doctor/patient relationship. There was never a face-to-face examination. There was never a history. There was no physical examination.' " (citation omitted)); *United States* v. *Fuchs,* 467 F.3d 889 (5th Cir. 2006) (rejecting pharmacist's challenge to convictions for dispensing controlled substance "not in the usual course of professional practice in violation of 21 U.S.C. 841(a);" scheme involved customers going to pharmacist's Web site, completing an online profile and requesting medication, which was then forwarded to physician who "reviewed the patient's profile and approved and signed the prescription without communicating with the patient either face to face or over the telephone").

As these decisions make plain, a physician acts outside of the usual course of professional practice and lacks a legitimate medical purpose when he issues a controlled substance prescription to a person with whom he has not established a legitimate doctor-patient relationship. As the MQAC's finding makes clear—and as Dr. Van Komen's testimony corroborates—by failing to take a medical history, review medical records and perform physical examinations, Respondent did not establish a legitimate doctor-patient relationship with any of the persons he prescribed phentermine to through eDrugstore. Tr. 330 & 360–61.

Respondent's conduct was not simply "malpractice, or even intentional malpractice." *United States* v. *Feingold,* 454 F.3d 1001, 1010 (9th Cir. 2006). Rather, he "wantonly ignored the basic protocols of the medical profession" and "his actions completely betrayed any semblance of legitimate medical treatment." *Id.* Accordingly, I hold that Respondent, in issuing phentermine prescriptions for eDrugstore, acted outside of the usual course of professional practice and lacked a legitimate medical purpose and therefore violated Federal law. 21 U.S.C. 841(a)(1); 21 CFR 1306.04(a). And to make clear for purposes of Federal law, where, as here, a physician violates the CSA's prescription requirement, the drug is deemed diverted.[21]

I further find that the Government has proved by a preponderance of the

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Protection Act of 2008, Public Law 110–425, 122 Stat. 4820 (2008). Section 2 of the Act prohibits the dispensing of a prescription controlled substance "by means of the Internet without a valid prescription," and defines, in relevant part, the "[t]he term 'valid prescription' [to] mean[] a prescription that is issued for a legitimate medical purpose in the usual course of professional practice by * * * a practitioner who has conducted at least 1 in-person medical evaluation of the patient." 122 Stat. 4820 (codified at 21 U.S.C. 829(e)(1) & (2)). Section 2 further defines "[t]he term 'in-person medical evaluation' [to] mean[] a medical evaluation that is conducted with the patient in the physical presence of the practitioner, without regard to whether portions of the evaluation are conducted by other health professionals." *Id.* (codified at 21 U.S.C. 829(e)(2)(B)). These provisions do not, however, apply to Respondent's conduct.

[20] At the hearing, Respondent contended that the Government violated his right to Due Process by introducing the evidence regarding the MQAC's 2005 statement of charges and its 2007 order because the Government did not make any allegations in the Show Cause Order regarding the first MQAC proceeding. Tr. 322. Respondent did not dispute, however, that the documents were noticed in the Government's pre-hearing statement and that they were timely exchanged. *Id.* at 324–25. The ALJ properly overruled Respondent's objection in holding that the Government had complied with due process.

One of the fundamental tenets of Due Process is that the Agency must provide a respondent with notice of those acts which the Agency intends to rely on in seeking the revocation of its registration so as to provide a full and fair opportunity to challenge the factual and legal basis for the Agency's action. *See NLRB* v. *I.W.G., Inc.,* 144 F.3d 685, 688–89 (10th Cir. 1998); *Pergament United Sales, Inc.,* v. *NLRB,* 920 F.2d 130, 134 (2d Cir. 1990). *See also* 5 U.S.C. 554(b) ("Persons entitled to notice of an agency hearing shall be timely informed of * * * the matters of fact and law asserted.").

However, " '[p]leadings in administrative proceedings are not judged by the standards applied to an indictment at common law.' " *Citizens State Bank of Marshfield* v. *FDIC,* 751 F.2d 209, 213 (8th Cir. 1984) (quoting *Aloha Airlines* v. *Civil Aeronautics Bd.,* 598 F.2d 250, 262 (DC Cir. 1979)). *See also Boston Carrier, Inc.* v. *ICC,* 746 F.2d 1555, 1560 (DC Cir. 1984) (quoted in *Edmund Chein,* 72 FR 6580, 6592 n.21 (2007) ("an agency is not required 'to give every [Respondent] a complete bill of particulars as to every allegation that [he] will confront' "). Thus, the failure of the Government to disclose an allegation in the Order to Show Cause is not dispositive, and an issue can be litigated if the Government otherwise timely notifies a respondent of its intent to litigate the issue.

The Agency has thus recognized that "the parameters of the hearing are determined by the prehearing statements." *Darrell Risner, D.M.D.,* 61 FR 728, 730 (1996). Accordingly, in *Risner,* the Agency held that where the Government has failed to disclose "in its prehearing statements or indicate at any time prior to the hearing" that an issue will be litigated, the issue cannot be the basis for a sanction. 61 FR at 730. *See also Nicholas A. Sychak, d/b/a Medicap Pharmacy,* 65 FR 75959, 75961 (2000) (noting that the function of pre-hearing statements is to provide Due Process through "adequate * * * disclosure of the issues and evidence to be submitted in * * * proceedings"); *cf. John Stafford Noell,* 59 FR 47359, 47361 (1994) (holding that notice was adequate where allegations were not included in Order to Show Cause but "were set forth in the Government's Prehearing Statement").

[21] The MQAC also found that Respondent had prescribed controlled substances to three State residents and yet had "failed to keep any medical records for these patients" and thus lacked documentation of having taken the patient's history, physical exam, and had no "documentation of any kind to support the patient's diagnosis and treatment." GX 28, at 7. Here again, the MQAC found that Respondent had committed unprofessional conduct and violated the standard of care applicable under Washington law. *Id.* However, the MQAC found that the State had failed to prove that Respondent lacked a therapeutic purpose in issuing these prescriptions.

While the ALJ's opinion erroneously suggests that the CSA requires that a physician maintain patient records, *see* ALJ at 26–27, the CSA requires only that a doctor maintain records showing the disposition of controlled substances which are dispensed and administered (but not prescribed) as a regular part of his professional practice. *See* 21 CFR 1304.04(d). However, a practitioner's failure to maintain records required under State law which relate to the prescribing of controlled substances is properly considered by the Agency under factors two, four, and five of the public interest standard.

evidence that Respondent also wrote the prescriptions which were identified as having been ordered through the Heynowmeds Web site and which were filled by the Saran pharmacies. *See* GXs 2–5. Relatedly, I reject Respondent's affirmative defense that his name, signature and DEA registration number were "stole[n] and misused" by Abel Rodriguez.

As found above, Respondent's name, registration number, and signature were found on more than 130 controlled substance prescriptions which were intercepted by the Government in its investigation of the Saran conspiracy; [22] these prescriptions were clearly distributed as evidenced by the attached shipping labels. GX 3. The presence of Respondent's name, registration number, and signature on these prescriptions creates a rebuttable presumption that he authorized them. Moreover, during the execution of search warrants at both CHS/ISG and the home of one of Saran's co-conspirators, Investigators seized a document which listed Respondent as the prescribing physician for several Web sites whose prescriptions were filled at Saran's pharmacies. Finally, in an interview with investigators, Respondent admitted that he had travelled from Washington State to Florida to meet Abel Rodriguez and that he had written prescriptions for Rodriguez (although he denied writing controlled substance prescriptions for his Web site).

Respondent did not testify in this proceeding. Instead, to support his defense, he put forward: (1) The results of a polygraph examination; (2) an affidavit submitted by Florida law enforcement officers in support of an arrest warrant for Abel Rodriguez, which stated that another physician's signature was used by an associate of Rodriguez to authorize prescriptions even though the physician was not involved in prescribing the drugs; and (3) the testimony of a DI who served the Show Cause Order and interviewed him later the same day during which he denied having written prescriptions for Heynowmeds.

Respondent's evidence is not sufficient to rebut the presumption that he wrote the prescriptions. With respect to the polygraph evidence, even putting aside the criticism of the Government's expert regarding the manner in which the test was administered, there is no consensus among the scientific community and the courts that polygraph evidence is reliable. *See United States* v. *Scheffer,* 523 U.S. at 309. As explained above, this evidence does not meet the standard of reliability imposed by the APA.

As for the affidavit's statement (which was based on the statement of one of Rodriguez's associates) that another physician's signature was used without his authority, all this establishes is that that physician's signature was misused. It does not prove that Respondent's registration was misused in writing the prescriptions.

Finally, Respondent relies on his statement to the DIs in which he denied that he wrote the controlled substance prescriptions identified in the Order to Show Cause. Respondent also points to the testimony of the DI that she found him to be credible.

However, Respondent's interview was not sworn. Moreover, the DI who did the interview was based in Seattle, had no previous role in the Saran investigation which was run by the Fort Worth, Texas office, and thus was not familiar with what the investigation had uncovered. Accordingly, the DI did not have the underlying knowledge of the facts of the investigation necessary to probe Respondent's story and to evaluate his credibility.

Beyond this, there is no reason to give dispositive weight to this statement when Respondent could have testified (and subjected himself to cross-examination) at his hearing but chose not to. It is well established that the Agency can draw an adverse inference from a respondent's failure "to testify in response to probative evidence offered against" him. *See Baxter* v. *Palmigiano,* 425 U.S. 308, 316 (1976); *see also United States* v. *Solano-Godines,* 120 F.3d 957, 962 (9th Cir. 1997) ("In civil proceedings * * * the Fifth Amendment does not forbid fact finders from drawing adverse inferences against a party who refuses to testify."). It is appropriate to draw an adverse inference here, where the Government produced evidence showing that his name, registration number and signature were used to authorize controlled substance prescriptions and Respondent failed to testify.[23]

I thus find that Respondent authorized the intercepted prescriptions. And for the same reasons that I found that the phentermine prescriptions violated Federal law (*i.e.,* he did not establish a legitimate doctor/patient relationship with those he prescribed for), I conclude that these prescriptions were also issued outside of the usual course of professional practice and lacked a legitimate medical purpose and thus violated Federal law. *See* 21 U.S.C. 841(a)(1); 21 CFR 1306.04(a).

The prescriptions violated Federal law for a further reason. As the Supreme Court explained shortly after the CSA's enactment, "[i]n the case of a physician[,] [the Act] contemplates that he is authorized by the State to practice medicine and to dispense drugs in connection with his professional practice." *United States* v. *Moore,* 423 U.S. at 140–41. *See also* 21 U.S.C. 802(21) (defining "[t]he term 'practitioner' [to] mean[] a physician * * * or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices * * * to dispense * * * a controlled substance in the course of professional practice."). Accordingly, DEA has held that "[a] physician who engages in the unauthorized practice of medicine under state law is not a 'practitioner acting in the usual course of * * * professional practice,'" and that "[a] controlled-substance prescription issued by a physician who lacks the license necessary to practice medicine within a State is therefore unlawful under the CSA." *United Prescription Services, Inc.,* 72 FR at 50407 (quoting 21 CFR 1306.04(a)). Likewise, the MQAC's 2002 Guidelines clearly stated that "[p]hysicians who treat or prescribe through Internet Web sites are practicing medicine and must possess appropriate licensure in all jurisdictions where patients reside." GX 24, at 6. Because Respondent was licensed only in Washington State, the prescriptions identified in Government Exhibits 2–5 were unlawful under both Federal law and the laws of numerous States for this reason as well. *See, e.g.,* Ala. Code § 34–24–502 (2005); *id.* § 34–24–51; Cal. Bus. & Prof. Code § 2052 (2005) [24]; N.C. Gen.

[22] The act of writing a prescription, by itself, constitutes the delivery of a controlled substance under Federal law even if the prescription is never dispensed by a pharmacy.

[23] In his brief, Respondent argues that the Government has not met its evidentiary burden because it did not present additional evidence establishing his involvement with Heynowmeds such as "proof of payments" to him from Heynowmeds or "testimony from an undercover officer or from bona fide drug-seeking customers about direct contacts with" him. Resp. Br. at 34–36. Respondent's position would have some merit if he had presented substantial, reliable and probative evidence that he was not involved with Heynowmeds. He did not. I further note that while Respondent promised to turn over his bank records, he never did.

[24] *See also Hageseth* v. *Superior Court,* 59 Cal. Rptr. 3d 385 (Ct. App. 2007) (upholding prosecution of out-of-State and unlicensed physician who prescribed drug to State resident over the Internet for the unauthorized practice of medicine); *United Prescription Services,* 72 FR at 50401 n.10 (discussing actions brought by Medical

Continued

Stat. § 90–18; Tenn. Code Ann. § 63–6–201; Tenn. Comp. R. & Regs. 0880–2.16; Tex. Occ. Code Ann. §§ 151.056 & 155.001.

As the forgoing demonstrates, Respondent issued numerous controlled substance prescriptions in violation of both Federal and State laws. He also lacked the records required under Washington law to justify his prescribing of controlled substances. Accordingly, I conclude that the evidence presented by the Government on factors two and four satisfies its *prima facie* burden of showing that granting Respondent's application "would be inconsistent with the public interest." 21 U.S.C. 823(f).

Sanction

Under Agency precedent, where, as here, "the Government has proved that a registrant has committed acts inconsistent with the public interest, a registrant must ' "present[] sufficient mitigating evidence to assure the Administrator that [he] can be entrusted with the responsibility carried by such a registration." ' " *Medicine Shoppe-Jonesborough,* 73 FR 364, 387 (2008) (quoting *Samuel S. Jackson,* 72 FR 23848, 23853 (2007) (quoting *Leo R. Miller,* 53 FR 21931, 21932 (1988))). "Moreover, because 'past performance is the best predictor of future performance,' *ALRA Labs, Inc.* v. *DEA,* 54 F.3d 450, 452 (7th Cir.1995), [DEA] has repeatedly held that where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for [his] actions and demonstrate that [he] will not engage in future misconduct." *Medicine Shoppe,* 73 FR at 387; *see also Jackson,* 72 FR at 23853; *John H. Kennedy,* 71 FR 35705, 35709 (2006); *Cuong Tron Tran,* 63 FR 64280, 62483 (1998); *Prince George Daniels,* 60 FR 62884, 62887 (1995). *See also Hoxie* v. *DEA,* 419 F.3d at 483 ("admitting fault" is "properly consider[ed]" by DEA to be an "important factor[]" in the public interest determination).

The ALJ did not acknowledge any of these cases in her recommended decision. *See* ALJ at 30–32. Instead, she noted that it was "appropriate to consider all of the facts and circumstances" which, in her view, include that he "was cooperative and truthful when working with DEA personnel," the Medical Board's 2007 finding that "there was no evidence that [he] mishandled controlled substances during the MQAC's" June's 2005 investigation, and "most significant[ly]," that under the MQAC's 2009 Order, Respondent is now being supervised by another physician. *Id.* Apparently, the ALJ also deemed it significant that since the institution of the proceeding, the Agency had not found any evidence of Respondent's mishandling of controlled substances. *Id.* at 31–32. Expressing her belief that "this proceeding has instilled in the Respondent a grave respect for the authority and responsibilities which attach to his DEA registration," the ALJ recommended that Respondent "be given an opportunity to demonstrate, during his mentorship, his continuing ability and willingness to comply with the statutory and regulatory provisions that adhere to a * * * registration." *Id.* at 32.

The ALJ's reasoning is unpersuasive. While it is true that the MQAC found no diversion in its 2005 investigation, as explained above, under Federal law, when prescriptions are issued outside of the usual course of professional practice and lack a legitimate medical purpose, 21 CFR 1306.04(a), the drugs are deemed to have been diverted. Indeed, in other decisions involving practitioners who prescribed over the Internet, DEA has noted the egregious nature of this misconduct and the serious threat it poses to public health and safety. *See William R. Lockridge,* 71 FR 77791, 77800 (2006) (noting that internet prescriber "was a drug dealer" and that conduct created "imminent danger to public health and safety"); *Mario Avello,* 70 FR 11695, 11697 (2005); *cf. Southwood Pharmaceuticals, Inc.,* 72 FR 36487, 36504 (2007) (discussing increase in the rates of prescription drug abuse and the Internet's "role in facilitating the growth of prescription drug abuse"); *see also* National Center on Addiction and Substance Abuse, "*You've Got Drugs!*" *IV: Prescription Drug Pushers on the Internet* (2007), at 11 ("[T]he wide availability of dangerous and addictive drugs on the Internet reveals a wide-open channel of distribution. This easy availability has enormous implications for public health, particularly the health of our children, since research has documented the tight connection between availability of drugs to young people and substance abuse and addiction.") (GX 32).

Moreover, as explained above, the Federal courts have recognized that prescribing controlled substances under these circumstances (*i.e.,* without taking medical history, physically examining the patient, and maintaining patient records) constitutes drug dealing. *See Nelson,* 383 F.3d at 1231–32 ("A practitioner has unlawfully distributed a controlled substance if she prescribes the substance either outside the usual course of medical practice or without a legitimate medical purpose."); *United States* v. *Quinones,* 536 F.Supp.2d 267, 271 (E.D.N.Y. 2008) (rejecting motion to dismiss indictment under 21 U.S.C. 841; "[t]hat the moving defendants allegedly carried out their activities through the Internet is of no consequence. Two circuit courts have approved the application of the Federal drugs laws to the operation of Internet pharmacies.") (citing *Nelson,* 383 F.3d 1227, and *Fuchs,* 467 F.3d 889). Contrary to the ALJ's understanding, Respondent's internet prescribing does not involve minor regulatory violations, but rather egregious acts which go to the core of the CSA's statutory purpose of preventing diversion and abuse.

As noted above, the ALJ did not even acknowledge the extensive Agency case law which holds that where a registrant has committed acts which render his registration inconsistent with the public interest, he must do two things: (1) Accept responsibility for his actions, and (2) demonstrate that he will not engage in future misconduct. Accordingly, the ALJ made no finding as to whether Respondent has accepted responsibility for his misconduct.

However, the Agency is the ultimate fact finder so I do make a finding. Based on Respondent's failure to testify in this proceeding, as well as his maintaining that he has done nothing wrong, I find that he has not accepted responsibility for his misconduct. *See, e.g., Hoxie,* 419 F.3d at 483 ("admitting fault" is "properly considered" to be an "important factor"). Given the egregious nature of his misconduct, Respondent's failure to acknowledge his wrongdoing provides reason alone to hold that he has not rebutted the Government's *prima facie* case.[25] Accordingly,

Board of California against out-of State physicians for prescribing to State residents).

[25] None of the other circumstances identified by the ALJ is sufficient to overcome Respondent's failure to acknowledge his misconduct, and only one of them—his being monitored by a mentor—would tend to establish that he can be entrusted with a new registration.

If Respondent had accepted responsibility, the MQAC's limitation of his practice to an office-based setting, which is supervised by another physician who must report to the MQAC, would be entitled to some weight. However, the gravamen of this case involved Respondent's misconduct in prescribing over the Internet and not his prescribing in a clinical setting. Thus, it is not clear that Respondent's mentor has either the authority or the capability to properly monitor him to ensure that he does not engage in internet prescribing. Respondent has therefore also failed to carry his burden with respect to showing that he can be entrusted with a new registration.

As for the ALJ's finding that he was "cooperative," this ignores that during his interview with the DIs he agreed to provide them with his bank records but never did. While the ALJ also noted that Respondent was "truthful," this finding was based

Respondent's application will be denied.

Order

Pursuant to the authority vested in me by 21 U.S.C. 824(a), as well as 28 CFR 0.100(b) & 0.104, I order that the pending application of George Mathew, M.D., for a DEA Certificate of Registration as a practitioner be, and it hereby is, denied. This Order is effective November 26, 2010.

Dated: October 17, 2010.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. 2010–27094 Filed 10–26–10; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 09–48]

East Main Street Pharmacy; Affirmance of Suspension Order

On April 23, 2009, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to East Main Street Pharmacy ("Respondent"), of Columbus, Ohio. The Show Cause Order proposed the revocation of Respondent's DEA Certificate of Registration, BE5902615, as a retail pharmacy, as well as the denial of any pending applications to renew or modify its registration, "for reason that [Respondent's] continued registration is inconsistent with the public interest, as that term is used in 21 U.S.C. 823(f) and 824(a)(4)." ALJ Ex. 1, at 1. More specifically, the Order alleged that Respondent had violated its corresponding responsibility under Federal regulations to not fill unlawful prescriptions. *Id.* at 2 (citing 21 CFR 1306.04(a)).

The Show Cause Order alleged that Respondent was owned by Eugene H. Fletcher, Respondent's sole pharmacist, and that from "September 2005 through February 2006" it "filled 6,619 controlled substance prescriptions" including 4,979 prescriptions issued by Dr. Paul Volkman of Portsmouth, Ohio. *Id.* at 1. The Show Cause Order further alleged that on February 10, 2006, DEA had immediately suspended Volkman's registration and that the Agency subsequently found that he had "'repeatedly violated Federal law by prescribing controlled substances without a legitimate medical purpose and outside the course of professional practice.'" *Id.* (citing *Paul H. Volkman,* 73 FR 30630, 30642 (2008)). The Order also alleged that "Dr. Volkman directed his patients to have their prescriptions filled at" Respondent, who "filled them mostly in exchange for cash,'' and that "[n]inety-eight percent of Dr. Volkman's patients that filled their prescriptions at [Respondent] did not reside in the Columbus area." *Id.* Relatedly, the Order alleged that some of Volkman's patients travelled from Portsmouth and Chillicothe, Ohio to Respondent, a distance of 92 and 45 miles, respectively; that one of Volkman's patients had travelled from South Central Kentucky to Respondent to obtain his prescriptions, that many of Volkman's patients were obtaining prescriptions from other physicians, and that several of these persons died of overdoses. *Id.* at 2.

The Show Cause Order further alleged that Respondent "filled prescriptions for combinations of controlled substances and the non-controlled, but highly addictive drug carisoprodal [sic] (Soma), under circumstances indicating that the prescriptions were issued outside the usual course of professional practice." *Id.* at 2. More specifically, the Order alleged that Respondent filled for numerous patients of Volkman, "large quantity prescriptions" for a benzodiazepine, two narcotic pain medications, and Soma, and that "[t]hese drug combinations are generally known in the medical and pharmacy profession as being favored by drug-seeking individuals." *Id.* The Order also alleged that Respondent "filled several of the above combination prescriptions when the patients should have had two to three weeks' supply of medication from a previous prescription" and it either "did not recognize, or ignored these indicators of drug diversion and abuse." *Id.*

Finally, the Order alleged that, with regard to Dr. Volkman's prescriptions, Mr. Fletcher had told a DEA Investigator "that it was 'not [his] job to question a physician.' " *Id.* Based on the above, the Order alleged that Respondent "knew, or should have known that [the] controlled substance prescriptions it filled for patients of Dr. Volkman were for no legitimate medical purpose." *Id.*

By letter of May 20, 2009, counsel for Respondent timely requested a hearing.[1] ALJ Ex. 2, at 1. The matter was then placed on the docket of the Agency's Administrative Law Judges (ALJs), and an ALJ proceeded to conduct pre-hearing procedures.

On May 26, 2009, the ALJ issued an Order for Pre-Hearing Statements. ALJ Ex. 14. The ALJ's order directed the parties to prepare a written statement, to be filed with the Hearing Clerk and served on opposing counsel, disclosing the "names and addresses of all witnesses whose testimony is to be presented." *Id.* at 2. The ALJ further ordered the parties to provide a:

> [b]rief summary of the testimony of each witness, with the Government to indicate clearly each and every act, omission or occurrence upon which it relies in seeking to revoke Respondent's DEA Certificate of Registration, and the Respondent to indicate clearly each and every matter as to which it intends to introduce evidence in opposition thereto. The summaries are to state what the testimony will be, rather than merely listing the areas to be covered. The parties are reminded that testimony not disclosed in the prehearing statements or pursuant to subsequent filing is likely to be excluded at the hearing.

Id.

On July 31, 2009, the ALJ conducted a pre-hearing conference call with the parties and also issued a Prehearing Ruling. *See* ALJ Ex. 3. In her Prehearing Ruling, the ALJ ordered that "[i]f either party chooses to amend its witness list, it must file a supplement to its Prehearing Statement, noting any changes. The names of additional witnesses must be listed, along with a summary of the proposed testimony." *Id.* at 2. The ALJ further "reminded" the parties "that testimony not summarized in prehearing statements or

on an opinion of an Investigator who lacked adequate information to properly assess his credibility. Moreover, the inconsistency between Respondent's claim that in prescribing for eDrugstore he only wrote a "small minority" of controlled substance prescriptions and the evidence regarding the total number of prescriptions, the amounts he was paid for the respective types of prescriptions, and his compensation, provides further reason to question the ALJ's conclusion.

The ALJ also found it significant that the Agency had not produced any evidence that Respondent mishandled controlled substances since the institution of the proceeding. However, because Respondent failed to file a timely renewal application, thus allowing his registration to expire (and also had his State license suspended), he lacked authority to handle controlled substances for a substantial portion of this period. In addition, the weight to be given this circumstance is significantly diminished by the fact that he was then in the midst of a Show Cause Proceeding.

Finally, the ALJ did not cite any evidence to support her belief that "this proceeding has instilled in the Respondent a grave respect for the authority and responsibility which attach to his DEA registration." ALJ at 32. Given the egregious misconduct proved on this record, rather than take a leap of faith, I rely on the Agency's longstanding rule which requires that a registrant acknowledge his misconduct and the relevant evidence or, as in this case, the lack thereof.

[1] Therein, Respondent denied the allegations maintaining that "Mr. Fletcher, based on his experience, training, and expertise, reasonably believed that all prescriptions filled were for a legitimate medical purpose" and that he "frequently exercised independent judgment to determine if the prescriptions were for legitimate medical purposes, and often refused to fill prescriptions written by licensed medical doctors, including Dr. Volkman." ALJ Ex. 2, at 2.

supplements thereto may be excluded at the hearing." *Id.*

Pursuant to my authority under 21 U.S.C. 824(d), on November 10, 2009, I further ordered that Respondent's registration be suspended immediately because its "continued registration * * * constitutes an imminent danger to the public health and safety." ALJ Ex. 8, at 1. The Immediate Suspension Order incorporated by reference the allegations of the Order to Show Cause and cited the additional allegations that Respondent had recently filled more prescriptions for controlled substances for two persons who were travelling substantial distances to obtain the drugs. *Id.* at 1–2.

More specifically, the Immediate Suspension Order alleged that on October 2, 2009, L.D.C., a resident of Portsmouth, Ohio obtained from a physician practicing in Wheelersburg, Ohio, prescriptions for 90 tablets of oxycodone 30 mg. and 60 tablets of carisoprodol (a non-controlled but highly abused drug which metabolizes into meprobamate, a Schedule IV depressant), and that she then travelled "approximately 100 miles from Wheelersburg to Columbus" and filled the prescriptions at Respondent. *Id.* at 2. The Order alleged that the next morning, L.D.C. "was found dead at her residence * * * with a prescription vial identifying [Respondent] as the dispensing pharmacy and several scattered oxycodone tablets * * * next to her body," and that the Coroner's Office had preliminarily determined that she "died from the * * * 'probable toxic effects of drugs (oxycodone, carisoprodol and others).'" *Id.*

The Immediate Suspension Order also alleged that on various dates including July 3, September 1, and October 1, 2009, Respondent had filled various prescriptions for oxycodone issued to S.J.P., of Waverly, Ohio. *Id.* The Order alleged that Waverly, Ohio is "approximately 64 miles from Columbus" and that the prescriptions were issued by physicians who practiced "in Lees [sic] Summit, Missouri," as well as in Dayton and Portsmouth, Ohio, which are 78 and 92 miles, respectively, from Respondent. *Id.*

The Order thus alleged that Respondent "knew or should have known that the above dispensed controlled substances were likely to be diverted or used for other than legitimate medical purposes" and that "[b]y dispensing such prescriptions, [Respondent] failed to fulfill its corresponding responsibility for the proper dispensing of controlled substances." *Id.* at 3. Based on the above, I concluded that there was a "substantial likelihood that [Respondent] will continue to violate its corresponding responsibility to properly dispense controlled substances" and that Respondent's continued registration during the pendency of the proceeding "would constitute an imminent danger to the public health and safety." *Id.* I, therefore, ordered that Respondent's registration be suspended.

On November 18–19, 2009, as well as on March 23–25, 2010, the ALJ conducted a hearing in Columbus, Ohio.[2] At the hearing, both parties elicited testimony from witnesses and submitted documentary evidence into the record. Following the hearing, both parties filed briefs containing their proposed findings of fact, conclusions of law, and argument.

On May 18, 2010, the ALJ issued her Recommended Decision. Applying the public interest factors, *see* 21 U.S.C. 823(f), the ALJ concluded that the "record demonstrates that it is against the public interest for the Respondent to retain its controlled substances registration" and recommended that "Respondent's registration be revoked and any pending applications for renewal be denied." ALJ at 54.

Under the first factor—the recommendation of the appropriate State licensing board or professional disciplinary authority—the ALJ found that "the Ohio Board of Pharmacy has not made a recommendation in this proceeding." *Id.* at 45. The ALJ further found, however, that on March 5, 2009, the Board had fined Mr. Fletcher and placed his license on probation because he "did not ensure, on three separate occasions, that a qualified person was at * * * Respondent to receive deliveries of controlled substances," which "were left at unsecure locations pending his arrival at the Respondent. " *Id.* The ALJ concluded that this "security violation weighs in favor of revocation" of Respondent's registration. *Id.*

As to the second factor—Respondent's experience in dispensing controlled substances—the ALJ found that "Respondent ignored numerous 'red flags' when dispensing controlled substances to Dr. Volkman's patients." *Id.* at 46. In particular, the ALJ relied on the testimony and report of the Government's Expert that various patients of Volkman:

> (1) were driving long distances to have their prescriptions filled, (2) were receiving large volumes of controlled substances in the highest strength in each prescription, (3) were not receiving individualized therapy, for 75% of these patients received the same four drug 'cocktail,' (4) were paying large amounts of cash for their prescriptions, and (5) were receiving multiple narcotic pain killers on the same day.

Id.

Noting Agency precedent that "'[w]hen prescriptions are clearly not issued for legitimate medical purposes, a pharmacist may not intentionally close his eyes and thereby avoid [actual] knowledge of the real purpose of the prescriptions,'" *id.* at 47 (quoting *Ralph J. Bertolino,* 55 FR 4729, 4730 (1990)), the ALJ concluded that Respondent "clos[ed] a blind eye to these obvious red flags," and accordingly, "was not taking seriously its corresponding responsibility for these prescriptions" to

[2] On February 4, 2010, the Government filed a motion in limine to exclude the testimony of various witnesses for Respondent on the ground that their names and an adequate summary of their testimony had not been previously disclosed as required by the ALJ's Order for Pre-Hearing Statements. ALJ Ex. 20. At the hearing on March 23, the Government renewed its motion. The ALJ found that Respondent's Counsel had violated her Order because "the Summary of Witnesses [sic] testimonies was not provided by the deadlines, and the summary that was provided is topical in nature, and not specific" and did not provide "full disclosure of proposed witness testimony." Tr. 786–87. While deeming "such conduct abhorrent" and acknowledging that the Government's Motion "in all [of] parameters should be granted," she nonetheless allowed Respondent to call all of its witnesses even though the Government was "being prejudiced" by the inadequacy of the disclosure. *Id.* at 786–88. This was because the ALJ understood that she has "a responsibility to develop a record." *Id.* at 787.

The ALJ's comments reflect a clear misunderstanding of her role. Proceedings under sections 303 and 304 of the Controlled Substances Act are adversarial and not inquisitorial in nature. As such, it is not the ALJ's role but rather that of the parties to develop the record; the ALJ's role is to ensure that the parties do so in accordance with the Agency's rules of procedure and the Administrative Procedure Act and that the proceeding is conducted with due regard for the Respondent's rights under the Due Process Clause.

Equally troubling is the ALJ's failure to resolve the issues raised by the Government's motion prior to the second phase of the hearing, which did not reconvene until March 23, 2010. Notably, Respondent filed its response to the Government's motion and its second supplemental pre-hearing statement on February 12, 2010; surely, at some point during this nearly six-week-long period and prior to the hearing, the ALJ could have ruled on the motion and issued an appropriate order.

However, while I find the ALJ's delay in handling the motion and her ruling disturbing, much (if not most) of the evidence presented in this matter (including that presented by the Government) is not probative of the issue of whether Respondent violated 21 CFR 1306.04(a). Moreover, many of Respondent's witnesses testified as to the character/reputation of its owner; while disclosure regarding these witnesses should have been more detailed, the prejudice to the Government was minimal.

As to the remaining witnesses, only three of them (Mark Aalyson, Catherine Smith, and Carisa Cole) offered any testimony that is arguably relevant to, and probative of, the central issue. Notably, in its post-hearing brief, the Government does not contend that it was prejudiced by inadequate disclosure of the testimony of these witnesses. I therefore conclude that Government has not preserved its objection.

these patients. *Id.* (citing 21 CFR 1306.04(a)).

The ALJ also noted that "[m]any of Dr. Volkman's patients had told [Respondent's owner] that other pharmacies would not fill Dr. Volkman's prescriptions" and yet Respondent's owner did not call these other pharmacies to ask why. *Id.* She also noted that Respondent had an "unconventional" relationship with Volkman in that Volkman referred his patients to Respondent, that Mr. Fletcher and Volkman's office would coordinate keeping Respondent "open late in the evenings" so that Volkman's patients could fill their controlled substance prescriptions, and that it "kept large quantities of controlled substances on hand to fill these large prescriptions." *Id.* at 48. Relatedly, the ALJ found that one of Volkman's patients credibly testified that she had filled prescriptions at Respondent "while exhibiting 'high' behavior such as slurred speech, stumbling walk, and probably 'drooling.'" *Id.* at 49.

The ALJ further found that "a number of Dr. Volkman's patients died from drug overdoses after having prescriptions filled at the Respondent" and that while "these patients were often drug addicts who did not take the prescription drugs in the manner prescribed," the quantities Respondent dispensed "provided these patients with the means to ingest such quantities as to cause an overdose death." *Id.* at 47. The ALJ also found that the quantities Respondent dispensed were large enough not only to support various Volkman patients' "own addiction, but to also sell the extra controlled substances to provide the income needed for the next prescriptions, or to sponsor someone else in their quest for the drugs needed to feed their addiction." *Id.* at 48.

While noting that Respondent's owner had called Dr. Volkman "to verify his legitimacy," as well as "a local attorney to inquire about Dr. Volkman's reputation in the community," that he had called other prescribing physicians to verify prescriptions, and that he required customers to show identification prior to dispensing controlled substances and had no security issues beyond those for which he was cited by the Ohio Board, the ALJ concluded that "Respondent's failure to react to the 'red flags' raised by the conduct of Dr. Volkman's patients and the dispensing patterns the Respondent used for these patients weigh in favor of revocation." *Id.* at 49–50.

As to the third factor—Respondent's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances—the ALJ found that the record "contains no evidence of a conviction of * * * Respondent or Mr. Fletcher related to the dispensing of controlled substances." ALJ at 50.

As to the fourth factor—Respondent's compliance with applicable State, Federal, or local laws relating to controlled substances—the ALJ found that "Respondent violated recordkeeping requirements by failing to have readily retrievable biennial inventories" and thus violated 21 U.S.C. 827(a)(1) and 21 CFR 1304.11(c). *Id.* The ALJ also found that "Mr. Fletcher failed to do drug utilization reviews prior to dispensing controlled substances." *Id.* at 51.

Next, the ALJ found that "in 2008 and 2009, [Mr. Fletcher] conducted searches on the OARRS [3] database" for "individuals who had predeceased the search" and thus "violat[ed] the requirement that he only search this database for current customers." *Id.* She also found that "Respondent's banking conduct related to its dispensing business violated bank structuring laws and regulations" because "Mr. Fletcher made deposits just short of $10,000, thus avoiding the reporting requirement of the Bank Secrecy Act." *Id.*

Finally, the ALJ reiterated her previous findings that Respondent had ignored the "red flags" indicating that Dr. Volkman's prescriptions were illegal. *Id.* Noting "the lack of individual therapy, the quantities and strength of the medications, and the other behavior patterns demonstrated by" the Volkman patients, the ALJ concluded that Respondent had "adequate evidence to determine that the prescriptions were not written for a legitimate medical purpose," and that its violation of its "corresponding responsibility weights greatly in favor of revocation in this matter." *Id.* at 51–52.

As for the fifth factor—such other conduct which may threaten the public health and safety—the ALJ noted that Mr. Fletcher did not testify in the proceeding. *Id.* at 52. While she acknowledged the settled case law that notwithstanding the Fifth Amendment privilege, an adverse inference may be drawn in a civil matter based on a party's failure to testify, the ALJ nevertheless declined to "draw an adverse inference" even though she found Mr. Fletcher's "inconsistent handling of controlled substances" to be "most troubling." *Id.* (citing, *inter alia, Baxter* v. *Palmigiano,* 425 U.S. 308, 318 (1976)). More specifically, the ALJ observed that Mr. Fletcher "clearly knew the questions to ask when dispensing controlled substances to a customer" but that "in six months he filled over 4,900 prescriptions without seeming to consistently engage in such conversations with Dr. Volkman's patients" and that, even "when they demonstrated their addictive behavior before him, he filled [their] prescriptions anyway." *Id.* The ALJ concluded that this conduct was "adverse to the public health" and supported revocation. *Id.* at 53. The ALJ further noted that Mr. Fletcher had failed to provide assurances that he will not engage in future misconduct. *Id.* (citing numerous Agency cases).[4]

The ALJ thus concluded that the Government had "met its burden of proof" and demonstrated that Respondent's continued registration is inconsistent with "the public interest." *Id.* at 54. She therefore recommended that "Respondent's registration be revoked and [that] any pending applications for renewal be denied." *Id.*

On June 17, 2010, Respondent timely filed Exceptions to the ALJ's Decision; its Exceptions have been considered in my review of this matter. Having reviewed the record in its entirety, I agree with the ALJ's ultimate finding that Respondent's continued registration is inconsistent with the public interest. However, because Respondent's registration has expired and it has not filed a renewal application, there is neither a registration to revoke nor a renewal application to deny.

As noted above, Respondent's registration was suspended prior to the hearing pursuant to my authority under 21 U.S.C. 824(d). I, therefore, conclude that this case is not moot and uphold the suspension order. As the ultimate finder of fact, I make the following findings.

[3] Ohio Automated Rx Reporting System. The law allowing the Ohio Board of Pharmacy (BOP) to develop its prescription monitoring program (OARRS) became effective May 18, 2005; the rules implementing the law went into effect on January 1, 2006. GX 18, at 2 (Ohio Automated Rx Reporting System Handbook). These rules require every pharmacy (including out-of-State pharmacies) that "services outpatients and dispenses to an Ohio residence any controlled substance or any product containing tramadol or carisoprodol" "to submit the dispensing information to the BOP." *Id.*

[4] Based on the testimony of Respondent's character witnesses (which included some of his customers), the ALJ concluded that this "evidence demonstrates that the Respondent acts responsively in many of his dealings with others." ALJ at 54. The ALJ concluded, however, this evidence does "not negate the fact that at least between September 2005 and February of 2006, Mr. Fletcher chose to turn a blind eye to the conduct of Dr. Volkman's patients and to dispense controlled substances irresponsibly." *Id.*

Findings

Respondent previously held DEA Certificate of Registration, BE5902615, under which it was authorized to dispense controlled substance in Schedules II through V at the registered location of 1336 East Main Street, Columbus, Ohio 43205. GXs 1 & 2. Respondent last renewed its registration on August 27, 2007; its registration expired on August 31, 2010. *Id.* According to the records of the Agency, of which I take official notice, Respondent has not filed a renewal application.[5]

Respondent is owned by Eugene H. Fletcher, who is also its sole pharmacist.[6] ALJ Ex. 3, at 2. Respondent sells only prescription pharmaceuticals. Tr. 863.

In 2003, Dr. Paul Volkman, a physician who was unable to obtain malpractice insurance because of several large malpractice settlements and judgments, commenced working at a Portsmouth, Ohio pain clinic owned by one Denise Huffman. GX 6, at 2. As previously found by the Agency (and as upheld by the United States Court of Appeals for the Sixth Circuit), Volkman frequently prescribed large quantities of multiple controlled substances including narcotics containing oxycodone[7] and hydrocodone,[8] benzodiazepines such as Xanax (alprazolam) and Valium (diazepam),[9] as well as the currently non-controlled drug Soma (carisoprodol) which is nonetheless popular with drug abusers, without a legitimate medical purpose and outside of the usual course of professional practice. GX 6, at 2–3; *Paul H. Volkman,* 73 FR 30630, 30633–34, 30639 (2008), *pet. for rev. denied, Volkman* v. *DEA,* 567 F.3d 1215 (6th Cir. 2009). In plain English, the record in the Agency proceeding involving Dr. Volkman conclusively established that he was a drug dealer.

On September 9, 2005 (several months after DEA executed a search warrant at Huffman's clinic), Volkman left the clinic; three days later, he started seeing patients out of his residence at 1310 Center St. in Portsmouth.[10] GX 6, at 4; 73 FR at 30635. However, Volkman's patients encountered problems filling his prescriptions. GX 39, at 1. D.S., one of Volkman's patients, helped Volkman by going on the Internet to search for pharmacies that would fill his prescriptions; according to D.S., she would call and ask the pharmacists if they "would fill prescriptions for oxycodone 30 mg., hydrocodone 10 mg., Xanax 2mg., [and] Soma 350 mg., and if they had the drugs on hand."[11] Id. While the pharmacists at other pharmacies "either said they did not have the medications in stock or would not fill prescriptions for Dr. Volkman," Mr. Fletcher said that he had the "drugs in stock" and that "he would fill the prescriptions." *Id.* at 2.

Thereafter, D.S. posted a notice on a bulletin board in Volkman's office which provided Respondent's name, address, and phone number. *Id.; see also* GX 15. Directions were also provided from Volkman's residence to Respondent.[12] *See* GX 15, at 1, 2, 4, 5. Moreover, when, in October 2005, Volkman moved to Chillicothe, Ohio, he posted similar notices with directions to Respondent. The distance from Volkman's Portsmouth residence to Respondent was approximately 94 miles, *see* GX 15, at 2; the distance from his Chillicothe office to Respondent was 56 miles. GX 9, at 23.

According to Dr. Volkman's former security guard, "Volkman instructed his employees to send all his patients to [Respondent] to have their prescriptions filled." GX 22, at 2; *see also* GX 23, at 1. Moreover, "just about every day, a call was made from [Volkman's] clinic to [Respondent] or from the [Respondent] to the clinic" during which Mr. Fletcher was told when Volkman's "last patient had been seen" so that he would know how late to keep the pharmacy open to fill the prescriptions Volkman issued. GX 22, at 2. At times, patients would show up at Respondent and fill their prescriptions as late as midnight. GX 24, at 3; *see also* GX 23, at 2 (L.W. relating that she filled prescriptions at Respondent as late as 9 or 10 p.m.). Volkman's ex-security guard stated that the patients "did not appear to be in pain" and that he believed that "about 60% of [them] were pill patients and not pain patients." GX 22, at 3. *See also* GX 24, at 6 (affidavit of A.S.; "[t]here were some legitimate patients, but most of Dr. Volkman's patients were not legitimate. They were going to Dr. Volkman and [Respondent] for drugs to abuse and to sell."); GX 9, at 11 (photographs of patients waiting to see Volkman taken on date Portsmouth P.D. executed search warrant at his practice).

As part of the investigation, DEA Diversion Investigators (DIs) obtained data from the Agency's ARCOS system showing Respondent's purchases of oxycodone and hydrocodone combination drugs; these drugs are Schedule II and III narcotics, respectively. Tr. 533–34. The oxycodone data showed that in 2004, Respondent had purchased 96,000 dosage units. GX 9, at 33. However, during 2005, Respondent purchased 495,000 dosage units; of this amount, approximately 400,000 dosage units were purchased between September and December. *Id.* Likewise, in 2004, Respondent purchased 88,000 dosage units of hydrocodone. *Id.* at 34. In 2005, Respondent purchased 328,000 dosage units; of this amount, more than 200,000 were purchased between September and December.[13] *Id.* While in 2004, Respondent was only the 300th largest pharmacy purchaser of oxycodone in Ohio; in 2005, it was the eleventh largest purchaser, and in 2006, it was the seventh largest. *Id.*

On February 10, 2006, a search warrant was executed at Respondent and its dispensing records were seized.[14] Tr. 523. The records showed that between September 1, 2005 and February 10, 2006, Respondent dispensed a total of 6,619 controlled-

[5] An agency "may take official notice of facts at any stage in a proceeding-even in the final decision." U.S. Dept. of Justice, *Attorney General's Manual on the Administrative Procedure Act* 80 (1947). In accordance with the Administrative Procedure Act and DEA's regulation, Respondent is "entitled on timely request to an opportunity to show to the contrary." 5 U.S.C. 556(e); *see also* 21 CFR 1316.59(e). Accordingly, Respondent may file a motion for reconsideration of this fact within fifteen days of service of this Order which shall commence with the mailing of the Order.

[6] Mr. Fletcher additionally owns and operates a dumpster business and owns and manages both commercial and residential rental properties. *Id.* at 866, 1598.

[7] Oxycodone is a schedule II controlled substance. 21 CFR 1308.12(b)(1)(xiii).

[8] Hydrocodone, when combined with another non-narcotic therapeutic ingredient such as acetaminophen, is a schedule III controlled substance. 21 CFR 1308.13(e)(1).

[9] Alprazolam and diazepam are benzodiazepines and are schedule IV depressants. 21 CFR 1308.14(c).

[10] According to a Diversion Investigator (DI), Volkman started writing prescriptions out of his residence on September 12, 2005. GX 9, at 9.

[11] It is acknowledged that D.S.'s affidavit stated that in September 2005, she had started taking people to Respondent to fill prescriptions. GX 39, at 3. D.S. further stated that she had taken her friend C.R. to Respondent to fill prescriptions and that C.R. overdosed and died the same day as her first trip to Respondent. *Id.* at 5. Subsequently, the Government acknowledged that C.R. had died on March 9, 2004. Letter of Government Counsel to ALJ, at 1. (May 10, 2010).

Notwithstanding D.S.'s misrepresentation, there is substantial circumstantial evidence establishing the relationship between Respondent and Volkman. I therefor find credible D.S.'s statement regarding how she found Respondent.

[12] In October 2005, the Portsmouth Police executed a search warrant at Volkman's residence. GX 6, at 4. While no charges were filed, Volkman was issued a condemnation notice. *Id.* Shortly thereafter, Volkman moved to Chillicothe, Ohio. *Id.*

[13] The data also showed that in 2006, Respondent purchased 820,000 dosage units of oxycodone and 224,000 dosage units of hydrocodone. GX 9, at 33–34.

[14] On the same day, a search warrant was also executed at Dr. Volkman's Chillicothe office and his registration was suspended. GX 9, at 13.

substance prescriptions; 4,979 of the prescriptions (75%) had been issued by Dr. Volkman.[15] GX 9, at 62. Corresponding with Mr. Fletcher's agreeing to fill Volkman's prescriptions, Respondent experienced multi-fold increases in the amounts of prescriptions it filled for oxycodone, hydrocodone, diazepam and alprazolam. Tr. 526; GX 9, at 29.

Nearly ninety-nine percent of the persons who obtained controlled-substance prescriptions from Volkman and filled them at Respondent did not live in Columbus, Ohio. GX 9, at 24; Tr. 522. Approximately half of the patients were from Kentucky, with some of the patients driving three to four hours to obtain the drugs;[16] many other patients were from the Portsmouth, Ohio area.[17] *See* GX 14; Tr. 571–72. From Portsmouth to Respondent there were 40 other pharmacies along the route. GX 34, at 2. Moreover, the dispensing records showed that 87 percent of Respondent's customers paid cash for their prescriptions; by contrast, according to the Government's Expert, "the national average of cash paying customers for prescriptions [was] 11.4% in 2005 and 10% in 2006."[18] GX 20, at 2; Tr. 534–35. Only five percent of the customers paid with insurance, and eight percent paid with a combination of insurance and cash. Tr. 534–35; GX 9, at 41.

L.W., a resident of Quincy, Kentucky, and A.S., a resident of Portsmouth, were among those persons who obtained controlled-substance prescriptions from Volkman and filled them at Respondent. *See* GXs 23 & 24; Tr. 272. On October 10, 2005, L.W. filled at Respondent prescriptions for 270 tablets of oxycodone 30 mg., 240 tablets of hydrocodone/apap (10/500),[19] 90 tablets of alprazolam 2 mg. (generic for Xanax), and 180 tablets of carisoprodol 350 mg. GX 12, at 2. On November 7, L.W. obtained from Respondent an additional 270 tablets of oxycodone 30 mg., 240 hydrocodone 10/500, 90 alprazolam 2 mg., and 240 tablets of carisoprodol; on December 6, she obtained the same four drugs and quantities, the sole difference being that she received only 180 oxycodone 30 mg. *Id.* Finally, on February 3, 2006, L.W. obtained from Respondent 360 tablets of oxycodone 30 mg., 360 tablets of hydrocodone 10/325, 90 tablets of alprazolam 2 mg., and 240 carisoprodol. *Id.*

In an affidavit, L.W. stated that while she initially needed to take pain medication following two accidents, the last of which occurred in February 2004, at the time she was seeing Dr. Volkman and filling the prescriptions at Respondent, she was both selling the drugs and taking them "to get high." GX 23, at 4. She stated that on those occasions when she spoke with Mr. Fletcher at Respondent, he "never asked me about my medical condition but would just make small talk." *Id.*[20] She further stated that she "was high on drugs several times when having prescriptions filled at [Respondent] and at times was high when [she] spoke with" Mr. Fletcher. *Id.* at 3–4. L.W. further stated that on her last visit to Respondent, she was "so high" that her "slurred speech and unsteady walk would have been very noticeable" and that her "head was hanging down and [she] was probably drooling." *Id.* at 4.

Respondent filled A.S.'s prescriptions, which she obtained from Dr. Volkman, for oxycodone, hydrocodone, diazepam, alprazolam, and carisoprodol on seven occasions between September 13, 2005 and February 1, 2006. GX 12, at 1. More specifically, on September 13, Respondent dispensed to her 240 oxycodone 30 mg., 180 hydrocodone/apap 10/650, 90 diazepam 10 mg., and 90 carisoprodol 350 mg. *Id.* Respondent made additional dispensings of Volkman's prescriptions as follows: On October 10, 330 oxycodone 30 mg., 240 hydrocodone 10/500, 90 alprazolam 2 mg., and 180 carisoprodol 350 mg.;[21] on November 8, 165 oxycodone 30 mg., 120 hydrocodone, 45 alprazolam, and 90 carisoprodol; on December 2, 180 oxycodone 5 mg., 240 hydrocodone, 90 alprazolam, and 180 carisoprodol; on December 20, 90 oxycodone 5 mg., 120 hydrocodone, 45 alprazolam, and 90 carisoprodol; on January 2, 2006, 240 oxycodone 15 mg., 240 hydrocodone, 90 alprazolam, and 180 carisoprodol; and on February 1, 240 oxycodone 30 mg., 240 hydrocodone, 90 alprazolam, and 180 carisoprodol. *Id.*

A.S. testified at the hearing. While the ALJ found portions of her testimony not credible because "she became vague, and contradicted herself," ALJ at 23 n.6, the ALJ found credible her testimony that her sister-in-law told her about Dr. Volkman and sponsored her by giving her the money to pay for her office visit and to fill the prescriptions she obtained. *Id.* at 22 n.5; Tr. 264. The ALJ further found credible A.S.'s testimony that she gave her sister-in-law "half of the pills," which her sister-in-law then sold to raise money to sponsor someone else. ALJ at 22 & n.5. (citing Tr. 266, 276, 283.) A.S. testified that her sister-in-law "would take several people to the doctor" and that they would go to Respondent to fill the prescriptions. Tr. 283. A.S.'s sister-in-law would pay for everything and receive "half [of] the medication." *Id.* A.S. testified that Volkman gave her combination prescriptions and that Volkman's office told her to go to Respondent, which was a two-hour drive (one-way) from Portsmouth. *Id.* at 274–75. A.S. also admitted that she was addicted to oxycodone and had been at the time she obtained prescriptions from Dr. Volkman and filled them at Respondent.[22] *Id.* at 253 & 336.

[15] During this period, Respondent filled a total of 5,206 prescriptions issued by Volkman. GX 9, at 24, 28.

[16] Several persons drove to Respondent from Paintsville, Kentucky, a distance of 182 miles; according to a DI, there were 96 pharmacies enroute. GX 34, at 3.

[17] According to the testimony of Lisa Roberts, R.N., who works for the Portsmouth Health Department and who is a member of the Ohio Department of Health Poison Action Group, Tr. 26, Scioto County (where Portsmouth is located) "showed a 360 percent increase in unintentional prescription drug overdoses" from 1999 to 2009. *Id.* at 32. In a Community Health Assessment she prepared for the City of Portsmouth, Ms. Roberts wrote that "Scioto County has long been the target of lucrative 'Pill Mills' [which] prescribe powerful prescription drugs to individuals without proof of chronic pain." GX 8, at 6. Continuing, Ms. Roberts noted that "[m]any people have become addicted as a result of these establishments" and that "much of the pills distributed there end up being illegally diverted to the public, including [to] high school students." *Id.* She also noted that "[p]eople come from other states as well to patronize these establishments." *Id.* Ms. Roberts testified that she "knew people that went to [Dr. Volkman] to get drugs to sell," as well as about the practice of sponsoring, by which an abuser or drug dealer recruits another person and fronts the person the money needed to pay for a doctor visit and to fill the prescriptions; the sponsor then receives half the pills back which can then be sold. Tr. 43, 62–63. *See also* Tr. 264, 266, 276, 283.

[18] Payment information was taken from the seized prescriptions. Tr. 570.

[19] Apap is the abbreviation for acetaminophen.

[20] *Cf.* GX 22, at 3 (affidavit of Delbert Evans, Dr. Volkman's security guard; "Some calls by Eugene were to speak with Dr. Volkman but the majority of the calls were to determine how late he should stay open to fill Dr. Volkman's prescriptions.").

[21] After this date, each of the hydrocodone dispensings was for the 10 mg. strength (which is the strongest formulation); the alprazolam dispensings were for the 2 mg. strength, and the carisoprodol was for the 350 mg. strength. *See* GX 12, at 1.

[22] On cross-examination, A.S. admitted that she never told Mr. Fletcher that she was addicted or that she was giving half of her drugs to her sister-in-law. Tr. 312. However, one would hardly expect a drug abuser or diverter to tell a pharmacist why she was seeking the drugs. A.S. also testified on cross-examination that she presented valid prescriptions to Mr. Fletcher. *Id.* at 314. However, Respondent's counsel did not clarify what he meant by the term "valid," which can mean one of several things such as that the prescriptions were not fraudulent or forged, that they were issued for a legitimate medical purpose, or that they were in proper form and contained the required information.

A.S. also testified that she had been in constant pain since a 1996 car accident, that she was in pain when she testified in this proceeding, and that she

Continued

S.L.J. was a confidential informant for the Portsmouth Police Department (PPD). GX 4, at 744. On September 16, 2005, the PPD sent S.L.J. to see Dr. Volkman and to obtain controlled-substance prescriptions. *Id.* Dr. Volkman wrote her prescriptions for oxycodone 30 mg. and Percocet,[23] which S.L.J. turned over to the police. *Id.* On September 26, S.L.J., who was an addict, returned to Dr. Volkman's office on her own initiative and without the PPD's knowledge; she obtained prescriptions for 135 tablets of Percocet 5/325 mg. and 135 tablets of oxycodone 30 mg. *Id.* at 745–46. The same day, S.L.J. filled those prescriptions at Respondent. *Id.* at 746. On September 29, 2005, S.L.J. was found dead; the coroner determined that the cause of death was "multiple drug intoxication." *Id.* The Government did not, however, submit the coroner's report or a police report and thus did not establish that Respondent dispensed the drugs on which S.L.J. overdosed.[24]

E.R. lived in Grayson, Kentucky and went to Dr. Volkman at his Chillicothe, Ohio clinic on just one occasion. GX 4, at 749 & 750; Tr. 407. He had planned to obtain prescriptions for controlled substances, fill them, and then sell the drugs on the street to get out of debt. Tr. 405–07, 409–10. E.R., who had heard from friends that Volkman would write large-volume controlled-substance prescriptions, drove for several hours with a friend to see Volkman. *Id.* at 406, 410. E.R. obtained from Volkman prescriptions for 240 oxycodone 30 mg., 240 hydrocodone/apap 10/500, 90 alprazolam 2 mg., and 90 Soma 350 mg. *Id.* at 408; GX 4, at 750. The following day, E.R. drove with his wife to Respondent and filled the prescriptions. *Id.* at 409–12.

Immediately after he obtained the drugs, E.R. entered his car and proceeded to crush and snort two oxycodone tablets. *Id.* at 412. On the return trip, "he also took a couple of Xanax." *Id.* Following a stop at the local WalMart, E.R. and wife went to see a friend who sold controlled substances and E.R. offered to sell him some of the hydrocodone. *Id.* at 413. However, the drug dealer was having a domestic dispute so E.R. and his wife returned to their home. *Id.*

Later that evening, the drug dealer came to E.R.'s house and "partied with" E.R. for several hours. *Id.* The following morning, E.R. was found dead. *Id.* at 413–14. However, once again, the Government did not introduce into evidence the coroner's report or a police report and thus has not established in this case that E.R. overdosed on the drugs he obtained at Respondent.

The evidence also showed that in October 2005, and shortly after Respondent started dispensing the Volkman prescriptions, Mr. Fletcher phoned Robin Padolik, who was then employed as an Automated Clearing House Coordinator for the Commerce National Bank (CNB), where he held various accounts. GX 25, at 1, 3. According to Ms. Padolik, beginning around September 2005, CNB personnel began noticing an increase in the amounts of Mr. Fletcher's cash deposits and placed him on CNB's "Watch List." *Id.* The same month, Mr. Fletcher's transfers to his outside accounts became more frequent, and in mid-October, Mr. Fletched called and asked Ms. Padolik "at what point the bank would be required to file a form when he made a cash deposit; how a deposit would [be] process[ed]"; and, if making deposits into two "separate accounts [would] prevent a form submission." *Id.* at 3. Ms. Padolik specifically related that on October 13, 2005, Mr. Fletcher called and asked whether "if he deposited $6,000 in one account and $4,000 in another account," the bank would be required "to submit 'that report.' " *Id.* Based on Mr. Fletcher's question, Ms. Padolik, who had been trained in the Bank Secrecy Act and the recognition of money-laundering, concluded that Mr. Fletcher "apparently knew [that] the threshold for reporting was any amount over $10,000, but did not know the name of the form the bank was required to file." *Id.* Ms. Padolik ducked Mr. Fletcher's question. *Id.*

On October 18, Mr. Fletcher called Ms. Padolik and asked if "account deposit amounts were associated with the Taxpayer Identification Number (TIN)." *Id.* at 4. He also asked "how he could change his TIN" for the accounts he maintained for Respondent and for his other business ventures. *Id.* Ms. Padolik again ducked Mr. Fletcher's questions and reported him to Andrew Reardon, CNB's Compliance Manager. *Id.*

As Ms. Padolik testified, "it was really a big red flag when he started asking questions about dollar amounts * * * so it looked like he was really fishing for information on how he can [sic] get around BSA reporting." Tr. 167. Ms. Padolik explained that "[d]eposit structuring * * * is a break-up of cash deposits that are turned into other financial transactions * * * it's cash that is taken from its criminal origin and passed through the system with many transactions * * * Structuring is a way to take cash from an illegal source and make it look more legal by passing it through the financial system." Tr. 157–58.

Ms. Padolik specifically identified six transactions by Mr. Fletcher which raised her suspicion that he was engaged in structuring to avoid the bank's filing of a Currency Transaction Report (CTR). GX 25, at 4; *see also* Tr. 166; 31 CFR 103.11. These included deposits of $9,900 on October 11, a check for $41,000 issued to an investment company on October 15, a deposit of $9,980 on October 17, a deposit of $8,380 on October 18, a deposit of $9,950 on October 19, and a deposit of $9,900 on October 20, 2005. GX 25, at 4. Following a review of his transactions by the CNB's High Risk Committee, the Bank concluded that Mr. Fletcher had engaged in structuring in violation of Federal banking regulations and closed his accounts. Tr. 207–08; GX 28.[25] A DI further found that Mr. Fletcher's "net profit from dispensing for Dr. Volkman [was] almost $500,000." Tr. 620.

DEA Investigators interviewed Mr. Fletcher regarding the Volkman prescriptions on two occasions, February 10, 2006 and November 27, 2007. Tr. 600. According to the DI who conducted the latter interview, Mr. Fletcher said that "he had questions about" Dr. Volkman. *Id.* at 606. Mr. Fletcher maintained that he had called Dr. Volkman, who told him that "he did an MRI, and blood tests."[26] *Id.* Mr. Fletcher also maintained that Volkman's prescriptions were valid because "the physician was licensed in Ohio and [the prescription] was written to the person

had pain at the level of an eight on the scale of one to ten. *Id.* at 258–60.

[23] Percocet is a brand-name product containing oxycodone and acetaminophen and is a schedule II controlled substance. ALJ Ex. 5, at 1.

[24] While I previously found in the *Volkman* decision that S.L.J. had died of multiple drug intoxication and had both oxycodone and alprazolam in her system, *see* 73 FR 30636 n.23, Respondent was not a party to that proceeding. The Government was thus required to prove this fact anew, which it failed to do because the DI testified that he was unsure of, and did not recall the cause of S.L.J.'s death. Accordingly, I conclude that the Government has not proved that S.L.J.'s death was caused by the prescriptions she filled at Respondent.

[25] To refute this evidence, Respondent put on the testimony of his accountant, who maintained that Mr. Fletcher "more than likely" was of "low sophistication" in regards to banking regulations. Tr. 1602. However, I find credible Ms. Padolik's testimony (both at the hearing and in her affidavit) regarding the questions Mr. Fletcher asked regarding the bank's reporting obligations and conclude that he clearly knew what he was doing and was engaged in structuring.

[26] There was also testimony that Volkman's patients complained to Respondent's employees of having to pay extra for drug tests. Tr. 1265–67; 1713–14.

presenting" it. *Id.* He stated the prescriptions were not forged. *Id.*

However, twice in the interview, Mr. Fletcher admitted that his customers had told him that "'other pharmacists would not fill Dr. Volkman's prescriptions.'" *Id.* at 622 & 624. The DI then asked Mr. Fletcher if he had "call[ed] the other pharmacists and asked them why they were not filling Dr. Volkman's scripts." *Id.* at 622. Mr. Fletcher answered: "I don't communicate with other pharmacists." *Id.*

The DI also asked Mr. Fletcher if he ever felt that Dr. Volkman's patients were addicted to drugs; Mr. Fletcher answered that it was "'hard to say.'" *Id.* at 606. Mr. Fletcher told the DI that sometimes Dr. Volkman's patients would ask him to sell them extra pills; Mr. Fletcher stated that he had refused to do so. *Id.* He also stated that he did "not get into" the "personal life" of his customers to determine their medical conditions. GX 9, at 69.

When the DI asked Mr. Fletcher about his "corresponding responsibility," he acknowledged that a physician must prescribe "for a legitimate ailment, and [that] the dose must be correct." GX 9, at 68. However, Mr. Fletcher maintained that "what to prescribe and the quantities" was for the physician to decide and that it was "not his job to question a physician." *Id.* He further asserted that he did not find it suspicious that the customers were traveling long distances, paying cash, obtaining combinations of controlled substances, and that other pharmacies had refused to fill the prescriptions. *Id.* at 69.

The Government introduced evidence showing that Respondent's purchases and dispensings of controlled substances were substantially greater than that of a single CVS pharmacy which was located 1.6 miles from it. GX 9, at 30–39. It also introduced evidence comparing the prices Respondent and four other independent pharmacies (two of which were located in Columbus, two of which were located in Portsmouth) paid their suppliers for various controlled substances as well as what they charged their customers; the Government asserts that this evidence shows that these four pharmacies sold controlled substances at an average price 37% cheaper than that charged by Respondent. GX 9, at 55–56.

It is obvious, however, that neither strand of evidence rises to the level of substantial evidence because neither is based on a statistically valid sample. Indeed, to compare Respondent's controlled-substance dispensings to that of a single CVS located 1.6 miles away ignores that the two stores may serve communities with substantially different demographics such as the age of the residents and the presence of competitors. So too, comparing Respondent's prices with those charged by four other pharmacies (out of likely thousands of pharmacies in the State of Ohio including hundreds of independents) and which do not even appear to have been selected at random, is manifestly inadequate to prove that Respondent charged more because it was selling to an illicit market.

The Government also put on extensive evidence to the effect that Respondent was located in a bad/high-crime neighborhood and that Mr. Fletcher carried a gun while at his business. As for the character of Respondent's neighborhood, the principal issue in this case was whether Respondent was dispensing controlled-substance prescriptions which it either knew or had reason to know lacked a legitimate medical purpose and were issued outside of the usual course of professional practice. *See* ALJ Ex. 1, at 1–2 (citing 21 CFR 1306.04(a)). Whether Respondent is located in a bad neighborhood is of no relevance in determining whether Mr. Fletcher violated his corresponding responsibility under the CSA. While there is evidence (discussed below) that Respondent and Mr. Fletcher were found by the Ohio Board of Pharmacy to have violated State law because he was not present on three occasions when controlled substances were delivered and the drugs were not properly stored, GX 16, at 2, presumably, this would have been a violation even if Respondent had been located in the safest neighborhood in the State of Ohio. So too, the evidence that Mr. Fletcher carried a gun is entirely irrelevant.[27]

Evidence Regarding Respondent's Practices After February 10, 2006

The Government also obtained data from OARRS, the Ohio prescription monitoring program, showing controlled-substance prescriptions that were issued by Florida-based physicians and filled by Respondent. Tr. 476; GXs 10 & 11. The Government submitted a spreadsheet showing more than fifty prescriptions for drugs such as oxycodone in 15 mg. and 30 mg. strength and alprazolam, which Respondent filled between September 4, 2007 and September 2, 2008. *See* GX 10. At least seventeen of the persons listed as having filled prescriptions at Respondent were residents of Kentucky; several individuals filled multiple prescriptions for oxycodone on the same day. *See id.* For example, on April 25, 2008, A.B., a resident of Denton, Kentucky (143 miles from Respondent), filled prescriptions for 180 oxycodone 30 mg., 120 oxycodone 15 mg., and 90 alprazolam 2 mg.; on July 23, 2008, C.W., a resident of Ashland, Kentucky (123 miles from Respondent), filled prescriptions for 240 oxycodone 30 mg., 60 oxycodone 15 mg., and also 60 alprazolam 2 mg.; and on August 11, 2008, N.W., a resident of Flatwoods, Kentucky (118 miles from Respondent), filled prescriptions for 240 oxycodone 30 mg., 90 oxycodone 15 mg., and also 60 alprazolam 2 mg. GX 10, at 1–2. Moreover, on August 25, 2008, C.L. filled prescriptions for 90 diazepam 10 mg. and 60 alprazolam 2 mg.[28] *Id.* at 1.

Additional Evidence Regarding Patient Deaths

The Government also introduced evidence regarding two additional persons, L.D.C. and B.A., who obtained controlled substances from Respondent and died the following day. Both deaths occurred in the fall of 2009.

L.D.C., who was 34 years old at the time of her death, lived in West Portsmouth, Ohio. GX 29. On October 2, 2009, L.D.C. obtained prescriptions from Dr. Georgescu of Wheelersburg, Ohio for 90 tablets of oxycodone 30 mg. (90 dosage units) and 60 tablets of

[27] The Government also introduced evidence showing that Mr. Fletcher had violated the Ohio Board of Pharmacy's Acceptable Use Policy for the OARRS, because he obtained prescription information on two persons who had died. Tr. 930–31, 1803, 1808; GX 42, at 1. According to the Government's Expert, this violated the Board's policy because a pharmacy can only obtain information on a current customer. Tr. at 930–31. Notably, the Government's Expert did not testify that this conduct violated any State law or regulation.

While this may be an improper use of the database and a violation of the Board's policy, the matter is best left to the Board to resolve.

[28] On March 20, 2009, the Ohio Board of Pharmacy sent a notice to pharmacists explaining that it had observed "a significant volume of prescriptions from physicians in Florida" who were prescribing oxycodone, Xanax, Percocet and Soma for residents of Ohio and Kentucky who were "generally 20–55 years old and usually pay cash." GX 17. The Board further explained that "[i]n many of these cases, we are wondering how the term 'legitimate medical purpose' applies when a patient who is supposedly in severe pain can ride to Florida and back to receive treatment when we have excellent facilities in Ohio." *Id.* The Board requested pharmacists who had "already filled such prescriptions" to contact one of its Agents because the Board believed that "this may be a coordinated effort to obtain drugs and we are trying to develop a list of the people involved." *Id.*

There was also evidence that because of the effectiveness of the State of Kentucky's prescription monitoring program, drug dealers were sponsoring people to go to South Florida to obtain controlled-substance prescriptions and that some of these individuals would fill the prescriptions in Ohio. Tr. 429–34.

carisoprodol which she then filled at Respondent. GX 32, at 1, 4; GX 29, at 2; Tr. 629. These were the first and last prescriptions she filled at Respondent. GX 32, at 1.

According to the report filed by the Scioto Sheriff's Office, on October 3, L.D.C.'s boyfriend found her lying on the floor of the master bedroom near the footboard of their bed with blood coming from her nose and mouth. *Id.* On arriving at the scene, a Deputy Sheriff observed "38 white pills laying beside her and a pill bottle labeled oxycodone 30 mg. [which] was prescribed on October 2, 2009 and filled at" Respondent. GX 29, at 2. The officer also found that "on a dresser next to her [were] 10 oblong pills scored GG/2/4/9 and a pill bottle labeled Soma 350 mg. with 48 pills in it." *Id.* He also "saw a silver spoon with white residue on it and a needle with no cap on it." *Id.* at 4. A second officer made the same observations and reported that the pills labeled GG/2/4/9 were "believed to be Xanax." *Id.* at 5.

Thereafter, an autopsy was performed on L.D.C. On November 30, 2009, the Coroner issued her Opinion that the cause of L.D.C.'s death was the "[t]oxic effects of drugs" including "oxycodone, oxymorphone and others." GX 37, at 1. According to the toxicology report, oxycodone, oxymorphone, carisoprodol, and meprobamate were found in her blood. *Id.* at 2; GX 31.

On November 4, 2009, B.A., "a recovering drug addict" and resident of Morehead, Kentucky, "went to a doctor in Portsmouth[,] Ohio" and obtained four controlled-substance prescriptions, which he then filled at Respondent the same day. GX 38, at 1 & 7. The prescriptions were for 60 tablets of Roxicodone 30 mg. (oxycodone), 120 tablets of oxycodone 15 mg., 180 tablets of Roxicodone 30 mg. (oxycodone), and 30 alprazolam 1 mg. *Id.* at 7.

B.A. "went to bed at around 2300–2400 on Thursday November 4[,] 2009 and was high when he went to bed." *Id.* at 1. He was "found deceased the next morning by his room-mate." *Id.*

The next morning, a Detective went to B.A.'s trailer and interviewed B.A.'s roommate L.R., who reported that B.A. "appeared to be a little high last night before he went to bed" but because B.A. "had not been home all day yesterday * * * he did not know exactly what all [B.A.] had done." *Id.* at 4. L.R. further stated that B.A. "really didn't seem right," that he had been in the bathroom "for a long time," that when B.A. went to bed, he was "snoring really loud" but that when L.R. got up to use the bathroom at about 3:30 a.m., B.A. was no longer snoring. *Id.* at 5.

The Detective obtained L.R.'s consent to search the premises and found a key on B.A.'s car key ring which fit a safe in B.A.'s bedroom. *Id.* at 5. The Detective opened the safe and found six pill bottles, including the four prescriptions which B.A. had filled the day before at Respondent. *Id.* at 5–6.

With respect to these four prescriptions, the Detective found that there were no tablets left in the bottle which had contained 60 Roxicodone 30 mg., there were only fifty-two tablets left in the bottle which had contained 120 oxycodone 15 mg., there were only nineteen tablets left in the bottle which had contained 180 Roxicodone 30 mg., and there were only eight tablets left of the thirty alprazolam. *Id.* at 7.

The Detective also interviewed two persons who had accompanied B.A. on his trip to the doctor's office and to Respondent. *Id.* They stated that when B.A. emerged from the doctor's office, he had a "'mapquest' printout" with directions to Respondent; B.A. told them that the doctor's staff had said to fill his prescriptions at Respondent. *Id.* at 8.

Following L.D.C.'s death, Investigators conducted surveillance of Respondent during which they observed the license plates of its customers to determine where they were coming from. Tr. 592. One of the plates was traced to S.P., a resident of Waverly, Ohio. Tr. 593; GX 33. The Investigators then obtained an OARRS report on S.P. and prepared a spreadsheet listing the prescriptions she filled by date between November 6, 2007 and October 30, 2009, the dispensing pharmacy, and the prescriber. GX 33.

The report showed that S.P. had obtained oxycodone from Respondent on eighteen occasions during this period using prescriptions she had obtained from seven different doctors. *See* GX 33. Moreover, according to the OARRS report, the doctors were located in Waverly, Beavercreek, Dayton, Wheelersburg and Portsmouth; two of the Portsmouth doctors practiced at different clinics.[29] *Id.*

The prescriptions included ones for oxycodone issued by the following doctors: (1) On November 6 and December 4, 2007, as well as on January 9 and February 14, 2008, by Dr. B.B. of Waverly, Ohio; (2) on May 20, June 13 and 23, July 11, August 12, 2008 and January 6, 2009, by Dr. D.B. of Beavercreek, Ohio; (3) on September 10, October 1 and 27, and November 27, 2009, by Dr. M.G. of Portsmouth (Medical Solutions, L.L.C.); (4) on July 3, 2009, by Dr. J.D. of a different Portsmouth clinic (Complete Pain Management, L.L.C.); (5) on September 1, 2009, by Dr. P.C. of Dayton; (6) on October 1, 2009, by Dr. M.F. of Wheelersburg; and (7) on October 30, 2009, by Dr. J.C. of Portsmouth. *See* GX 33. The OARRS Report also contained controlled-substance prescriptions written by additional doctors which S.P. filled at other pharmacies. *See id.*

On November 6, 2009, DEA Investigators conducted an administrative inspection of Respondent. Tr. 610, 692. Investigators requested that Mr. Fletcher provide Respondent's biennial inventory of its controlled substances, but Respondent was unable to do so. *Id.* at 693–94. The lead DI further testified that Mr. Fletcher stated that he was unaware of the requirement of maintaining a biennial inventory. *Id.* at 694.

The Government's Expert Witness

The Government called Donald Sullivan, R.Ph. and PhD, as its expert witness. Dr. Sullivan, who holds active pharmacist licenses in Ohio and Florida, obtained a B.S. in Pharmacy from The Ohio State University, as well as both an M.S. and PhD in Pharmaceutical Administration, also from The Ohio State University. GX 19, at 1; Tr. 922. Between 1997 and 2006, Dr. Sullivan was an Associate Professor of Pharmacy Practice at Ohio Northern University. GX 19, at 1; Tr. 920. Thereafter, Dr. Sullivan was appointed to the rank of Full Professor and has been Chairman of the Department of Pharmacy at Ohio Northern University for the last four years. Tr. 920.

During graduate school, Dr. Sullivan worked as a Registered Pharmacist at both retail and mail order pharmacies. GX 19, at 2; Tr. 934. He testified that he has worked at "several different independents in the central Ohio area" and that he currently works part-time as a pharmacist for North Central Mental Health. *Id.* at 934–35. Dr. Sullivan was offered and accepted as an "expert witness * * * on standard pharmacy

[29] However, Drs. J.C. and M.G. appeared to have practiced at the same Portsmouth address. *See* GX 33, at 2; GX 38, at 7–8. There is, however, no evidence that J.C. and M.G. were at the clinic in the same time period.

In the Immediate Suspension Order, the Government alleged that Dr. M.F. was in Lee's Summit, Missouri. ALJ Ex. 8, at 2. On cross-examination, the DI conceded that the prescription issued by Dr. M.F. had indicated that he was in Wheelersburg, Ohio. Tr. 701.

During cross-examination of the DI, Respondent's counsel also suggested that Dr. P.C. was not practicing in Dayton but rather in Portsmouth when he wrote the prescriptions for S.P. *Id.* at 629–31. However, the DI said he did not have information that Dr. P.C. was practicing in Portsmouth and Respondent produced no evidence establishing this as a fact. *Id.* at 631.

practice and standards for dispensing controlled substances." *Id.* at 938.

Dr. Sullivan testified that the curriculum at pharmacy college includes courses in pharmacology and therapeutics, which cover "the actual pharmacology and pathophysiology of drug abuse," as well as in pharmacy law, which covers the subject of prescription drug abuse and prescription drug fraud. *Id.* at 925. He testified that the American Council of Pharmaceutical Education, which accredits schools of pharmacy, requires that these subject areas "be taught." *Id.* at 925–26. Dr. Sullivan has taught pharmacy law since his time as a teaching assistant in graduate school; in addition to his teaching at Ohio Northern University, he also teaches pharmacy law in continuing education programs and in review classes for the NAPLEX exam. *Id.* at 933.

Dr. Sullivan testified that under both Ohio and Federal law, there "is corresponding responsibility between the physician and the pharmacist." Tr. 939. He further explained that "[a] lot of pharmacists think that just because the physician wrote it, I have to fill it." *Id.* However, Dr. Sullivan stated that [t]here is nothing in Ohio law that says you have to fill any prescription." *Id.* at 939–40. He then explained that "one of the first things we try to get the students and pharmacist to understand is that under Ohio law, and federal law * * * 50 percent of the responsibility falls on the pharmacy, the pharmacist, 50 percent falls on the physician. Don't just fill it because the doctor wrote it." *Id.*

Similarly, in his report, Dr. Sullivan, after discussing the CSA's prescription requirement (21 CFR 1306.04(a)), explained that:

> The State of Ohio has similar language in its laws and regulations. Ohio Law states that: The pharmacist who fills any prescription has a corresponding responsibility with the physician to make sure that the prescription has been issued for a *Legitimate Medical Purpose.* The responsibility to ensure that a prescription is for a legitimate medical purpose in the usual course of a prescriber's professional practice is equal for both the physician and pharmacist. (Fifty percent of this responsibility is on the pharmacist and 50% is on the physician). The argument that "Just because a physician wrote the prescription, I can legally fill it" is no excuse.

GX 20, at 1 [30] (emphasis in original).

More importantly, Dr. Sullivan testified that a pharmacist is "[a]bsolutely" taught to question the legality of a prescription. Tr. 940. As examples of prescriptions he had refused to fill, Dr. Sullivan noted an instance where a physician had written for a combination of a narcotic, a benzodiazepine, a muscle relaxant, and a sleeping pill; there were "similar doses for everybody, [with] no individualization of therapy"; and "maximum doses for everyone." *Id.* at 940–41. Dr. Sullivan further testified that when he called the physician to determine what was wrong with the patients, "so we could document whether it is for a legitimate purpose," the physician never provided a "good answer" and he "stopped filling prescriptions for these patients." *Id.* at 941.

Continuing, Dr. Sullivan explained that "[m]ore is required" from a pharmacist than merely verifying the prescription with the doctor and that "[i]t is still [a pharmacist's] professional judgment to make the call * * * is it for a legitimate purpose or not?" *Id.* at 942. Dr. Sullivan emphasized that "just because the physician tells [a pharmacist] that, yes, it is for a legitimate medical purpose * * * [the pharmacist] still ha[s] that 50 percent corresponding liability to make [his] own judgment, is that for a legitimate medical purpose or not." *Id.*

Dr. Sullivan testified that there are "red flags" which pharmacists need to recognize and consider before they dispense a prescription. Tr. 936. As examples, he testified that pharmacists are "required to do drug utilization review on every prescription * * * before it is dispensed in the pharmacy" to determine whether "doses * * * are too high, duplicate therapy, potential use or misabuse [sic], [and prescriptions are] being filled too soon." [31] *Id.* Additional red flags include "[m]aximum doses being seen for every single patient, lack of individuation of therapy, certain patterns from physicians of potential abuse of seeing the same types of controlled substances over, and over, and over, again." *Id.* at 937. Moreover, other red flags involve "drug interactions [such as] [t]wo drugs being used for the same thing, three drugs being used for the same thing, three drugs in different classes[ ] that can cause the same side effects, such as respiratory [depression] where you might see a benzodiazepine, a muscle relaxer, and a narcotic pain killer." *Id.* at 937.

On cross-examination, Dr. Sullivan explained that "[t]here is no permanent physical checklist. [A pharmacist] should look for several different things, such as number of drugs being prescribed, quantities, types of drugs, patient profile, what is going on with that patient's drug therapy in the past, because you have to do prospective DUR. Where the patient lives, where they are coming from, and even method of payment." *Id.* at 993.

Dr. Sullivan further testified that it is "[a]bsolutely" important that pharmacists communicate with one another. Tr. 950–51. Dr. Sullivan explained that a pharmacist readily "develop[s] a pretty quick informal network among the pharmacists * * * within a five to ten mile radius" of his store because of the need to transfer prescriptions and that these informal networks also host such discussion as whether there is suspicious prescribing going on in various parts of the State. *Id.* at 951–52. Continuing, he testified that if a pharmacist is presented with a

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[30] While the Ohio courts may have interpreted State law as described above, as explained below, Dr. Sullivan's testimony that Federal law allocates fifty percent of the responsibility to the physician and fifty percent to the pharmacist is not a correct statement of the law, which has been amply explained in numerous decisions of the Federal courts and this Agency. To make clear, Federal law does not apportion the responsibility for dispensing unlawful prescriptions between a prescribing practitioner and a pharmacist. Rather, Federal law imposes separate and independent duties on the prescriber and the pharmacist.

More specifically, the prescriber must act within the usual course of professional practice and have a legitimate medical purpose to lawfully issue a controlled-substance prescription. 21 CFR 1306.04(a). As the Supreme Court and numerous Federal courts have made plain, to lawfully prescribe a controlled substance the physician must act "in accordance with a standard of medical practice generally recognized and accepted in the United States." *United States* v. *Moore,* 423 U.S. 122, 138–39 (1975); *see also United States* v. *Smith,* 573 F.3d 639, 647–48 (8th Cir. 2009); *United States* v. *Merrill,* 513 F.3d 1293, 1306 (11th Cir. 2008).

By contrast, a "pharmacist is not required to * * * practice medicine." *United States* v. *Hayes,* 595 F.2d 258, 261 (5th. Cir 1979). "What is required of [a pharmacist] is the responsibility not to fill an order that purports to be a prescription but is not a prescription within the meaning of the statute because he knows [or has reason to know] that the issuing practitioner issued it outside the scope of medical practice." *Id.* at 261. As the Fifth Circuit has further explained, "a pharmacist can know that prescriptions are issued for no legitimate medical purpose without his needing to know anything about medical science." *Id* at 261 n.6; *see also United States* v. *Henry,* 727 F.2d 1373, 1379 (5th Cir. 1984) (applying "reason to believe" standard to pharmacist); *United States* v. *Seeling,* 622 F.2d 207, 213 (6th Cir. 1980) (upholding use of deliberate ignorance instruction in prosecution of pharmacist).

However, Dr. Sullivan's statements that: (1) A pharmacist is not required to fill any prescription, and (2) it is not an excuse that because a doctor wrote the prescription, it can be legally filled, are consistent with Federal law.

[31] According to Dr. Sullivan, as part of the prospective drug utilization review, a pharmacist is required to check a patient's profile for the following: "(a) *over-utilization or under-utilization*[;] (b) *therapeutic duplication*[;] (c) drug-disease state contraindications[;] (d) drug-drug interactions[;] (e) *incorrect drug dose or duration of treatment*[;] (f) drug-allergy interaction[;] (g) *abuse/misuse*[;] (h) inappropriate duration of treatment[; and] (i) documented good/nutritional supplements-drug interactions." GX 20, at 3–4 (emphasis in original).

prescription which another pharmacy had refused to fill, "there had better be a lot of documentation, a lot of conversation with the physician, and a very, very good explanation * * * professionally as to why that patient needs that prescription filled" before the pharmacist "risk[s] [his] license and fill[s] that prescription." *Id.* at 953.

Dr. Sullivan explained that were a patient to tell him that another pharmacy had refused to fill the prescription, he would first call that pharmacist and ask why he refused to fill the prescription and why he suspected that the prescription was not "for a legitimate medical purpose." *Id.* Dr. Sullivan also explained that it was "[a]bsolutely" important that a pharmacist maintain an open line of communication with a prescribing physician. *Id.* at 954.

Dr. Sullivan reviewed the prescriptions issued to fifty-five patients by Dr. Volkman which were filled by Respondent between September 13, 2005 and February 9, 2006. *Id.* at 948, 991, 1011; GX 20.[32] He subsequently prepared a report which was submitted into the record. GX 20.

At the outset of his report, Dr. Sullivan observed that "all these patients were from extreme southern Ohio and northern Kentucky" and were "driving 2+ hours to Columbus to have their prescriptions filled." *Id.* at 1. Dr. Sullivan noted that the customers "would have bypassed [dozens of other] pharmacies en route to Columbus." *Id.;* Tr. 960. Dr. Sullivan opined that "[t]his would be a major red flag to any pharmacist" and that "a reasonable pharmacist would seriously question why these patients were driving such a long distance to have their prescriptions filled." GX 20, at 1. At the hearing, Dr. Sullivan further explained that according to the Shearing Report, which "looks at why consumers shop at certain community pharmacies," in "at least 28 out of the last 30 years, the number one reason is proximity to where they live." Tr. 959. Dr. Sullivan thus observed that "[t]his pattern of patients traveling long distances from the location of their home and physician is extremely unusual and very suspicious." GX 20, at 2.

In addition, Dr. Sullivan noted that forty of the fifty-five patients (73%) had paid cash for their prescriptions" and that "the national average of cash paying customers for prescriptions [was] 11.4% in 2005 and 10% in 2006."[33] *Id.* Explaining that "profit margins on cash prescriptions are 30% higher than insurance prescriptions for brand-name[] drugs and 100% to 500% higher than insurance prescriptions for generics," he concluded that this "is an obvious example of a pharmacy profiting from drugs that are most likely being abused or diverted for sale on the street" and that "[a]ny reasonable pharmacist knows that a patient that wants to pay cash for a large quantity of controlled substances is immediately suspect." *Id.*

In his report, Dr. Sullivan stated that in all of his "years of practice and teaching, I have never seen such an abuse of controlled substances dispensing by one pharmacy, especially in schedule II controlled substances."[34] GX 20, at 1. Dr. Sullivan also found "extremely surprising the volume of controlled substances this one doctor [wrote], especially for schedule II drugs." GX 20, at 1–2. According to Dr. Sullivan, this "should have been a major red flag for any reasonable pharmacist that this physician is nothing more than a controlled substance prescription mill for patients who are diverting and abusing narcotic drugs." *Id.* at 2.

Dr. Sullivan further observed that "75% of the [Volkman] patients received the same four drug cocktail, which included a benzodiazepine, two narcotic pain killers and Soma (a muscle relaxer known to be highly abused)." *Id.* at 3. According to Dr. Sullivan, "[i]t is well known in the pharmacy profession [that] the combination of a benzodiazepine, narcotic pain killer, and Soma [is] being used by patients abusing prescription drugs." *Id.* Dr. Sullivan then noted that Dr. Volkman "took this to another level by prescribing two narcotic pain killers at the same time." *Id.*

In his testimony, Dr. Sullivan explained that pharmacists refer to the combination of "the benzodiazepine, the narcotic * * * pain killer, and the sleeping pill" as "[t]he triple," and that when Soma (carisoprodol) is added, the combination is known as the "homerun." Tr. 956. Noting that Volkman was issuing duplicate prescriptions for schedule II narcotics, Dr. Sullivan testified that he had never seen two schedule II narcotics prescribed together other than for treatment of cancer or hospice patients. *Id.* at 956–57, 1027–28.[35] He further observed that "41 of the 55 [patients] (75%) received two narcotic pain killers on the same day," and that this happened "68 different times for these 41 patients." GX 20, at 3. He then reiterated that "[t]o have two schedule II controlled substances, or two narcotics, a schedule II, and a schedule III * * * like * * * a Vicodin * * * or a Lortab * * * combined together * * * was something [he] had never seen to this extent before these prescriptions." *Id.* at 957.

Noting that a pharmacist's primary obligation is to take care of the patient, Dr. Sullivan stated that if he saw two prescriptions for two narcotic pain killers for one patient, he would worry about the potential central nervous system (CNS) effects or "the respiratory depression that might occur with this patient." *Id.* at 957. Observing that "a lot of these drugs" have a "synergistic effect on respiratory depression," he explained that "[i]t is not two narcotics equal twice the respiratory depression, it is one plus one equals three or four times the respiratory depression." *Id.* Moreover, when a benzodiazepine and a muscle relaxant are added "on top of that," there is a concern as to whether "the patient

[32] While the ALJ found that "Dr. Sullivan was provided 55 prescriptions," ALJ at 30, his subsequent testimony made clear that he had actually reviewed hundreds of prescriptions. Tr. 1011 ("There were 55 patients, there were hundreds of prescriptions that I looked at.").

Respondent's Counsel also took issue with Dr. Sullivan's statement that he had reviewed a "random" sample. *See* Tr. 992 ("So you would agree with me that this isn't really a random sample, wouldn't you?"). Dr. Sullivan testified that the sample represented ten percent of the prescriptions seized from Respondent by DEA and that the selection of that ten percent was "based on a statistical formula" that he obtained from a statistics Web site and had later validated, but he did not include the formula in his report. *Id.* at 992.

However, it is immaterial whether the sample Dr. Sullivan reviewed was randomly selected as Mr. Fletcher's obligation under 21 CFR 1306.04(a) applies to every prescription he dispensed.

[33] The ALJ found that Dr. Sullivan "credibly" testified that "nationwide[ ] only 10% of prescriptions [are] paid for in cash." ALJ at 31 (citing Tr. 961). Dr. Sullivan further testified that IMS Health, "the number one data collection firm for basically all prescription drug prescribing, dispensing, and pricing," was the source of this data. Tr. 961.

[34] In his testimony, Dr. Sullivan elaborated that he had "almost never seen" cases where physicians were "abusing the prescribing of controlled substances" by issuing prescriptions for schedule II drugs and that most cases typically involved schedule III and IV drugs. Tr. 955–56. On cross-examination, Dr. Sullivan admitted that he had probably not filled a pain medication prescription in approximately twelve years, *id.* at 977, and that this report represented his first determination that "a pharmacy is abusing controlled substances." *Id.* at 990. However, he had previously filled "probably 1,000" prescriptions for oxycodone and thousands of prescriptions for alprazolam. *Id.* at 980–981.

[35] When asked on cross-examination if he knew what break-through pain is and whether he was aware that Dr. Volkman "practiced pain break-through type treatment," Dr. Sullivan explained that there is no such separate specialty in pain management and that this "is when a patient is on a dose of medication, and they are having flare-ups in pain, then another drug is given to help on a temporary acute basis to take care of that pain flare." Tr. 1027. He further stated that such treatment regimens were sometimes seen "in hospice patients and cancer patients." *Id.* at 1028. Respondent did not establish that Volkman was legitimately prescribing multiple drugs for this purpose.

[is] going to be able to safely take these medications together." *Id.* He then testified that looking at the quantities, doses, and that multiple drugs were being prescribed for a single patient, he would ask himself "how could this possibly be for a legitimate medical purpose." Tr. 958.

In his report, Dr. Sullivan further noted that there were three patients who "received three narcotic pain killers on the same day" and that "[t]here is no logical reason why the patient would be on two or three narcotic pain killers at the same time." GX 20, at 3. Continuing, he explained that this is "a major red flag" which is strongly suggestive of abuse and that "[n]o reasonable pharmacist would fill two or three of these prescriptions on the same day." *Id. See also id.* at 5 (discussing M.C., who on the same day received prescriptions for Percocet 10/325, Norco 10/325,[36] and oxycodone 30 mg.).

With regard to the narcotic pain killers Respondent dispensed, Dr. Sullivan explained that the "normal dose of oxycodone" is "5 mg. to 10 mg. every four hours," but that "80% of the patients in the sample were prescribed 15 mg. to 60 mg. every two or three hours." GX 20, at 4. Dr. Sullivan explained that "a reasonable pharmacist would recognize this as a problem and a marker of drug abuse and addiction." *Id.*

As to the prescriptions for schedule III hydrocodone/apap drugs, Dr. Sullivan noted that "100% (89/89) were for the highest strength available, which is 10 mg. of hydrocodone." *Id.* Observing that it was "clinically impossible that all the patients in the sample would always need the highest possible dose of hydrocodone with acetaminophen," Dr. Sullivan thus concluded that there was "no individualization of dosing based on pain in these patients, which should have been a major red flag for any pharmacist." *Id.* Moreover, "[a]ny pharmacist would have known that this was a problem and a strong indicator of a doctor operating a controlled substance prescribing mill." *Id.*[37]

With respect to the Xanax (alprazolam) prescriptions, "one of the most highly abused benzodiazepines on the market" and a drug "in high demand on the street," Dr. Sullivan observed that all sixty prescriptions were for the maximum strength of the drug. *Id.* Moreover, ninety-three percent of the prescriptions "exceeded the FDA approved maximum daily dosage of 4 mg. per day" and thirty-two percent "exceeded the FDA approved dosing schedule of three times a day." *Id.* At the hearing, Dr. Sullivan explained that Xanax 2 mg. is generally only prescribed to patients with post-traumatic stress disorder. Tr. 970.

Again, Dr. Sullivan noted that there was "no individualization of therapy" and that "[e]very patient was prescribed the same strength at extremely high doses." GX 20, at 4. He further opined that "[a]ny pharmacist would have known that this was a problem and a strong indicator of a doctor operating a controlled substance prescribing mill." *Id.*

With regard to the Valium (diazepam), which is also "a highly abused benzodiazepine in high demand on the street," Dr. Sullivan noted that all of the forty-two prescriptions he reviewed were for the highest strength available, 10 mg. GX 20, at 4. He then noted that Patient K.D. "was prescribed Valium 20 mg. at bedtime, twice the maximum dose," and "[a]t least 50% of the prescriptions were written for a maximum dose of four times daily." *Id.* at 5. Dr. Sullivan again explained that "[a]ny pharmacist would have known that this was a problem and a strong indicator of a doctor operating a controlled substance prescribing mill." *Id.*

After noting that over the period of September 2005 through January 2006, Dr. Volkman "seemed to be writ[ing] larger doses and higher quantities as time went on" and that this was "definitely a sign of drug abuse" which "a reasonable pharmacist[38] would have caught," Dr. Sullivan discussed "a few of the most blatant examples of abuse and diversion." *Id.* These included instances in which Respondent provided early refills such as for L.B., who on December 28, 2005, received a Xanax prescription two weeks early; and S.K., who, on September 13, 2005, received a prescription for 240 tablets of oxycodone 15 mg., with eight tablets to be taken per day (thus being a thirty-day supply), and who, one week later, obtained an additional 168 tablets of the same drug. *Id.* at 5–6. Moreover, M.P. filled two prescriptions for Percocet 5/325 on the same day, and L.A.T. filled two prescriptions for oxycodone on the same day. *Id.* at 6.

Dr. Sullivan further observed that J.C. had received a prescription for 720 tablets of oxycodone 15 mg. with a dosing of two tablets every two hours (or twenty-four tablets per day), as well as for twelve tablets per day of hydrocodone/apap 10 mg./325 mg.; according to Dr. Sullivan, "[n]o patient could take this much narcotic in one day and not overdose." *Id.* at 5. He also noted that M.C. had received three different narcotics on the same day including 180 Percocet 10/325, 180 Norco 10/325, and 240 oxycodone 30 mg., and observed that "[a]t these doses[,] this patient [was] taking 300 mg. of oxycodone per day along with 60 mg. of hydrocodone" and that "[n]o patient could take this much narcotic in one day and not overdose." *Id.* Finally, with respect to J.C. (a resident of Grayson, Ky.) and M.C. (a resident of Flatwoods, Ky.), Dr. Sullivan explained that "[a] reasonable pharmacist would notice [the amounts being taken] as a problem" and that the amounts were a marker of drug abuse or diversion such that a reasonable pharmacist would not have filled the prescriptions. *Id.*

Dr. Sullivan concluded his report as follows:

> A pharmacist might act in the best interest of the patient and fill an occasion[al] prescription for a high dose or large quantity. However, the evidence presented above is overwhelming and shows a pattern of dispensing controlled substances to patients who are known drug abusers[39] or are diverting prescription drugs for illegal purposes. There are dozens of patients with the same drugs on their profile[s] and all at maximum doses and beyond. There is no medically sound reason why patients should be treated with two or three drugs in the same class for the same thing as these patients are. Any reasonable pharmacist would notice this as a problem very quickly and easily. In addition, these drugs when combined cause CNS (central nervous system) depression and can easily lead to overdose. Any reasonable pharmacist would recognize this danger and would not dispense these medications (duplicate therapy) together. These are all textbook examples of drug abuse and/or drug diversion. Any reasonable pharmacist would quickly recognize this based on their education and training. In all my years of practicing and teaching, I have never seen such an abuse of controlled substance

[36] Norco is a brand name drug containing hydrocodone bitartrate and acetaminophen, and a schedule III controlled substance pursuant to 21 CFR 1308.13(e)(1). ALJ Ex. 5, at 2.

[37] Dr. Sullivan also observed that "[m]any of the narcotic prescriptions had the words 'severe LBP' on them," which "most likely stands for 'Severe Low Back Pain.'" GX 20, at 5. Explaining that "[l]ower back pain is viewed in the medical field as the 'biggest scam to obtain controlled substances' because it is the hardest to disprove due to the lack of definitive clinical measures," he reported that "[i]t is very unusual that all these patients had the same diagnosis and they all had to be on the maximum doses of these controlled substances including Soma." *Id.*

[38] On cross-examination Dr. Sullivan elaborated that "a reasonable pharmacist" is "[a] pharmacist who looks out for the best interest of their patients, takes care of their patients, within the legal requirements of the law." Tr. 1025.

[39] On cross-examination, Dr. Sullivan clarified that he described the patients as "known drug abusers" because "[t]hat is my professional opinion based on what I saw in the prescriptions." Tr. 1032–33.

dispensing by one pharmacy, especially in schedule II controlled substances.

Id. at 6.

On cross-examination, Dr. Sullivan conceded that he "would not have turn[ed] away every one of" the customers whose prescriptions were reviewed in his report but that after he had "seen a pattern," he "would have started to make phone calls and then started to not fill them." Tr. 1009. Moreover, "based on the large quantities" and "the safety of the patient," there were some prescriptions, including those "for three narcotic pain killers" that he "would not have filled" at all. *Id.* at 1010. Dr. Sullivan further explained that in determining which prescriptions he would have filled, he would "had to have looked at the patient history, and [considered] the conversation of the physician." *Id.* at 1011. Clarifying his testimony, Dr. Sullivan explained that while it might have required time to detect a pattern with respect to some of the prescriptions, others should not have been filled at all "just looking blatantly at the doses, the combinations, that would have been, definitely, harmful to that patient, taking those drugs in those doses." *Id.* at 1012–13. Dr. Sullivan then explained that part of the reason for his equivocation with respect to whether he would have filled some of the prescriptions is that when he reviewed them, he did not "know how long [Mr. Fletcher] had been treating those patients." *Id.* at 1013.

Dr. Sullivan also acknowledged that he does not have actual knowledge of whether the Volkman patients were abusing or diverting the drugs. *Id.* at 1019. However, he reiterated his opinion that based on the quantities and doses that Volkman was prescribing, the drugs were either being abused or diverted because the patients would be dead if they took the amounts that were prescribed. *Id.* at 1032. Notably, the ALJ found that Dr. Sullivan "rationally and credibly concluded that these patients abused the drugs, diverted the drugs, or [if they had] consumed them * * * would be dead." ALJ at 35 (citing Tr. 1032); Tr. 1019.

The State Board Proceeding

On March 5, 2009, the Ohio State Board of Pharmacy (Board) found that on three occasions between August 29, 2006 and November 27, 2007, deliveries of controlled substances were made to Respondent when a pharmacist was not on duty and that the drugs were not properly secured. GX 16, at 2–3 & 4; Tr. 1066. In the first instance, the delivery was placed in a hallway closet outside of Respondent; in both the second and third instances, the drugs were placed in a pharmacy technician's automobile, which was parked in Respondent's parking lot. GX 16, at 2. Based on these incidents, the Board found that Respondent violated Ohio law. *Id.* at 2–3 (citing Ohio Rev. Code § 4729.55). The Board fined Respondent $1,000.00, *id.* at 3, and Mr. Fletcher $1,500.00. Tr. 1073. In addition, the Board placed Mr. Fletcher's pharmacist's license on probation for two years and suspended it for twelve weeks, but then waived ten weeks of the suspension.[40] Tr. 1074. According to the Board's Order in the case against Respondent, it had the right to appeal to the State courts. GX 16, at 3.

Respondent's Evidence

Respondent called fifteen witnesses, half of whom testified regarding the Government's various excursions into such issues as the character of the neighborhood, Mr. Fletcher's practice of carrying a gun at work, and his prices. Having concluded that the character of the neighborhood and Mr. Fletcher's carrying of a gun are not relevant in assessing his compliance with 21 CFR 1306.04(a) and that the Government has not proved with substantial evidence that Respondent charged higher prices than similar pharmacies, it is not necessary to discuss the testimony of those witnesses Respondent called to refute these contentions.[41] Accordingly, only four witnesses offered testimony arguably relevant to the issues in this proceeding.

Mark Aalyson testified that he had practiced law in Portsmouth, Ohio, that his "practice was devoted exclusively" to representing injured workers before the Industrial Commission of Ohio, and that he knew most of the doctors who practiced in Scioto County. Tr. 1156. Mr. Aalyson testified that in the "early fall of 2006," Mr. Fletcher called him and asked whether he "had ever heard of a Dr. Paul Volkman."[42] *Id.* According to Mr. Aaylson, Mr. Fletcher told him that he was getting patients from the Scioto County area who were getting prescriptions for pain medication from Dr. Volkman. *Id.* at 1157. Mr. Aalyson testified that he told Mr. Fletcher that he did not know who Volkman was and was "not sure how long he has been around." *Id.* at 1158–59. Mr. Aalyson then asked Mr. Fletcher "what is the problem?" *Id.* Mr. Fletcher answered: "I'm getting a lot of people coming in, and I'm beginning to wonder if the guy is legitimate." *Id.* at 1159.

Julie Fuller worked as a sales representative for AmeriSource Bergen, a major drug distributor, from December 2003 until January 2007. Tr. 1550. She testified that during her visits to Respondent, she saw Mr. Fletcher check for early refills and for drug interactions. *Id.* at 1567–68. However, she acknowledged that the purpose of her visits was not "to observe him" in the practice of pharmacy but to get his business. *Id.* at 1584. Moreover, Ms. Fuller testified that she believed that Respondent closed at 6 p.m. and that her visits occurred "[s]omewhere between 10 and 5," Tr. 1582; she did not testify that she observed Mr. Fletcher filling any of Dr. Volkman's controlled-substance prescriptions. Her testimony is therefore of no probative value.

Respondent also called Mr. Fletcher's cousin, Carisa Cole, who worked at Respondent between December 2004 and October 2009. *Id.* at 1704–05. In her testimony, Ms. Cole maintained that she never saw anyone who appeared under the influence of either drugs or alcohol and that Mr. Fletcher would not serve persons who appeared under the influence (although it is not clear how she would know that Mr. Fletcher would not serve such persons if she never saw any one who appeared under the influence). *Id.* at 1708. However, on cross-examination, she testified that she could not recall that any of the patients Mr. Fletcher refused to dispense to for this reason were patients of Dr.

[40] Regarding the Ohio Board proceedings, the ALJ allowed Respondent to elicit the testimony of Barton Kaderly, who had previously been a citizen member of the Board; Mr. Kaderly testified as to his being "appalled" over the decision of his fellow board members to fine Respondent and Mr. Fletcher. Tr. 1064, 1074–75. Beyond the fact that Mr. Kaderly's personal opinion is irrelevant and should have been excluded, the ALJ apparently forgot that DEA has held that a registrant cannot collaterally attack the results of a State board proceeding in proceedings under 21 U.S.C. 823 & 824. *See Hicham K. Riba,* 73 FR 75773, 75774 (2008). I therefore give no weight to his testimony.

[41] These witnesses include Ms. Adkins, Ms. Berring, Mr. Gordon, Mr. Cates, Dr. Will, Mr. Macke, and Mr. Kimbler. I have, however, considered the testimony of these individuals (as well as that of Ms. Banks and Ms. Del Guzzo) to the extent they testified as to Mr. Fletcher's reputation and character.

As previously discussed, I have considered the testimony of Mr. Newman, Respondent's CPA, in making my findings regarding Respondent's structuring activities as well as that of Mr. Kaderly.

[42] Respondent's counsel asked Mr. Aalyson six times when this conversation occurred, going so far as to suggest that "you are not sure of the year, you don't have a telephone record, or anything, to show what year it would have been, it could have been 2005?" *See* Tr. 1156, 1166. While Mr. Aalyson answered this last question: "I can't remember, I'm sorry," he had previously testified repeatedly that the conversation had occurred around the time he entered into the agreement by which he sold his law practice and that this happened in October 2006. Tr. 1156, 1166.

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Volkman. *Id.* at 1741. She also stated that he turned away a person who presented a prescription issued by a Florida-based doctor but could not recall when this happened. *Id.* at 1712. Finally, she testified that he also sometimes turned people away because they did not have a photo ID. *Id.* at 1747.

Ms. Cole maintained that she was present when Dr. Volkman's patients came to the pharmacy and that "a lot of them complained of having blood taken too often" to "make sure that they were actually taking their medication." *Id.* at 1713. She also testified that while Respondent's hours were "until 5:30," "[t]here were a few times" that Mr. Fletcher would stay open later because he knew that Volkman's patients were coming. *Id.* at 1716, 1720. However, Ms. Cole never talked with either Dr. Volkman or his security guard. *Id.* at 1721.

On cross-examination, Ms. Cole stated that she would typically leave Respondent at "[a]bout 5:30," but that sometimes she would stay past 5:30 two or three times per week for the Volkman patients, and had stayed as late as 9:30 for a Volkman patient. *Id.* at 1733. However, she acknowledged that she would not typically be at the pharmacy after nine o'clock because she has "three children" and "child care issues." *Id.* at 1743–44. Moreover, she did not work at Respondent on Saturdays. *Id.* at 1740.

Ms. Cole acknowledged that Volkman's patients were typically not from the Columbus area and were coming from Portsmouth and Southern Ohio, as well as Kentucky and West Virginia. *Id.* at 1723. Ms. Cole also stated that Mr. Fletcher had asked these patients why they were filling their prescriptions at his pharmacy and that the patients had stated that other pharmacies did not have the medication or had run out. *Id.* at 1724. When then asked whether she knew if Mr. Fletcher had ever asked the patients "why they never filled their prescriptions at any pharmacies in between Portsmouth and Columbus," she answered that she did not know if there were any pharmacies between these cities even though she acknowledged that it was a two hour drive. *Id.* at 1726–27.

Ms. Cole also maintained that Mr. Fletcher had tried calling some of the pharmacies but then acknowledged that she was "not real sure" if she was present when any of these calls were made. *Id.* at 1725. Moreover, as found above, during an interview with a DEA Investigator, Mr. Fletcher stated that he did not call other pharmacies regarding the Volkman prescriptions. *Id.*

Ms. Cole also acknowledged that the Volkman prescriptions would include at least one schedule II drug, that being oxycodone, which would be prescribed in combination with Soma and alprazolam. *Id.* at 1732. She further acknowledged that Volkman patients would typically present their prescriptions at the same time and that they "typically had the same prescriptions." *Id.* at 1736.

Subsequently, Ms. Cole testified that "every time we got a prescription from Florida, or anywhere out of the State of Ohio, [or] even within the State of Ohio [but from outside of Columbus] * * * that we would call and verify the prescriptions," which Ms. Cole stated, would be done on "[t]he business line." Tr. 1747–48, 1753. Ms. Cole's recollection is patently erroneous as shown by the evidence that Respondent filled 4,900 controlled-substance prescriptions for Volkman's patients and the phone records Respondent submitted, which establish that during the five-month period in which it filled Volkman's prescriptions, it never made more than ninety-seven long distance phone calls in a month.[43] *See* RX 19. Ms. Cole also testified that she remembered D.S. (who had sponsored A.S.) bringing other people to Respondent to have her prescriptions filled. Tr. 1757.

Ms. Cole further testified that Mr. Fletcher questioned those persons who obtained controlled-substance prescriptions from Florida doctors, and that they claimed that they had recently moved to either Kentucky or Ohio or were working in Columbus and couldn't go home. *Id.* at 1749. Ms. Cole stated that she was "skeptical" of the people presenting these prescriptions because of the distances involved. *Id.* With the exception of her testimony as to her skepticism, the remainder of this testimony is absurd on its face—if a person had in fact recently moved to Kentucky or Southern Ohio, this fact would have been verifiable by simply looking at his/her driver's license as Ms. Cole claimed Mr. Fletcher always did. Moreover, if a person had recently moved to these areas, one must wonder how they would find out so quickly that only Respondent would fill their prescriptions. As for those persons who claimed they were working in Columbus and could not go home, it is odd that they could travel to South Florida to obtain the prescriptions in the first place.

[43] This also assumes that every single phone call was made to Dr. Volkman even though Respondent's phone bills show calls to numerous cities in Ohio where there is no evidence that Volkman worked or lived, as well as to cities in other States.

Respondent also called Catherine Smith, who worked as a pharmacy technician at Respondent and who considered Mr. Fletcher to be her "best friend." *Id.* at 1235.[44] Ms. Smith testified that her duties involved a variety of functions including working at the front window and "talk[ing] to [the] patients," "look[ing] at prescriptions," and also "fill[ing] prescriptions." *Id.* Ms. Smith testified that she saw the prescriptions "first," and that if one did not "look legit" (meaning forged), she would "present it to Mr. Fletcher." *Id.* at 1425. Ms. Smith also testified that she was the person who "counted the medicine" and "put [it] in a bottle" and that she "explained it to the patients." *Id.* at 1429–30. According to Ms. Smith, Mr. Fletcher would enter the prescription information into the pharmacy computer and print out the labels. *Id.* at 1430.

Ms. Smith further maintained that if a patient did not seem right to her, she would mention it to Mr. Fletcher, who would then question the patient and not fill the script if the patient was showing symptoms of being under the influence. *Id.* at 1238. She also claimed that Mr. Fletcher would ask Respondent's customers why they were taking the pain medicine; he would also tell the patients "this is a large quantity of pills you are taking here" and ask them "can you work without the medicine?" *Id.* at 1253–54. Ms. Smith further maintained that Mr. Fletcher would tell the patients "be careful of the way you take it, take it the way you are supposed to take it, the way they prescribe it" and that he would "tell them some of the cautions to take with it." *Id.* at 1254. She maintained that Mr. Fletcher "talked to everybody about their prescriptions." *Id.* at 1281.

On cross-examination, however, Ms. Smith then qualified her testimony, stating: "I'm not saying he talks to everybody, but the majority of them * * * that is on that kind of pain medicine." *Id.* at 1423. Moreover, when DEA Investigators interviewed numerous patients of Dr. Volkman, most of them stated that Mr. Fletcher did not ask about their medical conditions. GX 9, at 86; *see also* GX 23, at 3 (affidavit of L.W., "When having prescriptions filled at [Respondent], most of the time I spoke with Eugene's assistants but I did speak with Eugene several times also. When we spoke together, Eugene never asked me about my medical

[44] Ms. Smith testified that she did not work Saturdays and that only Mr. Fletcher worked then. Tr. 1240.

condition but would just make small talk.").

Ms. Smith also maintained that Mr. Fletcher would call the doctors "and make sure that the script is legit." *Id.* at 1264. However, while Mr. Fletcher may have spoken with Dr. Volkman on some occasions, according to Volkman's former security guard, the majority of the calls Mr. Fletcher made to Volkman's office "were to determine how late he should stay open to fill Dr. Volkman's prescriptions." GX 22, at 1–2. Moreover, in the calls the security guard answered, "Eugene never asked about the medical condition of any patients and I never recall hearing any other staff members discuss with Eugene any patient's medical condition or anything else other than to arrange pharmacy hours." *Id.* at 3. And as noted above, Respondent's phone records suggest that Respondent filled numerous prescriptions without calling Dr. Volkman.[45] Moreover, neither Ms. Smith nor Ms. Cole testified as to any specific instances in which Mr. Fletcher had refused to fill prescriptions presented by Volkman's patients on the ground that the prescriptions lacked a legitimate medical purpose.[46]

Finally, notwithstanding the substantial probative evidence offered against him, Mr. Fletcher did not testify in this proceeding.

Discussion

Section 304(a) of the Controlled Substances Act provides that "[a] registration * * * to * * * dispense a controlled substance * * * may be suspended or revoked by the Attorney General upon a finding that the registrant * * * has committed such acts as would render [its] registration under section 823 of this title inconsistent with the public interest as determined under such section." 21 U.S.C. 824(a)(4). In determining the public interest in the case of a practitioner, the Act directs that the following factors be considered:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing * * * controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

Id. § 823(f).

"[T]hese factors are * * * considered in the disjunctive." *Robert A. Leslie, M.D.,* 68 FR 15227, 15230 (2003). I may rely on any one or a combination of factors, and may give each factor the weight I deem appropriate in determining whether a registrant has committed acts which render its registration inconsistent with the public interest. *Id.* Moreover, it is well settled that I am "not required to make findings as to all of the factors." *Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005); *see also Morall* v. *DEA,* 412 F.3d 165, 173–74 (D.C. Cir. 2005).

The Government has the burden of proving by a preponderance of the evidence that the Respondent has committed acts which render its registration inconsistent with the public interest. 21 CFR 1301.44(d) & (e). However, where the Government has made out a *prima facie* case, the burden shifts to the Respondent to either refute the Government's case or to " 'present[] sufficient mitigating evidence' " to show why, notwithstanding that it has committed acts which render its registration inconsistent with the public interest, it can be entrusted with a new registration. *Medicine Shoppe-Jonesborough,* 73 FR 364, 387 (2008) (quoting *Samuel S. Jackson,* 72 FR 23848, 23853 (2007) (quoting *Leo R. Miller,* 53 FR 21931, 21932 (1988))), *pet. for rev. denied, Medicine Shoppe-Jonesborough* v. *DEA,* 2008 WL 4899525 (6th Cir.). "Moreover, because 'past performance is the best predictor of future performance,' *ALRA Labs, Inc.* v. *DEA,* 54 F.3d 450, 452 (7th Cir. 1995), [DEA] has repeatedly held that where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for [his] actions and demonstrate that [he] will not engage in future misconduct." *Medicine Shoppe,* 73 FR at 387; *see also Jackson,* 72 FR at 23853; *John H. Kennedy,* 71 FR 35705, 35709 (2006); *Cuong Trong Tran,* 63 FR 64280, 62483 (1998); *Prince George Daniels,* 60 FR 62884, 62887 (1995).

Having considered all of the factors, I conclude that the evidence pertinent to factors two and four makes out a *prima facie* showing that Respondent "has committed such acts as would render [its] registration * * * inconsistent with the public interest."[47] 21 U.S.C. 824(a)(4). I further conclude that Respondent has not rebutted the Government's *prima facie* case. Accordingly, I affirm the order of immediate suspension.[48]

Factors Two and Four—Respondent's Experience in Dispensing Controlled Substances and Compliance With Applicable Laws Relating to Controlled Substances

Under a longstanding DEA regulation, a prescription for a controlled substance is unlawful unless it has been "issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional

[45] Respondent also asked Ms. Smith, who formerly held a license as a registered nurse, a series of questions about the proper dosing of pain medications. Tr. 1279–80. Ms. Smith has not, however, maintained her license and did not testify as to having any expertise in the treatment of chronic pain patients. *Id.* at 1280.

[46] It is acknowledged that the ALJ found that Ms. Cole credibly testified that Mr. Fletcher refused to fill a prescription for a patient because the "patient may have been trying to fill a schedule II prescription too early." ALJ at 20 (quoting Tr. 1737). She did not, however, recall the name of the patient, and her testimony suggests that this was a one-time occurrence as she did not assert that this had happened on more than one occasion. Tr. 1737. Most significantly, she did not testify that he refused to fill the prescription because it lacked a legitimate medical purpose and the great weight of the evidence (including the volume of prescriptions, the type and quantity of the drugs, and Mr. Fletcher's statements to Investigators), supports the conclusion that he never refused to fill a prescription issued by Volkman because it lacked a legitimate medical purpose.

[47] As to factor one, the Ohio Board of Pharmacy has not made a recommendation in this matter. *See* 21 U.S.C. 823(f)(1). Moreover, while there is no evidence that the State Board has revoked either Respondent's or Mr. Fletcher's license, DEA has held repeatedly that a registrant's possession of a valid State license is not dispositive of the public interest inquiry. *See Patrick W. Stodola,* 74 FR 20727, 20730 n.16 (2009); *Robert A. Leslie,* 68 FR at 15230. As DEA has long held, "the Controlled Substances Act requires that the Administrator * * * make an independent determination as to whether the granting of controlled substances privileges would be in the public interest." *Mortimer Levin,* 57 FR 8680, 8681 (1992).

It is likewise noted that there is no evidence that either Respondent or Mr. Fletcher has been convicted of any offenses under Federal or State laws related to the distribution or dispensing of controlled substances. 21 U.S.C. 823(f)(3). However, there are multiple reasons why even serious misconduct may not be the subject of a criminal prosecution. Thus, DEA has recognized that the lack of any criminal convictions related to controlled substances is not dispositive. *See Edmund Chein,* 72 FR 6580, 6593 n.22 (2007).

Accordingly, that Respondent may still hold its Ohio pharmacy license and that neither it, nor Mr. Fletcher, has been convicted of a criminal offense is not dispositive.

[48] While Respondent allowed his registration to expire and has not submitted a renewal application, there is no evidence that Mr. Fletcher has surrendered Respondent's pharmacy license and his pharmacist's license, and neither party argues that this case is moot. Moreover, Respondent's registration was immediately suspended at which time its controlled substances were seized. Under the CSA, "[a]ll right, title, and interest in" any controlled substances seized pursuant to a suspension order "vest in the United States upon a revocation order becoming final" and "shall be forfeited to the United States." 21 U.S.C. 824(f). DEA has previously held that "a litigant cannot defeat the effect of this provision by simply allowing its registration to expire." *Meetinghouse Community Pharmacy, Inc.,* 784 FR 10073, 10074 n.5 (2009). Accordingly, there are collateral consequences which preclude a finding of mootness. *See id.; Trinity Health Care Corp.,* 72 FR 30849, 30853–54 (2007).

practice." 21 CFR 1306.04(a). This regulation further provides that while "[t]he responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, * * * a *corresponding responsibility rests with the pharmacist who fills the prescription*." *Id.* (emphasis added). Continuing, the regulation states that "the person knowingly filling such a purported prescription, as well as the person issuing it, [is] subject to the penalties provided for violations of the provisions of law relating to controlled substances."[49] *Id.*

DEA has consistently interpreted this provision "as prohibiting a pharmacist from filling a prescription for a controlled substance when he either 'knows or has reason to know that the prescription was not written for a legitimate medical purpose.'" *Medicine Shoppe-Jonesborough,* 73 FR at 381 (quoting *Medic-Aid Pharmacy,* 55 FR 30043, 30044 (1990); *see also Frank's Corner Pharmacy,* 60 FR 17574, 17576 (1995); *Ralph J. Bertolino,* 55 FR 4729, 4730 (1990); *United States* v. *Seelig,* 622 F.2d 207, 213 (6th Cir. 1980). This Agency has further held that "[w]hen prescriptions are clearly not issued for legitimate medical purposes, a pharmacist may not intentionally close his eyes and thereby avoid [actual] knowledge of the real purpose of the prescription." *Bertolino,* 55 FR at 4730 (citations omitted).

Respondent contends that "[t]he [G]overnment can point to no specific violation of a known rule, but merely relies upon the general and vague allegation that Respondent did not satisfy a 'corresponding duty' to ensure that [it] dispenses controlled substances for a legitimate medical purpose." Resp. Exceptions, at 1. It further contends that it "has been held to an unknown and ambiguous standard, [which is] higher than any standard previously imposed on any pharmacist." *Id.* at 6. Contrary to Respondent's contention, the Federal courts have had little problem applying the regulation and long ago expressly rejected the argument that the regulation is unconstitutionally vague and does not provide fair notice of what conduct is prohibited. *See, e.g., United States* v. *Hayes,* 595 F.2d 258, 260 (5th Cir. 1979) ("The regulation gives fair notice that certain conduct is proscribed.") (int. quotations and citations omitted).

Most significantly, the great weight of the evidence establishes that Mr. Fletcher filled numerous controlled-substance prescriptions which he had reason to know were not issued for a legitimate medical purpose by a practitioner acting in the usual course of professional practice. Indeed, Mr. Fletcher knew from the outset that Dr. Volkman's prescriptions lacked a legitimate medical purpose. As found above, Mr. Fletcher was specifically asked in a phone call by one of Dr. Volkman's patients if he would fill prescriptions written by Volkman for multiple drugs including oxycodone 30 mg. and hydrocodone 10 mg., which are schedule II and III narcotics respectively, Xanax 2 mg., a schedule IV benzodiazepine, and Soma (carisoprodol), a muscle relaxant which is currently a non-scheduled drug but which is nonetheless popular with drug abusers and which metabolizes into meprobamate, a schedule IV drug.[50]

As the Government's Expert explained, the combination of a benzodiazepine, a narcotic and carisoprodol is "well known in the pharmacy profession" as being used "by patients abusing prescription drugs." GX 20, at 3. Moreover, as the Government's Expert elaborated, Dr. Volkman took this "to another level" by prescribing two narcotics in addition to a benzodiazepine and carisoprodol, thus distributing a schedule II narcotic, a schedule III narcotic, a schedule IV depressant, and carisoprodol, for a total of four drugs at the same time. *Id.*

The Government's Expert further explained that the combination of these two narcotics, a benzodiazepine, and a muscle relaxant would have a "synergistic effect" on a patient's central nervous system and cause respiratory depression thus posing a substantial risk to any patient actually taking the drugs as prescribed. Thus, from the time Mr. Fletcher agreed to fill the prescriptions, he had reason to know that Volkman's prescriptions lacked "a legitimate medical purpose." 21 CFR 1306.04(a).

Notwithstanding this, there is ample evidence showing that Respondent repeatedly dispensed cocktail prescriptions for oxycodone, hydrocodone, alprazolam, and carisoprodol. *See* GX 12 (spreadsheet of prescriptions dispensed to A.S. and L.W.); GX 20, at 3 (Gov. Expert's report noting that "75% of the patients received the same four drug cocktail which included a benzodiazepine, two narcotic pain killers and Soma"). With respect to A.S.[51] and L.W., many of the oxycodone prescriptions were for 30 mg. and were for quantities which would provide a daily dose multiple times the amount that the Government's Expert—whose testimony was unrefuted—stated was the "normal dose of oxycodone" and thus indicated that Volkman was running a pill mill. Likewise, the prescriptions for hydrocodone and alprazolam were always for the strongest formulations of the drug; with respect to the alprazolam, the Government's Expert explained that ninety-three percent of the prescriptions he reviewed exceeded the FDA-approved maximum daily dosage and that the two-milligram strength of the drug is generally only prescribed for a patient with post-traumatic stress disorder.

Respondent also filled prescriptions issued to a single patient for multiple schedule II drugs on the same day, as well as three narcotic controlled substances on a single day. Moreover, in the prescriptions he reviewed, the Government Expert observed that there was "no individualization of dosing based on pain in these patients" with respect to the hydrocodone and alprazolam prescriptions and that "[a]ny pharmacist would have known that this was a problem and a strong indicator of a doctor operating a controlled substance prescribing mill." The Government's Expert also noted various instances of Respondent dispensing refills that were weeks early.

In addition, the fact that Mr. Fletcher had been called by D.S., who lived in Southern Ohio and was seeing a doctor whose office was nearly 100 miles away from his pharmacy, and yet, was obviously having problems filling her prescriptions, provided further reason to know that the prescriptions were not legitimate. While Mr. Fletcher did not ask where D.S. and Dr. Volkman were from and thus may not have had actual knowledge at the time of the initial phone call where Volkman and the patients were from, *see* GX 39, at 2; under a DEA regulation, each controlled-substance prescription must include the name and address of both

[49] As the Supreme Court recently explained, "the prescription requirement * * * ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse. As a corollary, [it] also bars doctors from peddling to patients who crave the drugs for those prohibited uses." *Gonzales* v. *Oregon,* 546 U.S. 243, 274 (2006) (citing *United States* v. *Moore,* 423 U.S. 122, 135 (1975)).

[50] Because of its potential for abuse, DEA has, however, initiated a proceeding to place carisoprodol into schedule IV of the Controlled Substances Act. *See* 74 FR 59108, 59109 (2009).

[51] While A.S. testified that she had been in pain caused by an auto accident, she also testified that she diverted drugs. Moreover, while A.S.'s pain may have justified the prescribing of a controlled substance, Respondent offered no evidence refuting the Government Expert's testimony that the four-drug cocktail of oxycodone, hydrocodone, alprazolam, and carisoprodol, which Volkman repeatedly prescribed to her, does not have a legitimate medical purpose.

the patient and prescriber. 21 CFR 1306.05(a).

Thus, the first time one of Volkman's patients presented a prescription to him, Mr. Fletcher knew that Volkman was practicing in Portsmouth, approximately 90 miles from Columbus, as well as the location of the patient's residence; he also knew with each successive prescription he received from a Volkman patient that they were travelling great distances to fill their prescriptions.

As the evidence shows, only a few of Volkman's patients lived in the Columbus area, and most of them were travelling great distances (and sometimes with others) to get their prescriptions filled at Respondent, with approximately half of them coming from Kentucky (more than two hours away) and many others coming from the Portsmouth area. Notwithstanding that many of the patients were travelling for hours to fill their prescriptions at Respondent, Volkman's controlled-substance prescriptions accounted for seventy-five percent of the total amount of controlled-substance prescriptions dispensed by Respondent, and controlled substances accounted for approximately ninety-five percent of Volkman's prescriptions. As the Government's Expert testified, the fact that the patients were driving so far to get their prescriptions filled "would be a major red flag to any pharmacist."

Indeed, Mr. Fletcher admitted in an interview that he had been told by Volkman's patients that no other pharmacists would fill the prescriptions. Yet, even when presented with this fact, he did not call any pharmacists to determine why. He also admitted in an interview that some of Volkman's patients had asked him to sell them extra pills, a clear indication that Volkman's patients were either abusing and/or selling the drugs. Yet he continued to fill Volkman's prescriptions.

Moreover, in substantial contrast to the national average of cash-paying customers which is approximately ten to eleven percent, nearly eighty-seven percent of the Volkman patients paid cash for their prescriptions. This, too, was a red flag as "[a]ny reasonable pharmacist knows that a patient that wants to pay cash for a large quantity of controlled substances is immediately suspect."

The evidence further shows that Respondent and Dr. Volkman's clinic would call each other on a daily basis to discuss when Volkman had seen his last patient so that Mr. Fletcher would know how late to stay open and that he stayed open as late as midnight to await the arrival of Volkman's patients and to fill their prescriptions. Relatedly, the evidence shows that Volkman directed his patients to go to Respondent and even provided driving directions to it. And the evidence also showed that Volkman's patients would travel to Respondent in groups.

Moreover, in early October 2005, Volkman, following a raid by the Portsmouth P.D., moved his "practice" to Chillicothe. Mr. Fletcher knew that Volkman had moved to Chillicothe because he called Volkman at this clinic. GX 22. This begs the question of whether Mr. Fletcher asked Volkman why he had moved his practice, which, like all of the other questions raised by his conduct, Mr. Fletcher has failed to address because he did not testify.[52] *See, e.g., Baxter* v. *Palmigiano,* 425 U.S. 308, 316 (1976). In light of the substantial probative evidence offered against Respondent and Mr. Fletcher, Mr. Fletcher's failure to testify supports the drawing of an adverse inference against Respondent and Mr. Fletcher. I therefore conclude that Mr. Fletcher knew that Volkman's prescriptions lacked "a legitimate medical purpose" and thus violated Federal law.

Against this evidence, Respondent elicited the testimony of his two employees. Ms. Smith testified that Mr. Fletcher would question his customers as to why they were taking the medicine, tell them that they were taking a large quantity of pills, and ask them if they could work without the drugs. She further maintained on direct examination that Mr. Fletcher "talked to everybody about their prescriptions" but then retreated from this testimony, stating that he did not talk "to everybody" but only "the majority of them." Moreover, earlier in her testimony, she had stated that she explained the medications to the patients and most of the patients interviewed by DEA Investigators stated that Mr. Fletcher did not ask them about their medical condition.

As for Ms. Cole, much of her testimony is of dubious credibility. For example, Ms. Cole testified that Mr. Fletcher had tried calling some of the pharmacies which had refused to fill Volkman's prescriptions. Yet, when interviewed by a DEA Investigator, Mr. Fletcher stated that he did not talk to other pharmacists. Ms. Cole also testified that every time Mr. Fletcher received prescriptions from outside of the Columbus area, he would call to verify the prescriptions. However, Respondent's phone records show otherwise.

Regardless, even if Mr. Fletcher had called to verify each and every prescription that Dr. Volkman issued, the evidence would still support the conclusion that he repeatedly violated his corresponding responsibility under Federal law because many of the Volkman prescriptions patently served no legitimate medical purpose. *See United States* v. *Hayes,* 595 F.2d at 260 ("[A] pharmacist may not fill a written order from a practitioner, appearing on its face to be a prescription, if he knows the practitioner issued it in other than the usual course of medical treatment.").

As the Fifth Circuit has explained, while "[v]erification by the issuing practitioner on request of the pharmacist is evidence that the pharmacist lacks knowledge that the prescription was issued outside the scope of professional practice[,] * * * it is not an insurance policy against a fact finder's concluding that the pharmacist had the requisite knowledge despite a purported but false verification." *Id.* at 261. A pharmacist has "the responsibility not to fill an order that purports to be a prescription but is not a prescription within the meaning of the [CSA] because he knows that the issuing practitioner issued it outside the scope of medical practice." *Id.*

In an interview with a DEA Investigator, Mr. Fletcher admitted that "he had questions about" Dr. Volkman but that he was satisfied because Volkman told him that he did an MRI and blood tests.[53] However, as found above, Respondent repeatedly dispensed drug cocktails for multiple controlled substances including oxycodone, hydrocodone, and alprazolam, as well as carisoprodol, a combination which is widely known in the pharmacy profession as being popular with drug abusers, and it did so in such quantities that any reasonable pharmacist would have asked how the prescriptions could possibly serve a legitimate medical purpose. The Government's Expert also explained that these cocktails would have a synergistic effect on a person's central nervous system and could cause respiratory

[52] The evidence also shows that in October 2005, shortly after he had commenced filling Volkman's prescriptions, Mr. Fletcher was aware of the $10,000 threshold which triggers a bank's obligation to report a cash deposit under the Bank Secrecy Act and that he then structured multiple bank deposits in an attempt to avoid his bank's filing of Currency Transaction Reports, which would draw attention to his activities. This evidence further supports the conclusion that Mr. Fletcher clearly knew that by filling the Volkman prescriptions, he was engaging in illegal activity.

[53] Respondent's employees also testified that some of Volkman's patients complained that he was requiring them to undergo blood or urine tests. This sliver of evidence provides no reason to ignore the overwhelming evidence against Respondent.

depression. Accordingly, even if Volkman told Mr. Fletcher that he did blood tests and MRIs, this would not make the prescriptions any more legitimate.[54]

This alone supports the conclusion that Mr. Fletcher violated Federal law in dispensing the Volkman prescriptions. 21 CFR 1306.04(a). The other evidence—such as that related to the quantities of the various drugs being prescribed, the dosing, and lack of individualization of therapy; the distances the patients were travelling and the typical method of payment; the fact that Mr. Fletcher knew that other pharmacists had refused to fill Volkman's prescriptions; the percentage and number of Volkman's prescriptions that were for controlled substances—is simply icing on the cake.

Moreover, even after a DEA Investigator had interviewed Mr. Fletcher and asked him if he found it suspicious that Volkman's patients were travelling long distances to fill their prescriptions, Mr. Fletcher proceeded to fill numerous oxycodone and alprazolam prescriptions for residents of Kentucky who had travelled to South Florida to obtain the prescriptions. Indeed, even one of Respondent's employees was "skeptical" as to whether these were legitimate prescriptions. While Respondent contends that Mr. Fletcher stopped filling prescriptions issued by Florida pain-clinic physicians after he received the Ohio Board of Pharmacy's Notice, Mr. Fletcher did not testify in this proceeding and so has failed to offer any explanation as to why he filled the prescriptions in the first place. Furthermore, a responsible DEA registrant should be able to make these determinations without the authorities having to provide the information to him on a silver platter.

Nor was this the end of Respondent's abysmal experience in dispensing controlled substances. On November 4, 2009, Respondent dispensed to B.A., a recovering drug addict who lived in Morehead, Kentucky, four controlled-substance prescriptions issued by a Portsmouth physician, including two for Roxicodone 30 mg. (totaling 240 tablets), one for 120 oxycodone 15 mg., and one for 30 alprazolam; B.A. had been directed by the doctor's staff to fill his prescriptions at Respondent. Later that day, B.A. got high, and the next morning, he was found dead; the detective who found the prescription vials noted that there were only nineteen tablets left out of the total of 240 Roxicodone 30 mg., there were only fifty-two tablets left out of the 120 oxycodone 15 mg., and only eight tablets out of the 30 alprazolam. The quantity of oxycodone provided by these prescriptions totaled 300 mg. per day, an amount which was five to ten times the normal daily dose of oxycodone (5 to 10 mg. every four hours) as testified to by the Government's Expert. Moreover, on this single day, Respondent dispensed three prescriptions for the same schedule II narcotic. According to the Government's Expert, both the multiple prescriptions which B.A. presented and the large quantities prescribed were "red flags" which are suggestive of abuse and "no reasonable pharmacist would fill" the prescriptions. Here again, however, Mr. Fletcher failed to testify and thus offered no explanation as to why he did so.

DEA Investigators also obtained an OARRS report which showed that on eighteen different occasions between November 6, 2007 and October 30, 2009, Respondent had dispensed oxycodone to S.P. based on prescriptions she obtained from seven different doctors; most of the doctors practiced in different cities (Waverly, Beavercreek, Dayton and Wheelersburg), and while three of the doctors practiced in Portsmouth, two of them practiced at different clinics. Notwithstanding that its own dispensing records should have shown that S.P. was a doctor shopper (indeed, there was no need for Mr. Fletcher to check the OARRS to make this determination), Respondent repeatedly dispensed this highly abused schedule II controlled substance to her. Here again, Mr. Fletcher did not testify and thus has failed to explain why he ignored the information in his own records.

Respondent and Mr. Fletcher also violated the CSA and DEA regulations because during the November 6, 2009 inspection, it could not produce the biennial inventory of controlled substances which it is required to maintain. *See* 21 U.S.C. 827(a)(1) ("every registrant * * * shall * * * as soon * * * as such registrant first engages in the * * * dispensing of controlled substances, and every second year thereafter, make a complete and accurate record of all stocks thereof on hand"); *see also* 21 CFR 1304.11. Moreover, Mr. Fletcher was unaware that there is such a requirement. Finally, as found by the Ohio Board of Pharmacy, Mr. Fletcher and Respondent violated Ohio law on three occasions because Mr. Fletcher, as "the responsible pharmacist[,] failed to maintain supervision and control over the custody and possession of dangerous drugs" which had been delivered to the pharmacy.

I therefore conclude that the evidence relevant to Respondent's experience in dispensing controlled substances and its record of compliance with applicable Federal and State laws related to controlled substances shows that it has committed acts which render its continued registration inconsistent with the public interest and which justified the suspension of its registration. Notably, Mr. Fletcher failed to testify in this proceeding; Respondent therefore has not rebutted the Government's *prima facie* case. While there is only the suspension order to review (because Respondent allowed its registration to expire), which I affirm, had Respondent filed a renewal application, I would have denied it.

Order

Pursuant to the authority vested in me by 21 U.S.C. 824, as well as by 28 CFR 0.100(b) and 0.104, I hereby affirm my order which immediately suspended the now-expired DEA Certificate of Registration, BE5902615, issued to East Main Street Pharmacy. This Order is effective immediately.

Dated: October 15, 2010.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. 2010–27096 Filed 10–26–10; 8:45 am]

BILLING CODE 4410–09–P

[54] Respondent also elicited the testimony of Mr. Aalyson, a lawyer who practiced workers compensation law in Portsmouth and who knew most of the local doctors, that Mr. Fletcher had called and asked him if knew whether Dr. Volkman was a legitimate doctor. Tr. 1159. Mr. Aalyson testified that the phone call occurred in October 2006, more than a year after Mr. Fletcher started filling Volkman's prescriptions and eight months after DEA suspended Volkman's registration and thus could no longer prescribe.

To the extent this testimony was offered to support the contention that Mr. Fletcher tried to do due diligence, it provides no comfort to him as the conversation occurred more than a year after he started filling Volkman's prescriptions. Moreover, even if the conversation had occurred shortly after Mr. Fletcher started filling Volkman's prescriptions (the apparent point of Respondent's repeated questioning of Mr. Aalyson regarding when the conversation occurred), his testimony that Mr. Fletcher stated that he was "getting a lot of people coming in, and I'm beginning to wonder if the guy is legitimate," Tr. 1159, would actually support the Government's case that Mr. Fletcher knew Volkman's prescriptions were not legitimate.

OFFICE OF MANAGEMENT AND BUDGET

Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Office of Management and Budget, Office of Federal Financial Management.

ACTION: Notice; request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) invites the general public and Federal agencies to comment on the renewal of the SF–LLL, Disclosure of Lobbying Activities. Although OMB proposes no changes to the SF–LLL as part of this notice, we are seeking public comments on whether changes are warranted. We are particularly interested in comments on whether the information collected in the forms could be more consistent with other similar governmentwide information collections or whether additional information should be collected to further the aims of government transparency.

DATES: Comments must be received by November 26, 2010. Due to potential delays in OMB's receipt and processing of mail sent through the U.S. Postal Service, we encourage respondents to submit comments electronically to ensure timely receipt. We cannot guarantee that comments mailed will be received before the comment closing date.

ADDRESSES: Comments may be sent to regulations.gov, a Federal E-Government Web site that allows the public to find, review, and submit comments on documents that agencies have published in the **Federal Register** and that are open for comment. Simply type "SF–LLL renewal-10" (in quotes) in the Comment or Submission search box, click Go, and follow the instructions for submitting comments. Comments received by the date specified above will be included as part of the official record.

Marguerite Pridgen, Office of Federal Financial Management, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503; telephone 202–395–7844; fax 202–395–3952; e-mail *mpridgen@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Marguerite Pridgen at the addresses noted above.

OMB Control No.: 0348–0046.

Title: Disclosure of Lobbying Activities.

Form No.: SF–LLL.

Type of Review: Extension of a currently approved collection.

Respondents: Contractors, States, Local Governments, Universities, Non-Profit Organizations, For-Profit Organizations, Individuals.

Number of Responses: 1,000.

Estimated Time per Response: 10 minutes.

Needs and Uses: The SF–LLL is the standard disclosure form for lobbying paid for with non-Federal funds, as required by the Byrd Amendment and amended by the Lobbying Disclosure Act of 1995. The Federal awarding agencies use information reported on this form for the award and general management of Federal contracts and assistance program awards.

Debra J. Bond,

Deputy Controller.

SUPPLEMENTARY INFORMATION:

I. Summary of Comments and Responses

On June 22, 2010, OMB published in the **Federal Register** a notice seeking comments on the Standard form LLL, Disclosure of Lobbying Activities (SF–LLL) in accordance with the Paperwork Reduction Act [75 FR 35507]. OMB Watch, Project on Government Oversight, Sunlight Foundation, and Thomas M. Susman submitted their combined comments in a single letter ("proposal") dated August 19, 2010. Their comments were the only comments received in response to the June 22 notice and included recommendations for major changes to the system of disclosing lobbying activities. In summary, the August 19 proposal recommends expanding the information collected by the SF–LLL; raising the thresholds for reporting from $100,000 and $150,000 to $250,000; adding a form and process for government employees to report contacts with lobbyists; posting SF–LLL content from electronic submissions on a centralized, public, searchable Web site within three days of receiving it; and creating a system to ensure enforcement of the new reporting requirements.

II. Next Steps

The August 19 proposal, which can be viewed at *regulations.gov,* includes several recommendations that would require changes in policy and the process of lobbying disclosure that cannot be implemented before the SF–LLL expires. Therefore, the SF–LLL will be renewed without change to prevent any disruption in collecting lobbying disclosure information by Executive Branch agencies. Concurrent with the renewal without change, the August 19 proposal will be carefully reviewed and assessed for further action separate from this renewal process.

[FR Doc. 2010–27153 Filed 10–26–10; 8:45 am]

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NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice.

SUMMARY: NARA is giving public notice that the agency has submitted to OMB for approval the information collection described in this notice. The public is invited to comment on the proposed information collection pursuant to the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted to OMB at the address below on or before November 26, 2010 to be assured of consideration.

ADDRESSES: Send comments to Mr. Nicholas A. Fraser, Desk Officer for NARA, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5167; or electronically mailed to *Nicholas_A._Fraser@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the proposed information collection and supporting statement should be directed to Tamee Fechhelm at telephone number 301–837–1694 or fax number 301–713–7409.

SUPPLEMENTARY INFORMATION: Pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13), NARA invites the general public and other Federal agencies to comment on proposed information collections. NARA published a notice of proposed collection for this information collection on August 4, 2010 (75 FR 47029 and 47030). No comments were received. NARA has submitted the described information collection to OMB for approval.

In response to this notice, comments and suggestions should address one or more of the following points: (a) Whether the proposed information collection is necessary for the proper performance of the functions of NARA; (b) the accuracy of NARA's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of information technology; and (e) whether small businesses are affected by this collection. In this notice, NARA is soliciting comments concerning the following information collections:

Title: Item Approval Request List.
OMB number: 3095–0025.
Agency form number: NA Form 14110.
Type of review: Regular.
Affected public: Business or for-profit, nonprofit organizations and institutions, federal, state and local government agencies, and individuals or households.
Estimated number of respondents: 2,616.
Estimated time per response: 15 minutes.
Frequency of response: On occasion.
Estimated total annual burden hours: 654 hours.
Abstract: The information collection is prescribed by 36 CFR 1254.72. The collection is prepared by researchers who cannot visit the appropriate NARA research room or who request copies of records as a result of visiting a research room. NARA offers limited provisions to obtain copies of records by mail and requires requests to be made on prescribed forms for certain bodies of records. NARA uses the Item Approval Request List form to track reproduction requests and to provide information for customers and vendors.

Dated: October 18, 2010.

Charles K. Piercy,

Acting Assistant Archivist for Information Services.

[FR Doc. 2010–27148 Filed 10–26–10; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Comment Request

ACTION: Notice.

SUMMARY: Under the Paperwork Reduction Act of 1995, Public Law 104–13 (44 USC U.S.C. 3506(c)(2)(A)), and as part of its continuing effort to reduce paperwork and respondent burden, the National Science Foundation invites the general public and other Federal agencies to take this opportunity to comment on this information collection.

Comments: Comments are invited on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information shall have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information on respondents, including through the use of automated collection techniques or other forms of information technology; and (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 submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

DATES: Written comments should be received by December 27, 2010 to be assured of consideration. Comments received after that date will be considered to the extent practicable.

ADDRESSES: Written comments regarding the information collection and requests for copies of the proposed information collection request should be addressed to Suzanne Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Blvd., Rm. 295, Arlington, VA 22230, or by e-mail to *splimpto@nsf.gov.*

For Additional Information or Comments: Contact Suzanne Plimpton, the NSF Reports Clearance Officer, phone (703) 292–7556, or send e-mail to *splimpto@nsf.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, which is accessible 24 hours a day, 7 days a week, 365 days a year (including Federal holidays).

SUPPLEMENTARY INFORMATION:

Title: Experimental Program to Stimulate Competitive Research (EPSCoR) Outcomes Survey.
OMB Approval Number: 3145–NEW.
Expiration Date of Approval: Not applicable.

Abstract

The National Science Foundation (NSF) Act of 1950 (Pub. L. 507–81st Congress, as amended) stated that "* * * it shall be an objective of the Foundation to strengthen science and engineering research potential and education at all levels throughout the United States; and avoid undue concentration of such research and education, respectively." This Congressional directive recognized the inherent value of a truly national scientific and engineering (S&E) research enterprise. Over time, however, the nation's S&E efforts became concentrated geographically, focusing primarily on a limited number of major research universities. The NSF's resources became concentrated to the point where in 1977, in response to congressional concerns; the National Science Board established a task force to examine the geographical distribution of NSF awards. The issue was discussed at the 195th meeting of the NSB. Approval was requested for initiation of a program designed to "stimulate competitive research in regions of the country that were less able to compete successfully for research funds." In 1978 the NSB approved a resolution (NSB–78–12) establishing the *Experimental Program to Stimulate Competitive Research (EPSCoR)* and the general guidelines for its management.

The mission of EPSCoR is to assist the National Science Foundation in its statutory function "to strengthen research and education in science and engineering throughout the United States and to avoid undue concentration of such research and education."

The EPSCoR goals are to: (1) Provide strategic programs and opportunities for EPSCoR participants that stimulate sustainable improvements in their R&D capacity and competitiveness; and (2) advance science and engineering capabilities in EPSCoR jurisdictions for discovery, innovation, and overall knowledge-based prosperity.

The EPSCoR objectives are to: (1) Catalyze key research themes and related activities within and among EPSCoR jurisdictions that empower knowledge generation, dissemination and application; (2) activate effective jurisdictional and regional collaborations among academic, government and private sector stakeholders that advance scientific research, promote innovation and provide multiple societal benefits; (3) broaden participation in science and engineering by institutions, organizations and people within and among EPSCoR jurisdictions; and (4) use EPSCoR for development, implementation and evaluation of future programmatic experiments that motivate positive change and progression.

Expected Respondents

The respondents will be current and former EPSCoR awardees based at academic; state and local governments; and non-profit organizations. Quantitative procedures will be fielded using web-based modes. Up to 200 EPSCoR awardees will be contacted to request their participation in the survey. As needed, each EPSCoR awardee will be contacted with reminders to complete the survey no more than twice during the survey's duration under this generic clearance. Technology will be heavily utilized to limit the burden on respondents.

Use of the Information

The purpose of this survey of EPSCoR awardees is to better understand outcomes of NSF EPSCoR-related investments. The data will be used internally to inform NSF as it considers future improvements to the EPSCoR program, and to gain a better understanding regarding the program's impact on associated research and education activities. Findings may be presented externally to Congress, the Office of Management and Budget (OMB), in technical papers at conferences, published in the proceedings of conferences, or in journals.

Burden on the Public

Number of Respondents: 200.
Number of Minutes per Response: 30.
Overall Burden Request (in hours): 100.

Dated: October 22, 2010.

Suzanne Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2010–27206 Filed 10–26–10; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

Seeks Qualified Candidates for the Advisory Committee on Reactor Safeguards

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Request for résumés.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) seeks qualified candidates for the Advisory Committee on Reactor Safeguards (ACRS). Submit résumés to Ms. Brandi Hamilton, ACRS, Mail Stop T2E–26, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, or e-mail *brandi.hamilton@NRC.GOV*.

SUPPLEMENTARY INFORMATION: The ACRS is a part-time advisory group, which is statutorily mandated by the Atomic Energy Act of 1954, as amended. ACRS provides independent expert advice on matters related to the safety of existing and proposed nuclear power plants and on the adequacy of proposed reactor safety standards. Of primary importance are the safety issues associated with the operation of 104 commercial nuclear power plants in the United States and regulatory initiatives, including risk-informed and performance-based regulations, license renewal, power uprates, and the use of mixed oxide and high burnup fuels. An increased emphasis is being given to safety issues associated with new reactor designs and technologies, including passive system reliability and thermal hydraulic phenomena, use of digital instrumentation and control, international codes and standards used in multinational design certifications, materials and structural engineering, nuclear analysis and reactor core performance, and nuclear materials and radiation protection. In addition, the ACRS may be requested to provide advice on radiation protection, radioactive waste management and earth sciences in the agency's licensing reviews for fuel fabrication and enrichment facilities, and for waste disposal facilities.

The ACRS also has some involvement in security matters related to the integration of safety and security of commercial reactors. *See* NRC Web site at *http://www.nrc.gov/aboutnrc/regulatory/advisory/acrs.html* for additional information about ACRS. Criteria used to evaluate candidates include education and experience, demonstrated skills in nuclear reactor safety matters, the ability to solve complex technical problems, and the ability to work collegially on a board, panel, or committee. The Commission, in selecting its Committee members, considers the need for a specific expertise to accomplish the work expected to be before the ACRS. ACRS Committee members are appointed to four-year terms and normally serve no more than three terms. The Commission looks to fill two vacancies as a result of this request. For these positions, a candidate must have at least 10 years of broad experience in either of the following areas:

- Nuclear plant operations with demonstrated experience and integrated knowledge of nuclear power plant electrical, mechanical, and control systems.
- A distinguished record of achievement in one or more areas of nuclear science and technology.

Candidates with pertinent graduate level experience will be given additional consideration. Consistent with the requirements of the Federal Advisory Committee Act, the Commission seeks candidates with diverse backgrounds, so that the membership on the Committee is fairly balanced in terms of the points of view represented and functions to be performed by the Committee. Candidates will undergo a thorough security background check to obtain the security clearance that is mandatory for all ACRS members. The security background check will involve the completion and submission of paperwork to NRC. Candidates for ACRS appointments may be involved in or have financial interests related to NRC-regulated aspects of the nuclear industry. However, because conflict-of-interest considerations may restrict the participation of a candidate in ACRS activities, the degree and nature of any such restriction on an individual's activities as a member will be considered in the selection process. Each qualified candidate's financial interests must be reconciled with applicable Federal and NRC rules and regulations prior to final appointment. This might require divestiture of securities or discontinuance of certain contracts or grants. Information regarding these restrictions will be provided upon request. A résumé describing the educational and professional background of the candidate, including any special accomplishments, publications, and professional references should be provided. Candidates should provide their current address, telephone number, and e-mail address. All candidates will receive careful consideration. Appointment will be made without regard to factors such as race, color, religion, national origin, sex, age, or disabilities. Candidates must be citizens of the United States and be able to devote approximately 100 to 130 days per year to Committee business. Résumés will be accepted **for 90 days from date of issue**.

Dated: October 21, 2010.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. 2010–27162 Filed 10–26–10; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63145; File No. SR–Phlx–2010–143]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Active SQF Port Fee

October 21, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 15, 2010, NASDAQ OMX PHLX LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

("SEC" or "Commission") the 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 proposes to amend fee calculations for the Active SQF Port Fee. The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqtrader.com/micro.aspx?id=PHLXfilings,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the Active SQF Port Fee calculation to account for a new version of the Specialized Quote Feed ("SQF") interface, which was recently released by the Exchange. The Exchange is amending the Active SQF Port Fee calculation so that member organizations not be assessed port fees for use of the prior version of the interface (SQF 5.0) while transitioning to (and paying for) the new version (SQF 6.0).

In a given month, active SQF ports are ports that receive inbound quotes at any time within that month. SQF is an interface that enables specialists, Streaming Quote Traders (SQTs") [3] and Remote Streaming Quote Traders ("RSQTs") [4] to connect and send quotes into Phlx XL.[5] The Exchange released SQF 6.0 on October 11, 2010. The Exchange anticipates that member organizations will utilize both SQF 5.0 and SQF 6.0 for a period of time.

Presently, quoting participants (users of SQF 5.0) do not receive reports of executions against their quote or other information that is relevant to their quoting application over SQF 5.0. SQF 6.0 provides more information than SQF 5.0. SQF 6.0 increases efficiency by allowing member organizations to access, information such as execution reports and other relevant data through a single feed, rather than through accessing multiple feeds, which was necessary under SQF 5.0.[6]

This administrative data will also include the definition of complex order strategies.[7] Auction notifications are available on SQF 6.0.[8] The new interface, SQF 6.0, will also contain execution report messages, which are not contained in SQF 5.0.[9] Other data is also available on SQF 6.0.[10]

The Exchange currently assesses an Active SQF Port Fee of $500 per month per port. Active SQF ports refer to ports that receive inbound quotes at any time within that month. The Exchange anticipates that member organizations will utilize both SQF 5.0 and SQF 6.0 for a period of time.

SQF 5.0 and SQF 6.0 require different port configurations, and, as a consequence, a member organization could be charged for both types of active SQF ports in a given month as the member organization transitions from SQF 5.0 to SQF 6.0. Therefore, the Exchange proposes not to charge a member organization for the use of SQF 5.0 active ports to the extent that the member is paying for the same (or greater) number of SQF 6.0 active ports. (If a member organization has more SQF 5.0 than SQF 6.0 active ports, then the member organization would continue to pay for the "extra" active SQF 5.0 ports.) This would avoid duplicative billing while a member organization transitions its ports from SQF 5.0 to SQF 6.0.[11]

2. Statutory Basis

The Exchange believes that its proposal to amend its schedule of fees is consistent with Section 6(b) of the Act [12] in general, and furthers the objectives of Section 6(b)(4) of the Act [13] in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members and other persons using its facilities. Specifically, the Exchange believes that this fee proposal is fair, reasonable and equitable because it will prevent all member organizations from experiencing an unintended increase in SQF port charges during the transition from SQF 5.0 to SQF 6.0.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

[3] An SQT is an Exchange Registered Options Trader ("ROT") who has received permission from the Exchange to generate and submit option quotations electronically through an electronic interface with AUTOM via an Exchange approved proprietary electronic quoting device in eligible options to which such SQT is assigned. *See* Exchange Rule 1014(b)(ii)(A).

[4] An RSQT is an ROT that is a member or member organization with no physical trading floor presence who has received permission from the Exchange to generate and submit option quotations electronically through AUTOM in eligible options to which such RSQT has been assigned. An RSQT may only submit such quotations electronically from off the floor of the Exchange. *See* Exchange Rule 1014(b)(ii)(B).

[5] *See* Securities Exchange Act Release No. 63034 (October 4, 2010), 75 FR 62441 (October 8, 2010) (SR–Phlx–2010–124).

[6] Member organizations that have written interfaces to the PHLX system could use the administrative data to determine the current status of the Exchange's market for a particular option. For example, this data would show which symbols are trading on the PHLX, the current state of an options symbol (*i.e.,* open for trading, trading, halted or closed), as well as similar information regarding complex order strategies.

[7] *See* Exchange Rule 1080.08.

[8] A member organization's quoting application can receive these notifications over the same interface it sends quotes to the Exchange, SQF, and can now use the data to respond to auctions quickly and efficiently. This data is not sent as a quote to the market because it represents interest that is not immediately executable or, in the case of complex orders, represents a complex strategy which is not disseminated by the Options Price Reporting Authority.

[9] The Exchange currently provides Exchange members with execution reports through two interfaces. Execution reports are made available to all exchange participants on a Risk Management Feed known as "RMP," as well as an interface replacing RMP known as the Clearing Trade Interface or "CTI". *See* Securities Exchange Act Release No. 62155 (May 24, 2010), 75 FR 30081 (May 28, 2010) (SR–Phlx–2010–67).

[10] Other data that is available on SQF 6.0 includes: (1) Options Auction Notifications (*e.g.,* opening imbalance, market exhaust, PIXL or other information currently provided on SQF 5.0) ;(2) Options Symbol Directory Messages (currently provided on SQF 5.0); (3) System Event Messages (*e.g.,* start of messages, start of system hours, start of quoting, start of opening); (4) Complex Order Strategy Auction Notifications (COLA); (5) Complex Order Strategy messages; (6) Option Trading Action Messages (*e.g.,* trading halts, resumption of trading); and (7) Complex Strategy Trading Action Message (*e.g.,* trading halts, resumption of trading).

[11] The Exchange anticipates that it will take several months for this transition to occur.

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(4).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[14] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–Phlx-2010–143 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx-2010–143. This file number should be included on the subject line if e-mail 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. 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–Phlx-2010–143 and should be submitted on or before November 17, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–27140 Filed 10–26–10; 8:45 am]

BILLING CODE 8011–01–P

[14] 15 U.S.C. 78s(b)(3)(A)(ii).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63146; File No. SR–BATS–2010–030]

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Fees for Use of BATS Exchange, Inc.

October 21, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 14, 2010, BATS Exchange, Inc. ("BATS" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify its fee schedule applicable to Members[3] of the Exchange pursuant to BATS Rules 15.1(a) and (c). While changes to the fee schedule pursuant to this proposal will be effective upon filing, the changes will become operative on October 15, 2010.

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to modify the "Equities Pricing" section of its fee schedule to adopt pricing for two new order routing strategies, named TRIM and SLIM, and for a Destination Specific Order sent to the Exchange's affiliate, BATS Y-Exchange, Inc. The Exchange also proposes to modify the "Options Pricing" section of its fee schedule to adopt pricing for Destination Specific orders routed to the new C2 Options Exchange. Finally, the Exchange proposes certain non-substantive changes related to the appearance of the fee schedule.

(i) Adoption of TRIM Pricing

The Exchange proposes to adopt pricing for its new TRIM order routing strategy, which strategy is focused on seeking execution of orders while minimizing execution costs by routing only to certain low cost execution venues on the Exchange's System routing table. The Exchange proposes to rebate Members $0.0003 per share for TRIM orders routed to and executed by its affiliated exchange, BATS Y-Exchange, Inc. ("BYX"), which is the same rebate to be offered by BYX to market participants that route directly to and execute at BYX. For executions through TRIM routing that occur at a dark liquidity venue (identified by the Exchange as a "DRT" venue) or the NYSE, the Exchange proposes to charge $0.0020 per share. Finally, to the extent an order routed through TRIM executes at a low-priced venue other than BYX, a DRT venue or NYSE, the Exchange proposes neither to charge the Member

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] A Member is any registered broker or dealer that has been admitted to membership in the Exchange.

any fee nor to pay any rebate for such execution.

(ii) Adoption of SLIM Pricing

The Exchange proposes to adopt pricing for its new SLIM order routing strategy, which, similar to TRIM, is focused on seeking execution of orders while minimizing execution costs by routing to certain low cost execution venues on the Exchange's System routing table. The primary distinction between TRIM and SLIM is that SLIM will route first to low cost execution venues but will ultimately route to all venues on the Exchange's System routing table, whereas TRIM only routes to low cost execution venues. As with TRIM, the Exchange proposes to rebate Members $0.0003 per share for SLIM orders routed to and executed by its affiliated exchange, BYX. For executions through SLIM routing that occur at the NYSE, the Exchange proposes to charge $0.0020 per share. Finally, to the extent an order routed through SLIM executes at any other venue, including any DRT venue, the Exchange proposes to charge $0.0026 per share.

(iii) Destination Specific Equities Routing to BYX

The Exchange proposes to adopt pricing for a Destination Specific Order [4] routed to and executed by its affiliated exchange, BYX. The Exchange proposes to refer to this routing as "B2B" routing, and proposes to rebate $0.0003 per share for B2B orders routed to and executed by BYX. As described above, this is the same rebate applicable to orders routed to BYX directly.

(iv) Destination Specific Options Routing to C2

As set forth in the Options pricing section of the fee schedule, the Exchange currently charges flat rates for Customer, Firm and Market Maker transactions executed at away markets pursuant to Destination Specific Order [5] routing strategies, which rates vary depending on the venue at which transactions execute.[6] The Exchange has two distinct categories of options exchanges with "Make/Take" pricing.[7] The first category of Make/Take pricing is proposed to apply to Destination Specific Orders executed at the International Stock Exchange ("ISE") or NASDAQ OMX PHLX ("PHLX") in issues for which Make/Take pricing applies. The fee for this first category of Make/Take markets is proposed as $0.20 per contract for Customer transactions and $0.50 per contract for Firm or Market Maker transactions. The Exchange proposes to add the soon to be operational C2 Options Exchange ("C2") to this category of Destination Specific routing. The Exchange believes that Members will benefit from the simplicity of the pricing structure, and that C2 pricing will be most consistent with the pricing offered by ISE and PHLX in issues for which Make/Take pricing applies.

(v) Additional Changes

In addition to the changes described above, the Exchange proposes adding additional headings to its fee schedule in order to maintain clear delineation between its equities and options pricing sections. The Exchange also proposes to move a footnote within the equities pricing section of the fee schedule to maintain its position at the bottom of the page in the version of the fee schedule maintained on its Web site.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6 of the Act.[8] Specifically, the Exchange believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,[9] in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and other persons using any facility or system which the Exchange operates or controls. The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. The Exchange believes that its fees and credits are competitive with those charged by other venues. Finally, the Exchange believes that the proposed rates are equitable in that they apply uniformly to all Members.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change imposes any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change has been designated as a fee change pursuant to Section 19(b)(3)(A)(ii) of the Act [10] and Rule 19b–4(f)(2) thereunder,[11] because it establishes or changes a due, fee or other charge imposed on members by the Exchange. Accordingly, the proposal is effective upon filing with the Commission.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–BATS–2010–030 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BATS–2010–030. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use

[4] As defined in BATS Rule 11.9(c)(12).

[5] As defined in BATS Rule 21.1(d)(7).

[6] The current form of the Exchange's Destination Specific routing fees were recently adopted. *See* Securities Exchange Act Release No. 63085 (October 8, 2010) (SR–BATS–2010–026).

[7] As defined on the fee schedule, Make/Take pricing refers to executions at the identified Exchange under which "Post Liquidity" or "Maker" rebates ("Make") are credited by that exchange and "Take Liquidity" or "Taker" fees ("Take") are charged by that Exchange.

[8] 15 U.S.C. 78f.

[9] 15 U.S.C. 78f(b)(4).

[10] 15 U.S.C. 78s(b)(3)(A)(ii).

[11] 17 CFR 240.19b–4(f)(2).

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,[12] 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, on official business days between the hours of 10 a.m. and 3 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–BATS–2010–030 and should be submitted on or before November 17, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–27141 Filed 10–26–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63148; File No. SR–BYX–2010–003]

Self-Regulatory Organizations; BATS Y-Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 11.13, entitled "Order Execution"

October 21, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 13, 2010, BATS Y-Exchange, Inc. (the "Exchange" or "BYX") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend BATS Rule 11.13 [sic],[3] entitled "Order Execution," to modify the description of certain routing strategies that the Exchange proposes to offer when it commences operations.

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 parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 11.13, which describes its order routing processes, to modify the description of certain routing strategies that the Exchange proposes to offer when it commences operations.

Recently, the Exchange proposed addition of reference in its Rules to various routing strategies that will be available through BYX based on the rules of its affiliate, BATS Exchange, Inc. ("BATS Exchange"). Such strategies include the CYCLE routing strategy, variations of the Parallel routing strategy, DRT routing and Destination Specific Routing. The Exchange proposes to further amend Rule 11.13 to offer two new routing strategies, which are described below.

- TRIM. TRIM is a routing option under which an order will check the System for available shares and then will be sent to destinations on the System routing table.
- SLIM. SLIM is a routing option under which an order will check the System for available shares and then will be sent to destinations on the System routing table, including BATS Exchange.

In addition to the addition of the TRIM and SLIM routing strategies, the Exchange proposes modifying the description of the Parallel T routing strategy to make clear that when checking the Exchange's System for available shares, it will only check for displayed shares prior to routing away from the Exchange. The Parallel T routing strategy is intended to route only to Protected Quotations and only for displayed size, and thus, the Exchange believes that removal of only displayed size from its own System is most consistent with this strategy.

Exchange Rule 11.13(a)(3)(E) includes a definition of DRT routing, which is a routing option in which the entering firm instructs the System to route to alternative trading systems included in the System routing table. The definition of DRT currently states that it can be combined with three specified routing strategies offered by the Exchange. The Exchange proposes modifying the description of DRT routing to make clear that it can be combined with all routing strategies, including the new TRIM and SLIM routing strategies, unless otherwise specified. In addition, because some routing strategies offered by the Exchange might include DRT routing at a later stage, the Exchange proposes to remove the word "first" from the definition of the DRT routing strategy.

2. Statutory Basis

The rule change proposed in this submission is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[4] Specifically, the proposed change is consistent with Section 6(b)(5) of the Act,[5] because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to, and perfect the mechanism of, a free and open market and a national market system. The proposed change to introduce additional routing strategies will provide market participants with greater flexibility in routing orders consistent with Regulation NMS without developing complicated order routing strategies on their own.

[12] The text of the proposed rule change is available on the Commission's Web site at *http://www.sec.gov/rules/sro.shtml.*

[13] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Commission notes that the Exchange proposes to amend BYX Rule 11.13.

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(5).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change imposes any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[6] and Rule 19b–4(f)(6) thereunder.[7]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[8] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)[9] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay in order to allow the Exchange to immediately offer Exchange Users the routing strategies when BYX, commences operations. Further, the Exchange believes that the proposed TRIM and SLIM routing strategies are consistent with routing strategies offered by the Nasdaq Stock Market ("NASDAQ").[10] In addition, the Exchange believes that its proposed new routing strategies will benefit market participants and their customers by allowing them greater flexibility in their efforts to fill orders and minimize trading costs. The Exchange expects to have technological changes for one or more of the new routing strategies in place to support the proposed rule change in the near future, and believes that benefits to Exchange Users expected from the proposed rule change should not be delayed. In addition, BYX states a delay to the implementation date would put the Exchange at a competitive disadvantage to other markets that already offer similar functionalities. The Commission believes that waiving the 30-day operative delay[11] is consistent with the protection of investors and the public interest and designates the proposal operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–BYX–2010–003 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BYX–2010–003. This file number should be included on the subject line if e-mail 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,[12] 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, on official business days between the hours of 10 a.m. and 3 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–BYX–2010–003 and should be submitted on or before November 17, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–27143 Filed 10–26–10; 8:45 am]

BILLING CODE 8011–01–P

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. BYX has satisfied this requirement.

[8] 17 CFR 240.19b–4(f)(6).

[9] *Id.*

[10] *See* NASDAQ Rule 4758.

[11] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[12] The text of the proposed rule change is available on the Commission's Web site at *http://www.sec.gov/rules/sro.shtml.*

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63150; File No. SR–FINRA–2009–058]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Amendment No. 1 to a Proposed Rule Change and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1, To Adopt FINRA Rule 2232 (Customer Confirmations) in the Consolidated FINRA Rulebook and To Delete NASD Rule 2230, NASD IM–2110–6 and Incorporated NYSE Rule 409(f)

October 21, 2010.

I. Introduction

On August 24, 2009, the Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a National Association of Securities Dealers, Inc. ("NASD")) filed with the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act" or "Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change to adopt FINRA Rule 2232 (Customer Confirmations) in the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

consolidated FINRA rulebook and to delete NASD Rule 2230, NASD IM–2110–6 and Incorporated NYSE Rule 409(f). The proposed rule change was published for comment in the **Federal Register** on September 21, 2009.[3] The Commission received three comments in response to the proposed rule change.[4] On September 16, 2010, FINRA responded to the comments[5] and filed Amendment No. 1 to the proposed rule change.[6] The Commission is publishing this notice and order to solicit comments on Amendment No. 1 and to approve the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. Description of the Proposed Rule Change

As part of the process of developing a new Consolidated FINRA Rulebook,[7] FINRA proposed to adopt a new, consolidated customer confirmation rule by adopting FINRA Rule 2232 (Customer Confirmations) and deleting NASD Rule 2230, NASD IM–2110–6 and NYSE Rule 409(f).[8]

A. Background

NASD and NYSE rules set forth certain basic requirements with respect to confirmations of transactions with customers.[9]

1. NASD Rule 2230

NASD Rule 2230 provides that a member, at or before the completion of each transaction[10] with a customer shall, give or send to the customer written notification (*i.e.*, confirmation) disclosing: (a) Whether the member is acting as a broker for the customer, as a dealer for its own account, as a broker for some other person, or as a broker for both the customer and some other person; and (b) in any case in which the member is acting as a broker for the customer or for both the customer and some other person, either the name of the person from whom the security was purchased or to whom it was sold for the customer and the date and time when the transaction took place or the fact that such information will be furnished upon the request of the customer, and the source and amount of any commission or other remuneration received or to be received by the member in connection with the transaction.

When NASD Rule 2230 was adopted in 1939[11] its requirements essentially duplicated those set forth in Exchange Act Rule 15c1–4 as originally adopted by the Commission. The primary difference between the two rules was that the scope of Rule 15c1–4 was restricted to over-the-counter transactions while the NASD rule by its terms extended to all member transactions with customers.[12] In 1977, the Commission rescinded Rule 15c1–4 and adopted Exchange Act Rule 10b–10, indicating that it would apply "regardless of the manner in which a broker-dealer conducts its business or the marketplace where transactions are effected."[13] Since then, the Commission has amended Rule 10b–10 several times.[14]

2. NASD IM–2110–6

NASD IM–2110–6 requires that any member providing a customer confirmation pursuant to Exchange Act Rule 10b–10 in connection with any transaction in callable common stock[15] must disclose on the confirmation that the security is callable common stock and that a customer may contact the member for more information concerning the security.

When IM–2110–6 was adopted in 2000, FINRA noted that an investor purchasing callable common stock is subject to unique risks not typically associated with ownership of common stock, even when such stock is called away at a premium.[16] FINRA also stated that the ability of an issuer's common stock to be called away from a shareholder generally is a material fact to an investor. Accordingly, in adopting the IM, FINRA stated that high standards of commercial honor and just and equitable principles of trade would require members to provide the disclosures as set forth in the IM. FINRA further emphasized that the disclosure of the call feature on the confirmation in no way relieves a member of its obligation to consider the callable nature of the security when complying with any applicable suitability obligations.

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[3] *See* Securities Exchange Act Release No. 60669 (September 14, 2009), 74 FR 48107 (September 21, 2009) ("Notice").

[4] *See* letter from Tamara K. Salmon, Senior Associate Counsel, Investment Company Institute ("ICI"), dated October 9, 2010 ("ICI Letter"); letter from Jonathan Feigelson, Senior Vice President, General Counsel, TIAA–CREF, dated October 13, 2009 ("TIAA–CREF Letter"); and letter from Clifford E. Kirsch and Susan S. Krawcyzk, Sutherland Asbill & Brennan on behalf of the Committee of Annuity Insurers ("CAI"), dated October 13, 2009 ("CAI Letter").

[5] *See* letter from Adam H. Arkel, Assistant General Counsel, FINRA, dated September 16, 2010 ("FINRA's Response").

[6] *See* Amendment No. 1 dated September 16, 2010 ("Amendment No. 1"). The text of Amendment No. 1 is available on FINRA's Web site at *http://www.finra.org/*, at the principal office of FINRA, and on the Commission's Internet Web site (*http://sec.gov/rules/sro.shtml*).

[7] The current FINRA rulebook consists of: (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE ("Incorporated NYSE Rules") (together, the NASD Rules and Incorporated NYSE Rules are referred to as the "Transitional Rulebook"). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE ("Dual Members"). The FINRA Rules apply to all FINRA member firms, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, *see Information Notice*, March 12, 2008 (Rulebook Consolidation Process).

[8] For convenience, the Incorporated NYSE Rules are referred to as the "NYSE Rules."

[9] The proposed rule change addresses basic customer confirmation requirements. FINRA rules separately set forth confirmation requirements that are specific to certain types of financial products, such as the requirements set forth in FINRA Rule 2360 (adopted as part of FINRA's set of consolidated rules addressing index warrants, options and security futures). *See* Securities Exchange Act Release No. 58932 (November 12, 2008), 73 FR 69696 (November 19, 2008) (Approval Order).

[10] Exchange Act Rule 10b–10(d)(2) states that the term "completion of the transaction" has the meaning set forth in Exchange Act Rule 15c1–1. The Rule 15c1–1 definition of "completion of the transaction" depends on whether the customer is purchasing or selling the security, the time when payment is made and the status of the custody/delivery of the security.

[11] NASD Rule 2230, formerly designated as Section 12 of the NASD Rules of Fair Practice, was adopted as part of FINRA's original rulebook. *See* Certificate of Incorporation and By-Laws, Rules of Fair Practice and Code of Procedure for Handling Trade Practice Complaints of National Association of Securities Dealers, Inc. (August 8, 1939).

[12] *See* Securities Exchange Act Release No. 1330 (August 4, 1937).

[13] *See* Securities Exchange Act Release No. 13508 (May 5, 1977) (Securities Confirmations: Final Rule).

[14] *See, e.g.*, Securities Exchange Act Release No. 19687 (April 18, 1983), 48 FR 17583 (April 25, 1983) (Securities Confirmations: Final Rule Amendments) (requiring, among things, disclosure to investors of certain yield and call feature information in connection with transactions in debt securities); Securities Exchange Act Release No. 34962 (November 10, 1994), 59 FR 59612 (November 17, 1994) (Confirmation of Transactions: Final Rule Amendments) (generally requiring, among other things, disclosure if a debt security is not rated by a nationally recognized statistical rating organization, disclosure if a broker-dealer is not a member of the Securities Investor Protection Corporation, and disclosure with respect to the availability of information with respect to transactions in collateralized debt securities); Securities Exchange Act Release No. 46471 (September 6, 2002), 67 FR 58302 (September 13, 2002) (Confirmation Requirements for Transactions of Security Futures Products Effected in Futures Accounts: Final Rule Amendments) (adopting, among others, requirements regarding transactions in securities futures products); Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) (Regulation NMS: Final Rules and Amendments) (making conforming amendments to Rule 10b–10 in connection with the adoption of Regulation NMS).

[15] Callable common stock is stock that is subject to being called away from a shareholder, either by the issuer or by a third party.

[16] *See* Securities Exchange Act Release No. 42761 (May 5, 2000), 65 FR 30459 (May 11, 2000) (Approval Order). *See also NASD Notice to Members* 00–33 (May 2000) (Callable Common Stock).

3. NYSE Rule 409(f)

NYSE Rule 409(f) requires that confirmation of all transactions in securities admitted to dealings on the NYSE—whether over-the-counter or on an exchange—sent by members or member organizations to their customers, must clearly set forth with a suitable legend the settlement date of each transaction. The rule provides that this requirement also applies to confirmations or reports from an organization to a correspondent, but does not apply to reports made by floor brokers to the member organization from which the orders were received. The rule further contains a general cross-reference instructing members to refer to Exchange Act Rule 10b–10.

B. Proposal

As discussed in the Notice, the proposed rule change would delete current NASD Rule 2230 from the FINRA rulebook and replace it with proposed FINRA Rule 2232, which would streamline and combine basic customer confirmation requirements in the NASD and NYSE Rules. Specifically:

• Proposed FINRA Rule 2232 would provide that confirmations must be given or sent to customers in conformity with the requirements of Exchange Act Rule 10b–10. FINRA believes that incorporating by reference the requirements of Rule 10b–10, as opposed to replicating Rule 10b–10's detailed requirements in FINRA's rule, would make the proposed rule clear and serve the interests of regulatory efficiency.

• The proposed rule change would delete NASD IM–2110–6 from the FINRA rulebook and transfer its requirements to proposed FINRA Rule 2232. Proposed FINRA Rule 2232 would expand the coverage of those requirements to make clear that the requirement to disclose that the security is callable (and that further information is available from the member) applies to any callable equity security,[17] not just callable common stock. As stated in the Notice, FINRA believes that, from the standpoint of investor protection, this change is necessary to ensure that the rule covers, for instance, callable preferred stock.[18]

• The proposed rule would include the requirement in NYSE Rule 409(f) to disclose the settlement date of the transaction, with two changes. First, consistent with FINRA's investor protection mission, the requirement to disclose the settlement date of the transaction would include all transactions in securities, not just NYSE-listed securities. Second, because the proposed rule would address customer confirmations, the elements of the NYSE rule addressing member-to-member communications would, consistent with the parameters of Exchange Act Rule 10b–10, be deleted.

FINRA will announce the implementation date of the proposed rule change in a *Regulatory Notice* to be published no later than 90 days following Commission approval. The implementation date will be no later than 240 days following Commission approval.

III. Summary of Comment Letters and FINRA's Response

The Commission received three comments on the proposed rule change,[19] all of which objected to the settlement disclosure requirement of the proposed rule, particularly with respect to mutual fund and variable annuity transactions. Among the reasons cited for the objections were differences in calculating settlement dates for mutual fund purchases through a broker-dealer versus those purchased through a mutual fund's underwriter.[20] Another commenter was of the view that variable annuity transactions were not a "good fit" because they do not settle like other securities transactions.[21] One commenter also objected to the potential costs associated with reprogramming and testing automated confirmation systems to include settlement date information.[22] This commenter also made a number of procedural objections.[23] One commenter urged FINRA to revise the proposed rule to relieve broker-dealers from having to disclose the settlement date when that date is the same as the trade date, or considering the settlement date requirement to be satisfied if the trade date on the confirmation is the same as the settlement date.[24] Another commenter indicated that there should be a two-year implementation timetable if the rule change is adopted as proposed.[25]

In its response, FINRA clarified that it intended the settlement date provisions to apply only to transactions in traditional equity securities, whether traded on an exchange or over-the-counter where, according to FINRA, the disclosure of settlement date serves the purposes of investor protection.[26] FINRA filed Amendment No. 1 to clarify this intent by limiting the settlement date provisions of the proposed rule to transactions in: (1) Any NMS stock as defined in Rule 600 of Regulation NMS; [27] and (2) any equity security subject to the reporting requirements of the FINRA Rule 6600 series, other than direct participation programs as defined in FINRA Rule 6642. FINRA stated that it also made other minor changes to the proposed rule in the interest of clarity.

FINRA also noted that with respect to considering the implementation costs of a proposed rule filing, in a self-regulatory organization rulemaking, the appropriate standard, as stated in Section 15A(b)(9) of the Exchange Act, is that the rules do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[28] Moreover, FINRA tailors its proposed rule changes as narrowly as possible to achieve the intended and necessary regulatory benefit. As stated in Item 4 of the proposed rule change, FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. FINRA also noted that, as required under Section 19(b)(1) of the Exchange Act,[29] it submitted to the Commission a concise general statement of the basis and purpose of the proposed rule.[30]

IV. Discussion and Commission Finding

After carefully considering the proposal, as amended by Amendment No. 1, the comments, and FINRA's

[17] Exchange Act Section 3(a)(11) defines the term "equity security" to include, among others, "any stock or similar security."

[18] As noted by FINRA in the Notice, Exchange Act Rule 10b–10(a)(4) requires that, in the case of any transaction in a debt security subject to redemption before maturity, the confirmation must include a statement to the effect that the debt security may be redeemed in whole or in part before maturity, that such a redemption could affect the yield represented and that additional information is available upon request.

[19] *See supra* note 4.

[20] *See* ICI Letter.

[21] *See* CAI Letter. This commenter further indicated that variable annuity transactions require the purchase or surrender of an insurance policy and as such, could not settle the way that other securities transactions settle.

[22] *See* TIAA–CREF Letter. In particular, this commenter stated that requiring the inclusion of the settlement date in customer confirmations would cost about $11 to 15 million dollars.

[23] *See* TIAA–CREF Letter. In addition, this commenter objected to FINRA not opening the proposal to comment by FINRA members and generally expressed its view that the proposal was inconsistent with the requirements of Exchange Act Rule 19b–4.

[24] *See* ICI Letter.

[25] *See* TIAA–CREF Letter.

[26] *See* FINRA's Response.

[27] *See* 17 CFR 242.600.

[28] This statement was confirmed in a telephone conversation with Adam Arkel of FINRA on October 19, 2010.

[29] 15 U.S.C. 78s(b)(1).

[30] *See supra* note 28.

Response, the Commission finds that the proposed rule change is consistent with the requirements of the Exchange Act, and the rules and regulations thereunder that are applicable to national securities associations.[31] In particular, the Commission believes the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Exchange Act,[32] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and in general, to protect investors and the public interest. The proposed rule change is consistent with FINRA's obligations under the Exchange Act to protect investors and the public interest because the proposed rule streamlines the rules governing broker-dealers' confirmation requirements by cross-referencing Exchange Act Rule 10b–10 while maintaining the additional disclosure requirements of NASD IM–2110–6 (*i.e.*, relating to callable securities) and extending the additional NYSE Rule 409(f) requirements (*i.e.*, relating to settlement date) to a broader range of equity securities.

The Commission believes that FINRA has adequately addressed the concerns raised by commenters with respect to the application of the settlement date provisions to mutual fund and variable annuity transactions. In particular, Amendment No. 1 limits the settlement date disclosure requirement to Regulation NMS stock and over-the-counter equity securities subject to the FINRA Rule 6600 series. We also believe that the proposed rule is consistent with the public interest and the protection of investors because information regarding the callable status of a security is generally a material fact for investors. Indeed, callable securities can subject investors to additional reinvestment risk because investors may have less attractive alternatives for reinvesting the proceeds if the issuer calls the security earlier than the investor's intended sell date, even when the security is called away at a premium. In addition, the disclosure of settlement date on a confirmation is important for investors because many of the rights and benefits associated with the beneficial ownership of a security do not confer until settlement date.[33] Finally, we note that the Exchange Act does not require a cost/benefit analysis with respect to proposed self-regulatory organization rules that are filed with, and approved by, the Commission.

V. Accelerated Approval

The Commission finds good cause, pursuant to Section 19(b)(2) of the Exchange Act,[34] for approving the proposed rule change, as modified by Amendment No. 1, prior to the 30th day after publication of Amendment No. 1 in the **Federal Register**. The changes proposed in Amendment No. 1 respond to specific concerns raised by commenters. In particular, Amendment No. 1 will limit the application of the settlement date provisions to transactions in Regulation NMS securities and to over-the-counter equity securities subject to the reporting requirements of the FINRA Rule 6600 series, other than direct participation programs as defined in FINRA Rule 6642.

Accordingly, the Commission finds that good cause exists to approve the proposal, as modified by Amendment No. 1, on an accelerated basis.

VI. 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 e-mail to *rule-comments@sec.gov*. Please include File Number SR–FINRA–2009–058 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2009–058. This file number should be included on the subject line if e-mail 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 a.m. and 3 p.m. Copies of such filings also will be available for inspection and copying at the principal office of FINRA. 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–FINRA–2009–058 and should be submitted on or before November 17, 2010.

VII. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Exchange Act,[35] that the proposed rule change (SR–FINRA–2009–058), as modified by Amendment No. 1, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[36]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–27145 Filed 10–26–10; 8:45 am]

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[31] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 17c(f).

[32] 15 U.S.C. 78o–3(b)(6).

[33] For example, an investor may not be eligible for dividend payments if the ex-dividend date falls between the transaction date and the settlement date.

[34] 15 U.S.C. 78s(b)(2).

[35] 15 U.S.C. 78s(b)(2).

[36] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63158; File No. SR–Phlx–2010–144]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Codify Prices for Co-Location Services

October 21, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on October 14, 2010, NASDAQ OMX PHLX LLC ("Phlx" or "Exchange") filed with the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been substantially 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 the Substance of the Proposed Rule Change

The Exchange is filing with the Securities and Exchange Commission ("Commission") a proposed rule change to codify pricing for co-location services. The text of the proposed rule change is available at *http://www.nasdaqtrader.com/micro.aspx?id=PHLXRulefilings*, at the Exchange's principal office, on the Commission's Web site at *http://www.sec.gov*, and at the Commission's Public Reference Room. The Exchange will implement the proposed rule change immediately.

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

Recently, the Commission approved an initial fee schedule of existing fees for the Exchange's co-location services.[3] This filing seeks to codify additional fees not included in that schedule. These fees are: (1) A one-time $3,000 fee for users selecting a Phase 3 2x 20 208 volt cabinet power option; (2) a one-time $200 per shelf fee for additional cabinet shelves within a power cabinet; (3) a one-time $175 fee per lock for single master key locks that allow customers to use a single key to access their secured equipment; and (4) a one-time per spout fee of $750 for cable downspouts that gather and secure cables entering customer equipment. All the foregoing products are provided only upon customer request, and the Exchange notes that use of its co-location products and services is completely voluntary and all are offered on a non-discriminatory basis.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[4] in general, and with Section 6(b)(5) of the Act,[5] in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. In particular, the filing codifies and makes transparent uniform fees imposed for co-location services.

In addition, the Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[6] in general, and with Section 6(b)(4) of the Act,[7] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which The Exchange operates or controls. In particular, the Exchange notes that the use of co-location services is entirely voluntary and made available on a non-discriminatory basis.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[8] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, 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 e-mail to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2010–144 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2010–144. This file number should be included on the subject line if e-mail 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

[3] Exchange Act Release No. 62395 (June 28, 2010), 75 FR 38584 (July 2, 2010).

[4] 15 U.S.C. 78f.

[5] 15 U.S.C. 78f(b)(5).

[6] 15 U.S.C. 78f.

[7] 15 U.S.C. 78f(b)(4).

[8] 15 U.S.C. 78s(b)(3)(a)(ii).

printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2010–144 and should be submitted on or before November 17, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–27198 Filed 10–26–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63157; File No. SR–BX–2010–068]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Codify Pricing for Co-Location Services

October 21, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 14, 2010, NASDAQ OMX BX, Inc. ("BX" 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 BX. Pursuant to Section 19(b)(3)(A)(ii) of the Act [3] and Rule 19b–4(f)(2) thereunder,[4] BX has designated this proposal as establishing or changing a due, fee, or other charge, which renders the proposed rule change effective upon filing. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

BX proposes to codify pricing for co-location services. BX will implement the proposed change immediately. The text of the proposed rule change is available at *http://nasdaqomxbx.cchwallstreet.com,* at BX's principal office, on the Commission's Web site at *http://www.sec.gov,* 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, BX 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. BX 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

Recently, the Commission approved an initial fee schedule of existing fees for the Exchange's co-location services.[5] This filing seeks to codify additional fees not included in that schedule. These fees are: (1) A one-time $3,000 fee for users selecting a Phase 3 2x 20 208 volt cabinet power option; (2) a one-time $200 per shelf fee for additional cabinet shelves within a power cabinet; (3) a one-time $175 fee per lock for single master key locks that allow customers to use a single key to access their secured equipment; and (4) a one-time per spout fee of $750 for cable downspouts that gather and secure cables entering customer equipment. All the foregoing products are provided only upon customer request, and the Exchange notes that use of its co-location products and services is completely voluntary and all are offered on a non-discriminatory basis.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[6] in general, and with Section 6(b)(5) of the Act,[7] in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. In particular, the filing codifies and makes transparent uniform fees imposed for co-location services.

In addition, the Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[8] in general, and with Section 6(b)(4) of the Act,[9] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which The Exchange operates or controls. In particular, the Exchange notes that the use of co-location services is entirely voluntary and made available on a non-discriminatory basis.

B. Self-Regulatory Organization's Statement on Burden on Competition

BX does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[10] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] Exchange Act Release No. 62396 (June 28, 2010), 75 FR 38585 (July 2, 2010).

[6] 15 U.S.C. 78f.

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78f.

[9] 15 U.S.C. 78f(b)(4).

[10] 15 U.S.C. 78s(b)(3)(A)(ii).

institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, 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 e-mail to *rule-comments@sec.gov*. Please include File Number SR–BX–2010–068 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BX–2010–068. This file number should be included on the subject line if e-mail 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 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BX–2010–068, and should be submitted on or before November 17, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–27197 Filed 10–26–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63156; File No. SR–NASDAQ–2010–133]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Codify Prices for Co-Location Services

October 21, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on October 14, 2010, The NASDAQ Stock Market LLC ("NASDAQ" 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 NASDAQ. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

NASDAQ proposes to change to codify pricing for co-location services NASDAQ will implement the proposed change immediately. The text of the proposed rule change is available at *http://nasdaq.cchwallstreet.com/,* at NASDAQ's principal office, on the Commission's Web site at *http://www.sec.gov,* and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASDAQ included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASDAQ has prepared summaries, set 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

Recently, the Commission approved an initial fee schedule of existing fees for the Exchange's co-location services.[3] This filing seeks to codify additional fees not included in that schedule. These fees are: (1) A one-time $3,000 fee for users selecting a Phase 3 2x 20 208 volt cabinet power option; (2) a one-time $200 per shelf fee for additional cabinet shelves within a power cabinet; (3) a one-time $175 fee per lock for single master key locks that allow customers to use a single key to access their secured equipment; and (4) a one-time per spout fee of $750 for cable downspouts that gather and secure cables entering customer equipment. All the foregoing products are provided only upon customer request, and the Exchange notes that use of its co-location products and services is completely voluntary and all are offered on a non-discriminatory basis.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[4] in general, and with Section 6(b)(5) of the Act,[5] in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. In particular, the filing codifies and makes transparent uniform fees imposed for co-location services.

In addition, the Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[6] in general, and with Section 6(b)(4) of the Act,[7] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members

[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

[3] Exchange Act Release No. 62397 (June 28, 2010), 75 FR 38860 (July 6, 2010).

[4] 15 U.S.C. 78f.

[5] 15 U.S.C. 78f(b)(5).

[6] 15 U.S.C. 78f.

[7] 15 U.S.C. 78f(b)(4).

and issuers and other persons using any facility or system which The Exchange operates or controls. In particular, the Exchange notes that the use of co-location services is entirely voluntary and made available on a non-discriminatory basis.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[8] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, 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 e-mail to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2010–133 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2010–133. This file number should be included on the subject line if e-mail 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 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2010–133, and should be submitted on or before November 17, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–27194 Filed 10–26–10; 8:45 am]

BILLING CODE 8011–01–P

[8] 15 U.S.C. 78s(b)(3)(a)(ii).

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63149; File No. SR–BYX–2010–004]

Self-Regulatory Organizations; BATS Y-Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Fees for Use of BATS Y-Exchange, Inc.

October 21, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 14, 2010, BATS Y-Exchange, Inc. (the "Exchange" or "BYX") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify its fee schedule applicable to Members[3] of the Exchange pursuant to BYX Rules 15.1(a) and (c). While changes to the fee schedule pursuant to this proposal will be effective upon filing, the changes will become operative on October 15, 2010.

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to implement a fee schedule applicable to use of the Exchange commencing on the date it begins operating as a national securities exchange. The Exchange currently intends to commence operations on October 15, 2010. Please find below a description of the fees and rebates that the Exchange intends to impose under the initial, proposed fee schedule.

The Exchange does not propose to charge different fees or grant different rebates depending on the amount of orders submitted to, and/or trades executed on or through, the Exchange. Accordingly, all fees and rebates

[3] A Member is any registered broker or dealer that has been admitted to membership in the Exchange.

described below are applicable to all Members, regardless of the overall volume of their trading activities on the Exchange. Furthermore, the proposed fees are different but structurally similar to those of the Exchange's affiliated exchange, BATS Exchange, Inc. ("BATS Exchange" or "BATS"), though the Exchange has omitted fees that are not currently proposed to be charged by the Exchange or that are not pertinent to the Exchange's planned business.

(i) Standard Order Execution Fees—Removing Liquidity

The Exchange is proposing to rebate $0.0003 per share for executions that remove liquidity from the Exchange, with the exception of executions involving securities priced under $1.00 per share. With respect to securities priced under $1.00 per share that remove liquidity from the Exchange's book, the Exchange proposes to charge a fee of 0.10% of the total dollar value of the execution.

(ii) Standard Order Execution Fees—Adding Liquidity

The Exchange proposes to establish a no charge and no rebate structure for adding displayed liquidity to the BYX order book in securities priced $1.00 and above and for adding any liquidity (displayed or non-displayed) to the BYX order book securities priced below $1.00. The Exchange proposes charging $0.0005 per share that adds non-displayed liquidity to the BYX order book in securities priced $1.00 and above. As defined on the proposed fee schedule, the reference to "non-displayed liquidity" for purposes of the fee schedule includes liquidity resulting from all forms of Pegged Orders,[4] Mid-Point Peg Orders,[5] and Non-Displayed Orders,[6] but does not include liquidity resulting from Reserve Orders [7] or Discretionary Orders.[8]

(iii) Standard Routing Pricing—Best Execution Routing

The Exchange proposes to charge the routing charges described below. All charges by the Exchange for routing are applicable only in the event that an order is executed. In other words, there is no charge for orders that are routed away from the Exchange but are not filled. The best execution routing fees proposed by this filing are identical to those charged by the Exchange's affiliated exchange, BATS Exchange (for identical best execution routing strategies). The standard best execution routing strategies offered by the Exchange include Parallel D, Parallel 2D, Parallel T, CYCLE, RECYCLE and DRT.

The Exchange proposes to offer the Parallel D, Parallel 2D, CYCLE and RECYCLE routing strategies at a charge of $0.0028 per share for executions that occur at other trading venues as a result of such strategies. The Exchange proposes to offer its Parallel T routing strategy with a charge of $0.0033 per share for executions that occur at other trading venues via Parallel T.

With respect to securities priced under $1.00 per share, the Exchange proposes to charge 0.28% of the total dollar value of the execution of an order that is routed away from the Exchange through Parallel D or Parallel 2D. Similarly, and based on the charge of $0.0033 per share for Parallel T routing, the Exchange proposes to charge 0.33% of the total dollar value of the execution for any security priced under $1.00 per share that is routed away from the Exchange through Parallel T.

In addition, consistent with the fees charged by BATS Exchange, BYX proposes to offer its DRT routing strategy to Members with a fee of $0.0020 per share executed at a dark liquidity venue. This lower fee is based on the fact that various dark liquidity venues to which the Exchange routes provide the possibility of executions at reduced rates. Finally, as BATS Exchange does on its fee schedule, BYX proposes to note that the current default best execution routing strategy used by the Exchange is to route through DRT to dark liquidity venues and then to other market centers through Parallel D.

(iv) Destination Specific Routing Pricing

The Exchange proposes to charge a consistent, discounted fee for Destination Specific Orders routed to certain of the largest market centers measured by volume (NYSE, NYSE Arca and NASDAQ) (referred to by the Exchange as "One Under" pricing). The One Under pricing proposed by BYX is identical to One Under pricing offered by BYX's affiliated exchange, BATS Exchange, and in each instance the execution fee will be $0.0001 less per share for orders routed to such market centers by the Exchange than such market centers currently charge for removing liquidity. Specifically, the Exchange proposes to charge: (a) $0.0020 per share for BYX + NYSE Destination Specific Orders executed at NYSE; (b) $0.0027 per share for BYX + NYSE ARCA Destination Specific Orders executed at NYSE Arca in Tape B securities; and (c) $0.0029 per share for BYX + NASDAQ Destination Specific Orders executed at NASDAQ or BYX + NYSE ARCA Destination Specific Orders executed at NYSE Arca in Tape A or Tape C securities, while such market centers currently charge removal rates, respectively, of: (x) $0.0021 per share; (y) $0.0028 per share; and (z) $0.0030 per share.

In conjunction with this proposal, the Exchange proposes to set forth these fees under a separate heading in order to make clear the order types to which "One Under" pricing applies. All other Destination Specific Order fees (*i.e.,* to BATS Exchange or other market centers, as described below) can be found under the heading for "Other Non-Standard Routing Options."

The Exchange also proposes to adopt pricing for a Destination Specific Order [9] routed to and executed by its affiliated exchange, BATS Exchange. The Exchange proposes to refer to this routing as "B2B" routing, and proposes to charge $0.0025 per share for B2B orders routed to and executed by BATS Exchange. This charge is the same charge a Member would incur if it routed an order to BATS Exchange directly. In addition, the Exchange proposes to adopt a charge of $0.0030 per share for Destination Specific Orders sent to and executed by any market center other than the NYSE, NYSE Arca, NASDAQ or BATS Exchange that displays a Protected Quotation [10] (each a "Protected Market Center"). Additionally, the Exchange proposes to charge $0.0020 per share for executions that occur at a dark liquidity venue through a BYX + DRT Destination Specific Order.

(v) Other Non-Standard Routing Options

In addition to non-standard routing options described elsewhere in this filing, the Exchange also proposes to charge certain other fees identical to those charged by its affiliated exchange, BATS Exchange. Specifically, the Exchange proposes to charge $0.0033 per share for Directed ISO's.[11] The Exchange also proposes not to charge for Modified Destination Specific Orders [12] routed to and executed by a dark liquidity venue through its "Dark Scan" routing strategy.

(vi) TRIM Routing Pricing

The Exchange proposes to adopt pricing for its new TRIM order routing strategy, which strategy is focused on

[4] As defined in BYX Rule 11.9(c)(8).
[5] As defined in BYX Rule 11.9(c)(9).
[6] As defined in BYX Rule 11.9(c)(11).
[7] As defined in BYX Rule 11.9(c)(1).
[8] As defined in BYX Rule 11.9(c)(10).
[9] As defined in BATS Rule 11.9(c)(12).
[10] As defined in BATS Rule 1.5(t).
[11] As defined in BYX Rule 11.9(d)(2).
[12] As defined in BATS Rule 11.9(c)(13).

seeking execution of orders while minimizing execution costs by routing only to certain low cost execution venues on the Exchange's System routing table. The Exchange proposes to charge Members $0.0025 per share for TRIM orders routed to and executed by its affiliated exchange, BATS Exchange, which is the same rebate to be offered by BATS to market participants that route directly to and execute at BATS. For executions through TRIM routing that occur at a dark liquidity venue (identified by the Exchange as a "DRT" venue) or the NYSE, the Exchange proposes to charge $0.0020 per share. Finally, to the extent an order routed through TRIM executes at a low-priced venue other than BATS, a DRT venue or NYSE, the Exchange proposes neither to charge the Member any fee nor to pay any rebate for such execution.

(vii) SLIM Routing Pricing

The Exchange proposes to adopt pricing for its new SLIM order routing strategy, which, similar to TRIM, is focused on seeking execution of orders while minimizing execution costs by routing to certain low cost execution venues on the Exchange's System routing table. The primary distinction between TRIM and SLIM is that SLIM will route first to low cost execution venues but will ultimately route to all venues on the Exchange's System routing table, whereas TRIM only routes to low cost execution venues. As with TRIM, the Exchange proposes to charge Members $0.0025 per share for SLIM orders routed to and executed by its affiliated exchange, BATS. For executions through SLIM routing that occur at the NYSE, the Exchange proposes to charge $0.0020 per share. Finally, to the extent an order routed through SLIM executes at any other venue, including any DRT venue, the Exchange proposes to charge $0.0026 per share.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6 of the Act. Specifically, the Exchange believes that the proposed rule change is consistent with Section 6(b)(4) of the Act, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and other persons using any facility or system which the Exchange operates or controls.

The various routing fees proposed by this filing, including fees for order execution and routing strategies offered by the Exchange, are intended to attract order flow to BYX by offering competitive and easy to understand rates to Exchange Members. All fees are structured in a manner comparable to corresponding fees of the Exchange's affiliate, BATS Exchange, and are set at levels equal to or lower than the levels of the comparable BATS Exchange fees. The differences between the fees charged for routing to specific market centers and routing of specific order types described above are due to different cost structures at the various market centers to which orders may be routed and other factors. For instance, lower transaction fees at NYSE allow the Exchange to charge lower routing fees for BATS + NYSE Destination Specific Orders than Destination Specific Orders routed elsewhere (i.e., to NASDAQ and other protected market centers). Similarly, lower transaction fees at dark liquidity venues permit the Exchange to charge lower routing fees for orders routed to such venues. Because the Exchange incurs additional costs and performs additional services in connection with certain routing services, such as the routing of Directed ISOs and Parallel T routing, it proposes to charge a higher routing fee for such orders. Finally, because the Exchange believes that a uniform routing fee for all other orders routed away from the Exchange through its best execution routing strategies provides Members with certainty as to transaction costs, it proposes to charge standard routing fees for such orders, rather than further differentiating routing fees that it charges to Members.

The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. Also, although routing services offered by the Exchange are available to all Members, Members are not required to use the Exchange's routing services, but instead, the Exchange's routing services are completely optional. Members can manage their own routing practices or can utilize a myriad of other routing solutions that are available to market participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change imposes any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change has been designated as a fee change pursuant to Section 19(b)(3)(A)(ii) of the Act [13] and Rule 19b–4(f)(2) thereunder,[14] because it establishes or changes a due, fee or other charge imposed on members by the Exchange. Accordingly, the proposal is effective upon filing with the Commission.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–BYX–2010–004 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BYX–2010–004. This file number should be included on the subject line if e-mail 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

[13] 15 U.S.C. 78s(b)(3)(A)(ii).

[14] 17 CFR 240.19b–4(f)(2).

submission,[15] 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, on official business days between the hours of 10 a.m. and 3 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–BYX–2010–004 and should be submitted on or before November 17, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–27144 Filed 10–26–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63147; File No. SR–BATS–2010–029]

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by BATS Exchange, Inc. To Amend BATS Rule 11.13, Entitled "Order Execution"

October 21, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 13, 2010, BATS Exchange, Inc. ("BATS" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend BATS Rule 11.13, entitled "Order Execution," to add certain new routing strategies and to modify the description of certain existing Exchange routing strategies.

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 parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 11.13, which describes its order routing processes, to add certain new routing strategies and to modify the existing description of two Exchange routing strategies.

Currently, various routing strategies are available through BATS, including the CYCLE routing strategy, variations of the Parallel routing strategy, DRT routing and Destination Specific Routing. The Exchange proposes to offer two new routing strategies, which are described below.

- TRIM. TRIM is a routing option under which an order will check the System for available shares if so instructed by the entering User and then will be sent to destinations on the System routing table.
- SLIM. SLIM is a routing option under which an order will check the System for available shares, will be routed to BATS Y–Exchange, Inc. ("BYX"),[3] and then will be sent to destinations on the System routing table.

In addition to the addition of the TRIM and SLIM routing strategies, the Exchange proposes modifying the description of the Parallel T routing strategy to make clear that when checking the Exchange's System for available shares, it will only check for displayed shares prior to routing away from the Exchange. The Parallel T routing strategy is intended to route only to Protected Quotations and only for displayed size, and thus, the Exchange believes that removal of only displayed size from its own System is most consistent with this strategy.

Exchange Rule 11.13(a)(3)(E) includes a definition of DRT routing, which is routing option in which the entering firm instructs the System to route to alternative trading systems included in the System routing table. The definition of DRT currently states that it can be combined with three specified routing strategies offered by the Exchange. The Exchange proposes modifying the description of DRT routing to make clear that it can be combined with all routing strategies, including the new TRIM and SLIM routing strategies, unless otherwise specified. In addition, because some routing strategies offered by the Exchange might include DRT routing at a later stage, the Exchange proposes to remove the word "first" from the definition of the DRT routing strategy.

2. Statutory Basis

The rule change proposed in this submission is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[4] Specifically, the proposed change is consistent with Section 6(b)(5) of the Act,[5] because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to, and perfect the mechanism of, a free and open market and a national market system. The proposed change to introduce additional routing strategies and to modify certain existing routing strategies will provide market participants with greater flexibility in routing orders consistent with Regulation NMS without developing

[15] The text of the proposed rule change is available on the Commission's Web site at *http://www.sec.gov/rules/sro.shtml.*

[16] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

[3] BYX is a registered national securities exchange and affiliate of the Exchange. *See* Securities Exchange Act Release No. 34–62716 (August 13, 2010), 75 FR 51295 (August 19, 2010) (order approving application of BATS Y–Exchange, Inc. for registration as a national securities exchange). BYX plans to commence operations on October 15, 2010.

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(5).

complicated order routing strategies on their own.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change imposes any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[6] and Rule 19b–4(f)(6) thereunder.[7]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[8] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)[9] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. BATS requests that the Commission waive the 30-day operative delay in order to allow BATS to immediately offer Exchange Users new routing strategies at or around the time that its affiliated national securities exchange, BYX, commences operations. Further, the Exchange believes that the proposed TRIM and SLIM routing strategies are consistent with routing strategies offered by the Nasdaq Stock Market ("NASDAQ").[10] In addition, the Exchange believes that its proposed new routing strategies will benefit market participants and their customers by allowing them greater flexibility in their efforts to fill orders and minimize trading costs. The Exchange expects to have technological changes for one or more of the new routing strategies in place to support the proposed rule change in the near future, and believes that benefits to Exchange Users expected from the proposed rule change should not be delayed. In addition, BATS states a delay to the implementation date would put the Exchange at a competitive disadvantage to other markets that already offer similar functionalities. The Commission believes that waiving the 30-day operative delay[11] is consistent with the protection of investors and the public interest and designates the proposal operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–BATS–2010–029 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BATS–2010–029. This file number should be included on the subject line if e-mail 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,[12] 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, on official business days between the hours of 10 a.m. and 3 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–BATS–2010–029 and should be submitted on or before November 17, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–27142 Filed 10–26–10; 8:45 am]

BILLING CODE 8011–01–P

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. BATS has satisfied this requirement.

[8] 17 CFR 240.19b–4(f)(6).

[9] *Id.*

[10] *See* NASDAQ Rule 4758.

[11] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[12] The text of the proposed rule change is available on the Commission's Web site at *http://www.sec.gov/rules/sro.shtml.*

[13] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF TRANSPORTATION

Office of the Secretary of Transportation

[DOT Docket No. DOT–OST–2010–0074]

The Future of Aviation Advisory Committee (FAAC) Subcommittee on Financing; Notice of Meeting

AGENCY: Office of the Secretary of Transportation, U.S. Department of Transportation.

ACTION: Notice of meeting.

SUMMARY: The Department of Transportation, Office of the Secretary of Transportation, announces a meeting of the FAAC Subcommittee on Financing, which will be held at the offices of the General Aviation Manufacturers Association, in Washington, DC. This notice announces the date, time, and location of the meeting, which will be open to the public. The purpose of the FAAC is to provide advice and recommendations to the Secretary of Transportation to ensure the competitiveness of the U.S. aviation industry and its capability to manage effectively the evolving transportation needs, challenges, and

opportunities of the global economy. The Subcommittee on Financing will address the need for a stable, secure, and sufficient level of funding for our aviation system and make recommendations to the Secretary for action. This is the fifth meeting of the subcommittee.

DATES: The meeting will be held on November 17, 2010, from 2 p.m. to 5 p.m. Eastern Standard Time.

ADDRESSES: The meeting will be held at the offices of the General Aviation Manufacturers Association, 8th Floor, 1400 K Street, Washington, DC 20533.

Public Access: The meeting is open to the public. (*See* below for registration instructions.)

Public Comments: Persons wishing to offer written comments and suggestions concerning the activities of the advisory committee or Subcommittee on Financing should file comments in the Public Docket (Docket Number DOT–OST–2010–0074 at *http://www.Regulations.gov*) or alternatively through the *FAAC@dot.gov* e-mail. If comments and suggestions are intended specifically for the Subcommittee on Financing, the term "Finance" should be listed in the subject line of the message. To ensure such comments can be considered by the subcommittee before its November 17, 2010, meeting, public comments must be filed by 5 p.m. Eastern Standard Time on November 12, 2010.

SUPPLEMENTARY INFORMATION:

Background

Under section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App. 2), we are giving notice of an FAAC Subcommittee on Financing meeting taking place on November 17, 2010, from 2 p.m. to 5 p.m. Eastern Standard Time, at the offices of the General Aviation Manufacturers Association, 8th Floor, 1400 K Street, Washington, DC 20533. The agenda includes—

1. Ratification of minutes from previous meeting.

2. Finalization of the subcommittee's recommendations for presentation at the final meeting of the FAAC on December 15, 2010.

Registration

The meeting room can accommodate up to 20 members of the public. Persons desiring to attend in person must pre-register by November 12, 2010, through e-mail to *FAAC@dot.gov*. The term "Registration: Financing" should be listed in the subject line of the message, and admission will be limited to the first 20 persons to pre-register and receive a confirmation of their pre-registration. Minutes of the meeting will be taken and will be made available to the public.

Request for Special Accommodation

The DOT is committed to providing equal access to this meeting for all participants. If you need alternative formats or services because of a disability, please send a request to *FAAC@dot.gov* with the term "Special Accommodations" listed in the subject line of the message by close of business on November 12, 2010.

FOR FURTHER INFORMATION CONTACT: John Hennigan, Air Traffic Organization, Federal Aviation Administration, 800 Independence Avenue, SW., Room 409, Washington, DC 20591; (202) 631–6644.

Issued in Washington, DC on October 22, 2010.

Pamela Hamilton-Powell,

Designated Federal Official, Future of Aviation Advisory Committee.

[FR Doc. 2010–27146 Filed 10–26–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2010–0178 (Notice No. 10–8)]

Information Collection Activities

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, this notice announces that the Information Collection Requests (ICR) abstracted below will be forwarded to the Office of Management and Budget (OMB) for review and comments. The ICRs describe the nature of the information collections and their expected burden. A **Federal Register** Notice with a 60-day comment period soliciting comments on these collections of information was published in the **Federal Register** on August 20, 2010 [75 FR 51520] under Docket No. PHMS–2010–0178 (Notice No. 10–3).

DATES: Interested persons are invited to submit comments on or before November 26, 2010.

ADDRESSES: Send comments regarding the burden estimate, including suggestions for reducing the burden, to the Office of Management and Budget (OMB), Attention: Desk Officer for PHMSA, 725 17th Street, NW., Washington, DC 20503. Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. A comment to OMB is most effective if OMB receives it within 30 days of publication.

FOR FURTHER INFORMATION CONTACT: Deborah Boothe or Steven Andrews, U.S. Department of Transportation, Office of Hazardous Materials Standards (PHH–10), Pipeline and Hazardous Materials Safety Administration, 1200 New Jersey Avenue, SE., East Building, 2nd Floor, Washington, DC 20590–0001, Telephone (202) 366–8553.

SUPPLEMENTARY INFORMATION: Section 1320.8(d), Title 5, Code of Federal Regulations requires Federal agencies to provide interested members of the public and affected agencies an opportunity to comment on information collection and recordkeeping requests. This notice identifies information collection requests that PHMSA will be submitting to OMB for renewal and extension. These information collections are contained in 49 CFR parts 171, 173, 178, and 180, of Hazardous Materials Regulations (HMR; 49 CFR parts 171–180). PHMSA has revised burden estimates, where appropriate, to reflect current reporting levels or adjustments based on changes in proposed or final rules published since the information collections were last approved. The following information is provided for each information collection: (1) Title of the information collection, including former title if a change is being made; (2) OMB control number; (3) abstract of the information collection activity; (4) description of affected persons; (5) estimate of total annual reporting and recordkeeping burden; and (6) frequency of collection. PHMSA will request a three-year term of approval for each information collection activity and, when approved by OMB, publish notice of the approval in the **Federal Register**.

PHMSA requests comments on the following information collections:

Title: Inspection and Testing of Portable Tanks and Intermediate Bulk Containers.

OMB Control Number: 2137–0018.

Summary: This information collection consolidates provisions for documenting qualifications, inspections, tests and approvals pertaining to the manufacture and use of portable tanks and intermediate bulk containers under various provisions of the HMR. It is necessary to ascertain whether portable tanks and intermediate bulk containers have been qualified, inspected, and retested in accordance with the HMR. The information is used to verify that certain portable tanks and intermediate bulk containers meet required performance standards prior to their being authorized for use, and to document periodic requalification and testing to ensure the packagings have not deteriorated due to age or physical abuse to a degree that would render them unsafe for the transportation of hazardous materials.

Affected Public: Manufacturers and owners of portable tanks and intermediate bulk containers.

Annual Reporting and Recordkeeping Burden:

Number of Respondents: 8,770.

Total Annual Responses: 86,100.

Total Annual Burden Hours: 66,390.

Frequency of collection: On occasion.

Title: Hazardous Materials Incident Reports.

OMB Control Number: 2137–0039.

Summary: This collection is applicable upon occurrence of incidents as prescribed in §§ 171.15, 171.16 and 171.21 of the HMR. A Hazardous Materials Incident Report, DOT Form F 5800.1, must be completed by a person in physical possession of a hazardous material at the time a hazardous material incident occurs in transportation, such as a release of materials, serious accident, evacuation or closure of a main artery. Incidents meeting criteria in § 171.15 also require a telephonic report. This information collection enhances the Department's ability to evaluate the effectiveness of its regulatory program, determine the need for regulatory changes, and address emerging hazardous materials transportation safety issues. The requirements apply to all interstate and intrastate carriers engaged in the transportation of hazardous materials by rail, air, water, and highway.

Affected Public: Shippers and carriers of hazardous materials.

Annual Reporting and Recordkeeping Burden:

Number of Respondents: 1,678.

Total Annual Responses: 16,768.

Total Annual Burden Hours: 23,037.

Frequency of collection: On occasion.

Title: Cargo Tank Motor Vehicles in Liquefied Compressed Gas Service.

OMB Control Number: 2137–0595.

Summary: These information collection and recordkeeping requirements pertain to the manufacture, certification, inspection, repair, maintenance, and operation of certain DOT specification and non-specification cargo tank motor vehicles used to transport liquefied compressed gases. These requirements are intended to ensure cargo tank motor vehicles used to transport liquefied compressed gases are operated safely, and to minimize the potential for catastrophic releases during unloading and loading operations. They include: (1) Requirements for operators of cargo tank motor vehicles in liquefied compressed gas service to develop operating procedures applicable to unloading operations and carry the operating procedures on each vehicle; (2) inspection, maintenance, marking, and testing requirements for the cargo tank discharge system, including delivery hose assemblies; and (3) requirements for emergency discharge control equipment on certain cargo tank motor vehicles transporting liquefied compressed gases that must be installed and certified by a Registered Inspector.

Affected Public: Carriers in liquefied compressed gas service, manufacturers and repairers.

Annual Reporting and Recordkeeping Burden:

Number of Respondents: 6,958.

Total Annual Responses: 920,538.

Total Annual Burden Hours: 200,914.

Frequency of collection: On occasion.

Issued in Washington, DC on October 21, 2010.

Charles E. Betts,

Acting Director, Office of Hazardous Materials Standards.

[FR Doc. 2010–27151 Filed 10–26–10; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection(s): Verification of Authenticity of Foreign License, Rating and Medical Certification

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on July 30, 2010, vol. 75, no. 146, page 45007. The information is used to identify airmen to allow the agency to verify their foreign license being used to qualify for a US certificate. Respondents are holders of foreign licenses wishing to obtain U.S. certificates.

DATES: Written comments should be submitted by November 26, 2010.

FOR FURTHER INFORMATION CONTACT: Carla Scott on (202) 267–9895, or by e-mail at: *Carla.Scott@faa.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–0724.

Title: Verification of Authenticity of Foreign License, Rating and Medical Certification.

Form Numbers: FAA Form 8060–71.

Type of Review: Renewal of an information collection.

Background: The information collected is used to properly identify airmen to allow the agency to verify their foreign license being used to qualify for a U.S. certificate. The respondents are holders of foreign licenses wishing to obtain a U.S. certificate. Per the General Aviation Operations Inspector's Handbook, a person who is applying for a U.S. pilot certificate/rating on the basis of a foreign-pilot license must apply for verification of that license at least 90 days before arriving at the designated FAA FSDO where the applicant intends to receive the U.S. pilot certificate.

Respondents: An estimated 5400 foreign license holders.

Frequency: The information is collected on occasion.

Estimated Average Burden per Response: Approximately 10 minutes per response.

Estimated Total Annual Burden: An estimated 900 hours annually.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/FAA, and sent via electronic mail to *oira_submission@omb.eop.gov,* or faxed to (202) 395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street, NW., Washington, DC 20503.

Public Comments Invited: You are asked to comment on any aspect of this

information collection, including (a) whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized 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.

Issued in Washington, DC on October 20, 2010.

Carla Scott,

FAA Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.

[FR Doc. 2010–27097 Filed 10–26–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. EP 704]

Review of Commodity, Boxcar, and TOFC/COFC Exemptions

AGENCY: Surface Transportation Board, DOT.

ACTION: Notice.

SUMMARY: The Surface Transportation Board (Board) will hold a public hearing beginning at 9:30 a.m. on December 9, 2010, in the Hearing Room on the first floor of the Board's headquarters in Washington, DC. The purpose of the public hearing will be to review certain categorical exemptions from regulation under 49 U.S.C. 10502, specifically the commodity exemptions under 49 CFR 1039.10 and 1039.11, the boxcar exemptions under 49 CFR 1039.14, and trailer-on-flatcar/container-on-flatcar (TOFC/COFC) exemptions under 49 CFR part 1090. Persons wishing to speak at the hearing should notify the Board in writing.

DATES: The public hearing will take place on December 9, 2010. Any person wishing to speak at the hearing should file with the Board a combined notice of intent to participate (identifying the party, the proposed speaker, the time requested, and the topic(s) to be covered) and the person's written testimony by November 30, 2010. Written submissions by interested persons who do not wish to appear at the hearing are also due by November 30, 2010.

ADDRESSES: All filings may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the "E–FILING" link on the Board's "*http://www.stb.dot.gov*" Web site. Any person submitting a filing in the traditional paper format should send an original and 10 copies of the filing to: Surface Transportation Board, Attn: Docket No. EP 704, 395 E Street, SW., Washington, DC 20423–0001.

Copies of written submissions will be posted to the Board's Web site and will be available for viewing and self-copying in the Board's Public Docket Room, Suite 131. Copies of the submissions will also be available (for a fee) by contacting the Board's Chief Records Officer at (202) 245–0235 or 395 E Street, SW., Washington, DC 20423–0001.

FOR FURTHER INFORMATION CONTACT: Julia Farr at (202) 245–0359. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at: (800) 877–8339.]

SUPPLEMENTARY INFORMATION: The exemption provisions pertaining to railroads first adopted in the Railroad Revitalization and Regulatory Reform Act of 1976, Public Law 94–210, 90 Stat. 31 (1976) (4R Act), and later modified in the Staggers Act of 1980, Public Law 96–448, 94 Stat. 1895 (1980) (Staggers Act), fundamentally changed the economic regulation of the railroad industry by the Board's predecessor, the Interstate Commerce Commission (the Commission). Prior to 1976, the Commission heavily regulated the industry. The Commission focused its regulation on ensuring equal treatment of shippers, which in some instances, led to railroad pricing decisions based on factors other than market considerations.

By the early 1970s, the railroads were in financial decline. In an effort to revitalize the struggling railroad industry, Congress enacted the 4R Act and, 4 years later, the Staggers Act. In both statutes, Congress reduced the Commission's oversight of railroads through various means, including the statutory exemption provisions of 49 U.S.C. 10505. Under § 10505, which was enacted in the 4R Act and modified in the Staggers Act, Congress directed the Commission to exempt railroad activities when it found that regulation was not necessary to carry out the national rail transportation policy (RTP) of 49 U.S.C. 10101, and either: (1) The exemption was of limited scope; or (2) regulation was not necessary to protect shippers from abuse of market power. (These exemption provisions are now contained in 49 U.S.C. 10502.[1]) In the Staggers Act, Congress directed the Commission to pursue exemptions aggressively, and to correct any problems arising as a result of the exemption through its revocation authority.[2]

Consistent with that Congressional directive, the Commission exempted numerous commodities, services, and types of transactions from regulation. In its first "commodity" exemption, in *Rail General Exemption Authority—Fresh Fruits & Vegetables,* 361 I.C.C. 211 (1979), the Commission exempted certain fresh fruits and vegetables from its regulations, based largely on its conclusion that the rail market share of movements of these goods, which were subject to strong competitive forces, was minimal and declining. Since then, the agency has exempted numerous other individual commodities, listed in 49 CFR 1039.10 and 1039.11, after finding that traffic for these individual commodities was sufficiently competitive and that railroads lacked sufficient market power such that abuse of shippers was not a substantial threat.[3] The Commission also exempted rail (and truck) operations provided in connection with intermodal (TOFC/COFC) services, under 49 CFR part 1090,[4] and the rail transportation of all commodities in single-line boxcar service, under 49 CFR 1039.14.[5]

These agency exemption decisions were instrumental in the U.S. rail system's transition from a heavily regulated, financially weak component of the economy into a mature, relatively healthy industry that operates with only minimal oversight. The transition, however, was not without challenges, sometimes because an exemption under § 10502 excuses carriers from virtually all aspects of regulation,[6] even though the Board's continuing jurisdiction over exempted movements also extinguishes

[1] 49 U.S.C. 10505, Public Law 95–473, 92 Stat. 1361, has been omitted by Public Law 104–88, Title I, § 102(a).

[2] H.R. Rep. No. 96–1430, at 105 (1980).

[3] *See, e.g., Rail Gen. Exemption Auth.—Nonferrous Recyclables,* 3 S.T.B. 62 (1998); *Rail Gen. Exemption Auth.—Petition of AAR to Exempt Rail Transp. of Selected Commodity Groups,* 9 I.C.C. 2d 969 (1993); *Exemption from Regulation—Rail Transp. Frozen Food,* 367 I.C.C. 859 (1983); *Liquid Iron Chloride,* 367 I.C.C. 347 (1983); *Rail Gen. Exemption Auth.—Miscellaneous Agric. Commodities,* 367 I.C.C. 298 (1983).

[4] *See Central States Motor Freight Bureau* v. *ICC,* 924 F.2d 1099 (DC Cir. 1991), for a summary of the agency's several actions in connection with the progressive deregulation of TOFC/COFC services through the exemption process.

[5] *See Brae Corp.* v. *United States,* 740 F.2d 1023 (DC Cir. 1984).

[6] *See Pejepscot Indus. Park—Pet. for Declaratory Order,* 6 S.T.B. 886, 891, *reconsideration granted in part,* 7 S.T.B. 220 (2003).

any common law cause of action regarding common carrier duties.[7] Thus, for exempted movements, rail customers could pursue legal remedies under the Interstate Commerce Act only if they successfully petitioned the agency to revoke the exemption under 49 U.S.C. 10502(d).

As long as 30 years have passed since the adoption of many of these exemptions. In recent years, the Board has received informal inquiries questioning the relevance and/or necessity of some of the existing commodity exemptions, given the changes in the competitive landscape and the railroad industry that have occurred over the past few decades. The Board will, therefore, hold a hearing to explore the continuing utility of and the issues surrounding the categorical exemptions under § 10502, specifically the various commodity exemptions under 49 CFR 1039.10 and 1039.11, the boxcar exemptions under 49 CFR 1039.14, and TOFC/COFC exemptions under 49 CFR part 1090. The Board seeks comments as to the effectiveness of these exemptions in the marketplace; whether the rationale behind any of these exemptions should be revisited; and whether the exemptions should be subject to periodic review.

Date of Hearing: The hearing will begin at 9:30 a.m. on December 9, 2010, in the 1st floor hearing room at the Board's headquarters at 395 E Street, SW., in Washington, DC and will continue, with short breaks if necessary, until every person scheduled to speak has been heard.

Notice of Intent to Participate and Testimony: Any person wishing to speak at the hearing should file with the Board a combined notice of intent to participate (identifying the party, the proposed speaker, the time requested, and the topic(s) to be covered) and the person's written testimony, by November 30, 2010. Also, any interested person who wishes to submit a written statement without appearing at the December 9, 2010 hearing should also file that statement by November 30, 2010.

Board Releases and Live Video Streaming Available Via the Internet: Decisions and notices of the Board, including this notice, are available on the Board's Web site at "*http://www.stb.dot.gov*." This hearing will be available on the Board's Web site by live video streaming. To access the hearing, click on the "Live Video" link under "Information Center" at the left side of the home page beginning at 9 a.m. on December 9, 2010.

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

Decided: October 21, 2010.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2010–27104 Filed 10–26–10; 8:45 am]

BILLING CODE 4915–01–P

[7] *See Consol. Rail Corp.—Declaratory Order—Exemption,* 1 I.C.C. 2d 895, 898 (1986).

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Advisory Council to the Internal Revenue Service; Meeting

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: The Internal Revenue Service Advisory Council (IRSAC) will hold a public meeting on Wednesday, November 17, 2010.

FOR FURTHER INFORMATION CONTACT: Ms. Anna Millikan, Program Analyst, National Public Liaison, CL:NPL, 7559, 1111 Constitution Avenue, NW., Washington, D.C. 20224. Telephone: 202–622–6433 (not a toll-free number). E-mail address: **public_liaison@irs.gov.*

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988), a public meeting of the IRSAC will be held on Wednesday, November 17, 2010, from 9 a.m. to 1 p.m. at the Madison, Loews Hotel, 1177 15th Street, NW., Montpelier Room, Washington, DC 20005. Issues to be discussed include, but not limited to: *The Issue Management Process, The New Proposed Form Regarding Uncertain Tax Positions, Automated Under Reporting (AUR) Soft Notice CP2057, Repayment of First Time Homebuyer Credit, The Filing Requirements for the Report of Foreign Bank and Financial Accounts ("FBAR") are Confusing and Extremely Overbroad, Collection Standard Should Be Revised To Enhance Collection and to Reduce Installment Payment Default Rates, Circular 230 Enrollment of Former Internal Revenue Service Employees, Recommendations Regarding Continuing Education Program and Sponsor Requirements Under Proposed Changes to Circular 230.* Reports from the four IRSAC subgroups, Large Business and International, Small Business/Self-Employed, Wage & Investment, and Office of Professional Responsibility will also be presented and discussed. Last minute agenda changes may preclude advanced notice. The meeting room accommodates approximately 80 people, IRSAC members and Internal Revenue Service officials inclusive. Due to limited seating, please call Anna Millikan to confirm your attendance. Ms. Millikan can be reached at 202–622–6433. Attendees are encouraged to arrive at least 30 minutes before the meeting begins. Should you wish the IRSAC to consider a written statement, please either call 202–622–6433, write to Internal Revenue Service, Office of National Public Liaison, CL:NPL:7559, 1111 Constitution Avenue, NW., Washington, DC 20224, or e-mail **public_liaison@irs.gov.*

Dated: October 21, 2010.

Candice Cromling,

Director, National Public Liaison.

[FR Doc. 2010–27116 Filed 10–26–10; 8:45 am]

BILLING CODE 4830–01–P

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of a temporary, emergency amendment to sentencing guidelines and commentary.

SUMMARY: Pursuant to section 8 of the Fair Sentencing Act of 2010, Public Law 111–220, the Commission hereby gives notice of a temporary, emergency amendment to the sentencing guidelines and commentary. This notice sets forth the temporary, emergency amendment and the reason for amendment.

The specific amendment in this notice is as follows: An amendment regarding offenses involving crack cocaine (particularly offenses covered by §§ 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and 2D2.1 (Unlawful Possession; Attempt or Conspiracy)) and to account for certain aggravating and mitigating circumstances in drug trafficking cases (particularly cases under § 2D1.1) to implement section 8 of the Fair Sentencing Act of 2010, Public Law 111–220.

DATES: The Commission has specified an effective date of November 1, 2010, for the emergency amendment.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Affairs Officer, Telephone: (202) 502–4597.

SUPPLEMENTARY INFORMATION: The Commission must promulgate a temporary, emergency amendment to implement the directive in section 8 the Fair Sentencing Act of 2010, Public Law 111–220, by November 1, 2010. On September 8, 2010, the Commission published in the **Federal Register** a proposed amendment and issues for comment regarding the implementation of this directive. *See* 75 FR 54700 (September 8, 2010).

The temporary, emergency amendment set forth in this notice also may be accessed through the Commission's Web site at *http://www.ussc.gov.*

Authority: 28 U.S.C. 994(a), (o), (p), (x); section 8 of the Fair Sentencing Act of 2010, Pub. L. 111–220.

William K. Sessions III,

Chair.

Fair Sentencing Act of 2010

1. Amendment: Section 2D1.1(a)(5) is amended by adding at the end the following:

"If the resulting offense level is greater than level 32 and the defendant receives the 4-level ('minimal participant') reduction in § 3B1.2(a), decrease to level 32.".

Section 2D1.1(b) is amended by redesignating subdivisions (10) and (11) as subdivisions (13) and (16); by redesignating subdivisions (2) through (9) as subdivisions (3) through (10); by inserting after subdivision (1) the following:

"(2) If the defendant used violence, made a credible threat to use violence, or directed the use of violence, increase by 2 levels.";

By inserting after subdivision (10), as redesignated by this amendment, the following:

"(11) If the defendant bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of the offense, increase by 2 levels.

(12) If the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance, increase by 2 levels.";

By inserting after subdivision (13), as redesignated by this amendment, the following:

"(14) If the defendant receives an adjustment under § 3B1.1 (Aggravating Role) and the offense involved 1 or more of the following factors:

(A)(i) The defendant used fear, impulse, friendship, affection, or some combination thereof to involve another individual in the illegal purchase, sale, transport, or storage of controlled substances, (ii) the individual received little or no compensation from the illegal purchase, sale, transport, or storage of controlled substances, and (iii) the individual had minimal knowledge of the scope and structure of the enterprise;

(B) The defendant, knowing that an individual was (i) less than 18 years of age, (ii) 65 or more years of age, (iii) pregnant, or (iv) unusually vulnerable due to physical or mental condition or otherwise particularly susceptible to the criminal conduct, distributed a controlled substance to that individual or involved that individual in the offense;

(C) The defendant was directly involved in the importation of a controlled substance;

(D) The defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense;

(E) The defendant committed the offense as part of a pattern of criminal conduct engaged in as a livelihood,

Increase by 2 levels.

(15) If the defendant receives the 4-level ('minimal participant') reduction in § 3B1.2(a) and the offense involved all of the following factors:

(A) The defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense;

(B) The defendant received no monetary compensation from the illegal purchase, sale, transport, or storage of controlled substances; and

(C) The defendant had minimal knowledge of the scope and structure of the enterprise,

Decrease by 2 levels.".

Section 2D1.1(c) is amended in subdivision (1) in the third entry by striking "4.5" and inserting "8.4"; in subdivision (2) in the third entry by striking "1.5" and inserting "2.8"; by striking "4.5" and inserting "8.4"; in subdivision (3) in the third entry by striking "500" and inserting "840"; by striking "1.5" and inserting "2.8"; in subdivision (4) in the third entry by striking "150" and inserting "280"; by striking "500" and inserting "840"; in subdivision (5) in the third entry by striking "50" and inserting "196"; by striking "150" and inserting "280"; in subdivision (6) in the third entry by striking "35" and inserting "112"; by striking "50" and inserting "196"; in subdivision (7) in the third entry by striking "20" and inserting "28"; by striking "35" and inserting "112"; in subdivision (8) in the third entry by striking "5" and inserting "22.4"; by striking "20" and inserting "28"; in subdivision (9) in the third entry by striking "4" and inserting "16.8"; by striking "5" and inserting "22.4"; in subdivision (10) in the third entry by striking "3" and inserting "11.2"; by striking "4" and inserting "16.8"; in subdivision (11) in the third entry by striking "2" and inserting "5.6"; by striking "3" and inserting "11.2"; in subdivision (12) in the third entry by striking "1" and inserting "2.8"; by striking "2" and inserting "5.6"; in subdivision (13) in the third entry by striking "500 MG" and inserting "1.4 G"; by striking "1" and inserting "2.8"; and in subdivision (14) in the third entry by striking "500 MG" and inserting "1.4 G".

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 3 by inserting "Application of Subsections (b)(1) and (b)(2).—

(A) Application of Subsection (b)(1).—" before "Definitions";

By inserting "in subsection (b)(1)" after "weapon possession"; by striking "adjustment" and inserting "enhancement"; by striking "his" and inserting "the defendant's"; and by adding at the end the following:

"(B) Interaction of Subsections (b)(1) and (b)(2).—The enhancements in subsections (b)(1) and (b)(2) may be applied cumulatively (added together), as is generally the case when two or more specific offense characteristics each apply. *See* § 1B1.1 (Application Instructions), Application Note 4(A). However, in a case in which the defendant merely possessed a dangerous weapon but did not use violence, make a credible threat to use violence, or direct the use of violence, subsection (b)(2) would not apply.".

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 8 in the last paragraph by striking "(2)" and inserting "(3)".

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 10(B) in the first paragraph by striking "(Except Cocaine Base)" after "Differing Controlled Substances"; and by striking the sentence beginning "To determine".

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 10(C) by striking "(Except Cocaine Base)" after "Differing Controlled Substances"; and in subdivision (C)(iii) by striking "five kilograms of marihuana" and inserting "2 grams of cocaine base"; by inserting ", and the cocaine base is equivalent to 7.142 kilograms of marihuana" after "16 kilograms of marihuana"; and by striking "21" and inserting "23.142".

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 10 by striking subdivision (D); and by redesignating subdivision (E) as subdivision (D).

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 10(D), as redesignated by this amendment, in the table captioned "Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)*" in the line referenced to Cocaine Base by striking "20 kg" and inserting "3,571 gm".

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 18 by striking "(2)" and inserting "(3)", and by striking "(4)" and inserting "(5)";

In Note 19 by striking "(10)" and inserting "(13)" in both places;

In Note 20 by striking "(10)" and inserting "(13)" in both places;

In Note 21 by striking "(11)" and inserting "(16)" each place it appears;

In Note 23 by striking "(6)" and inserting "(7)" each place it appears;

In Note 25 by striking "(7)" and inserting "(8)" in both places;

And in Note 26 by striking "(8)" and inserting "(9)" in both places.

The Commentary to § 2D1.1 captioned "Application Notes" is amended by adding at the end the following:

"27. Application of Subsection (b)(11).—Subsection (b)(11) does not apply if the purpose of the bribery was to obstruct or impede the investigation, prosecution, or sentencing of the defendant. Such conduct is covered by § 3C1.1 (Obstructing or Impeding the Administration of Justice) and, if applicable, § 2D1.1(b)(14)(D).

28. Application of Subsection (b)(12).—Subsection (b)(12) applies to a defendant who knowingly maintains a premises (*i.e.,* a 'building, room, or enclosure,' *see* § 2D1.8, comment. (backg'd.)) for the purpose of manufacturing or distributing a controlled substance.

Among the factors the court should consider in determining whether the defendant 'maintained' the premises are (A) whether the defendant held a possessory interest in (*e.g.,* owned or rented) the premises and (B) the extent to which the defendant controlled access to, or activities at, the premises.

Manufacturing or distributing a controlled substance need not be the sole purpose for which the premises was maintained, but must be one of the defendant's primary or principal uses for the premises, rather than one of the defendant's incidental or collateral uses for the premises. In making this determination, the court should consider how frequently the premises was used by the defendant for manufacturing or distributing a controlled substance and how frequently the premises was used by the defendant for lawful purposes.

29. Application of Subsection (b)(14).—

(A) Distributing to a Specified Individual or Involving Such an Individual in the Offense (Subsection (b)(14)(B)).—If the defendant distributes a controlled substance to an individual or involves an individual in the offense, as specified in subsection (b)(14)(B), the individual is not a 'vulnerable victim' for purposes of § 3A1.1(b).

(B) Directly Involved in the Importation of a Controlled Substance (Subsection (b)(14)(C)).—Subsection (b)(14)(C) applies if the defendant is accountable for the importation of a controlled substance under subsection (a)(1)(A) of § 1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)), *i.e.,* the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the importation of a controlled substance.

If subsection (b)(3) or (b)(5) applies, do not apply subsection (b)(14)(C).

(C) Pattern of Criminal Conduct Engaged in as a Livelihood (Subsection (b)(14)(E)).—For purposes of subsection (b)(14)(E), 'pattern of criminal conduct' and 'engaged in as a livelihood' have the meaning given such terms in § 4B1.3 (Criminal Livelihood).".

The Commentary to § 2D1.1 captioned "Background" is amended by inserting after the paragraph that begins "For marihuana plants" the following:

"The last sentence of subsection (a)(5) implements the directive to the Commission in section 7(1) of Public Law 111–220.

Subsection (b)(2) implements the directive to the Commission in section 5 of Public Law 111–220.";

In the paragraph that begins "Specific Offense Characteristic" by striking "Specific Offense Characteristic (b)(2)" and inserting "Subsection (b)(3)";

By inserting after the paragraph that begins "The dosage weight" the following:

"Subsection (b)(11) implements the directive to the Commission in section 6(1) of Public Law 111–220.

Subsection (b)(12) implements the directive to the Commission in section 6(2) of Public Law 111–220.";

In the paragraph that begins "Subsection (b)(10)(A)" by striking "(10)" and inserting "(13)";

In the paragraph that begins "Subsections (b)(10)(C)(ii)" by striking "(10)" and inserting "(13)";

And by adding at the end the following:

"Subsection (b)(14) implements the directive to the Commission in section 6(3) of Public Law 111–220.

Subsection (b)(15) implements the directive to the Commission in section 7(2) of Public Law 111–220.".

Section 2D1.14(a)(1) is amended by striking "(11)" and inserting "(16)".

Section 2D2.1(b) is amended by striking "References" and inserting "Reference"; by striking subdivision (1); and by redesignating subdivision (2) as subdivision (1).

The Commentary to § 2D2.1 captioned "Background" is amended by striking "five" and inserting "three"; and by striking the last paragraph.

Section 2K2.4 captioned "Application Notes" is amended in Note 4 by inserting after the first paragraph the following:

"A sentence under this guideline also accounts for conduct that would subject the defendant to an enhancement under § 2D1.1(b)(2) (pertaining to use of violence, credible threat to use violence, or directing the use of violence). Do not apply that enhancement when determining the sentence for the underlying offense.".

The Commentary to § 3B1.4 captioned "Application Notes" is amended in Note 2 by adding at the end as the last sentence the following: "For example, if the defendant receives an enhancement under § 2D1.1(b)(14)(B) for involving an individual less than 18 years of age in the offense, do not apply this adjustment.".

The Commentary to § 3C1.1 captioned "Application Notes" is amended in Note 7 by adding at the end the following new paragraph:

"Similarly, if the defendant receives an enhancement under § 2D1.1(b)(14)(D), do not apply this adjustment.".

Reason for Amendment: This amendment implements the emergency directive in section 8 of the Fair Sentencing Act of 2010, Public Law 111–220 (the "Act"). The Act reduced the statutory penalties for cocaine base ("crack cocaine") offenses, eliminated the statutory mandatory minimum sentence for simple possession of crack cocaine, and contained directives requiring the Commission to review and amend the guidelines to account for specified aggravating and mitigating circumstances in certain drug cases. The emergency amendment authority provided in section 8 of the Act required the Commission to promulgate the guidelines, policy statements, or amendments provided for in the Act, and to make such conforming changes to the guidelines as the Commission determines necessary to achieve

consistency with other guideline provisions and applicable law, not later than 90 days after the date of enactment of the Act.

First, the amendment amends the Drug Quantity Table in § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to account for the changes in the statutory penalties made in section 2 of the Act. Section 2 of the Act reduced the statutory penalties for offenses involving manufacturing or trafficking in crack cocaine by increasing the quantity thresholds required to trigger a mandatory minimum term of imprisonment. The quantity threshold required to trigger the 5-year mandatory minimum term of imprisonment was increased from 5 grams to 28 grams, and the quantity threshold required to trigger the 10-year mandatory minimum term of imprisonment was increased from 50 grams to 280 grams. *See* 21 U.S.C. 841(b)(1)(A), (B), (C), 960(b)(1), (2), (3).

To account for these statutory changes, the amendment conforms the guideline penalty structure for crack cocaine offenses to the approach followed for other drugs, *i.e.,* the base offense levels for crack cocaine are set in the Drug Quantity Table so that the statutory minimum penalties correspond to levels 26 and 32. *See generally* § 2D1.1, comment. (backg'd.). Accordingly, using the new drug quantities established by the Act, offenses involving 28 grams or more of crack cocaine are assigned a base offense level of 26, offenses involving 280 grams or more of crack cocaine are assigned a base offense level of 32, and other offense levels are established by extrapolating upward and downward. Conforming to this approach ensures that the relationship between the statutory penalties for crack cocaine offenses and the statutory penalties for offenses involving other drugs is consistently and proportionally reflected throughout the Drug Quantity Table.

To provide a means of obtaining a single offense level in cases involving crack cocaine and one or more other controlled substances, the amendment also establishes a marihuana equivalency for crack cocaine under which 1 gram of crack cocaine is equivalent to 3,571 grams of marihuana. (The marihuana equivalency for any controlled substance is a constant that can be calculated using any threshold in the Drug Quantity Table by dividing the amount of marihuana corresponding to that threshold by the amount of the other controlled substance corresponding to that threshold. For example, the threshold quantities at base offense level 26 are 100,000 grams of marihuana and 28 grams of crack cocaine; 100,000 grams divided by 28 is 3,571 grams.) In the commentary to § 2D1.1, the amendment makes a conforming change to the rules for cases involving both crack cocaine and one or more other controlled substances.

The amendment deletes the special rules in Note 10(D) for cases involving crack cocaine and one or more other controlled substances, and revises Note 10(C) so that it provides an example of such a case.

Second, the amendment amends § 2D1.1 to add a sentence at the end of subsection (a)(5) (often referred to as the "mitigating role cap"). The new provision provides that if the offense level otherwise resulting from subsection (a)(5) is greater than level 32, and the defendant receives the 4-level ("minimal participant") reduction in subsection (a) of § 3B1.2 (Mitigating Role), the base offense level shall be decreased to level 32. This provision responds to section 7(1) of the Act, which directed the Commission to ensure that "if the defendant is subject to a minimal role adjustment under the guidelines, the base offense level for the defendant based solely on drug quantity shall not exceed level 32."

Third, the amendment amends § 2D1.1 to create a new specific offense characteristic at subsection (b)(2) providing an enhancement of 2 levels if the defendant used violence, made a credible threat to use violence, or directed the use of violence. The new specific offense characteristic responds to section 5 of the Act, which directed the Commission to "ensure that the guidelines provide an additional penalty increase of at least 2 offense levels if the defendant used violence, made a credible threat to use violence, or directed the use of violence during a drug trafficking offense."

The amendment also revises the commentary to § 2D1.1 to clarify how this new specific offense characteristic interacts with subsection (b)(1). Specifically, Application Note 3 is amended to provide that the enhancements in subsections (b)(1) (regarding possession of a dangerous weapon) and (b)(2) may be applied cumulatively. However, in a case in which the defendant merely possessed a dangerous weapon but did not use violence, make a credible threat to use violence, or direct the use of violence, subsection (b)(2) would not apply.

In addition, the amendment makes a conforming change to the commentary to § 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) to address cases in which the defendant is sentenced under both § 2D1.1 (for a drug trafficking offense) and § 2K2.4 (for an offense under 18 U.S.C. 924(c)). In such a case, the sentence under § 2K2.4 accounts for any weapon enhancement; therefore, in determining the sentence under § 2D1.1, the weapon enhancement in § 2D1.1(b)(1) does not apply. *See* § 2K2.4, comment. (n. 4). The amendment amends this commentary to similarly provide that, in a case in which the defendant is sentenced under both §§ 2D1.1 and 2K2.4, the new enhancement at § 2D1.1(b)(2) also is accounted for by § 2K2.4 and, therefore, does not apply.

Fourth, the amendment amends § 2D1.1 to create a new specific offense characteristic at subsection (b)(11) providing an enhancement of 2 levels if the defendant bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of the offense. The new specific offense characteristic responds to section 6(1) of the Act, which directed the Commission "to ensure an additional increase of at least 2 offense levels if * * * the defendant bribed, or attempted to bribe, a Federal, State, or local law enforcement official in connection with a drug trafficking offense."

The amendment also revises the commentary to § 2D1.1 to clarify how this new specific offense characteristic interacts with the adjustment at § 3C1.1 (Obstructing or Impeding the Administration of Justice). Specifically, new Application Note 27 provides that subsection (b)(11) does not apply if the purpose of the bribery was to obstruct or impede the investigation, prosecution, or sentencing of the defendant because such conduct is covered by § 3C1.1.

Fifth, the amendment amends § 2D1.1 to create a new specific offense characteristic at subsection (b)(12) providing an enhancement of 2 levels if the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance. The new specific offense characteristic responds to section 6(2) of the Act, which directed the Commission to "ensure an additional increase of at least 2 offense levels if * * * the defendant maintained an establishment for the manufacture or distribution of a controlled substance, as generally described in section 416 of the Controlled Substances Act (21 U.S.C. 856)."

The amendment also adds commentary in § 2D1.1 at Application

Note 28 providing that among the factors the court should consider in determining whether the defendant "maintained" the premises are (A) whether the defendant held a possessory interest (*e.g.,* owned or rented) the premises and (B) the extent to which the defendant controlled access to, or activities at, the premises. Application Note 28 also provides that manufacturing or distributing a controlled substance need not be the sole purpose for which the premises was maintained, but must be one of the defendant's primary or principal uses for the premises, rather than one of the defendant's incidental or collateral uses of the premises. In making this determination, the court should consider how frequently the premises was used by the defendant for manufacturing or distributing a controlled substance and how frequently the premises was used by the defendant for lawful purposes.

Sixth, the amendment amends § 2D1.1 to create a new specific offense characteristic at subsection (b)(14) that provides an enhancement of 2 levels if the defendant receives an adjustment under § 3B1.1 (Aggravating Role) and the offense involved one or more of five specified factors. The new specific offense characteristic responds to section 6(3) of the Act, which directed the Commission "to ensure an additional increase of at least 2 offense levels if * * * (A) the defendant is an organizer, leader, manager, or supervisor of drug trafficking activity subject to an aggravating role enhancement under the guidelines; and (B) the offense involved 1 or more of the following super-aggravating factors:

(i) The defendant—

(I) Used another person to purchase, sell, transport, or store controlled substances;

(II) Used impulse, fear, friendship, affection, or some combination thereof to involve such person in the offense; and

(III) Such person had a minimum knowledge of the illegal enterprise and was to receive little or no compensation from the illegal transaction.

(ii) The defendant—

(I) Knowingly distributed a controlled substance to a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual;

(II) Knowingly involved a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual in drug trafficking;

(III) Knowingly distributed a controlled substance to an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct; or

(IV) Knowingly involved an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct, in the offense.

(iii) The defendant was involved in the importation into the United States of a controlled substance.

(iv) The defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense.

(v) The defendant committed the drug trafficking offense as part of a pattern of criminal conduct engaged in as a livelihood."

The amendment also revises the commentary to § 2D1.1 to provide guidance in applying the new specific offense characteristic at § 2D1.1(b)(14). Specifically, new Application Note 29 provides that if the defendant distributes a controlled substance to an individual or involves an individual in the offense, as specified in subsection (b)(14)(B), the individual is not a "vulnerable victim" for purposes of subsection (b) of § 3A1.1 (Hate Crime Motivation or Vulnerable Victim). Application Note 29 also provides that subsection (b)(14)(C) applies if the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the importation of a controlled substance. Subsection (b)(14)(C), however, does not apply if subsection (b)(3) or (b)(5) (as redesignated by the amendment) applies because the defendant's involvement in importation is adequately accounted for by those subsections. In addition, Application Note 29 defines "pattern of criminal conduct" and "engaged in as a livelihood" for purposes of subsection (b)(14)(E) as those terms are defined in § 4B1.3 (Criminal Livelihood).

The amendment also revises the commentary in § 3B1.4 (Using a Minor To Commit a Crime) and § 3C1.1 (Obstructing or Impeding the Administration of Justice) to specify how those adjustments interact with § 2D1.1(b)(14)(B) and (D), respectively. Specifically, Application Note 2 to § 3B1.4 is amended to clarify that the increase of two levels under this section would not apply if the defendant receives an enhancement under § 2D1.1(b)(14)(B). Similarly, Application Note 7 to § 3C1.1 is amended to clarify that the increase of two levels under this section would not apply if the defendant receives an enhancement under § 2D1.1(b)(14)(D).

Seventh, the amendment amends § 2D1.1 to create a new specific offense characteristic providing a 2-level downward adjustment if the defendant receives the 4-level ("minimal participant") reduction in subsection (a) of § 3B1.2 (Mitigating Role) and the offense involved each of three additional specified factors: Namely, the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense when the defendant was otherwise unlikely to commit such an offense; was to receive no monetary compensation from the illegal purchase, sale, transport, or storage of controlled substances; and had minimal knowledge of the scope and structure of the enterprise. The specific offense characteristic responds to section 7(2) of the Act, which directed the Commission to ensure that "there is an additional reduction of 2 offense levels if the defendant—

(A) Otherwise qualifies for a minimal role adjustment under the guidelines and had a minimum knowledge of the illegal enterprise;

(B) Was to receive no monetary compensation from the illegal transaction; and

(C) Was motivated by an intimate or familial relationship or by threats or fear when the defendant was otherwise unlikely to commit such an offense."

Eighth, to reflect the renumbering of specific offense characteristics in § 2D1.1(b) by the amendment, technical and conforming changes are made to the commentary to § 2D1.1 and to § 2D1.14 (Narco-Terrorism).

Ninth, the amendment amends § 2D2.1 (Unlawful Possession; Attempt or Conspiracy) to account for the changes in the statutory penalties for simple possession of crack cocaine made in section 3 of the Act. Section 3 of the Act amended 21 U.S.C. 844(a) to eliminate the 5-year mandatory minimum term of imprisonment (and 20-year statutory maximum) for simple possession of more than 5 grams of crack cocaine (or, for certain repeat offenders, more than 1 gram of crack cocaine). Accordingly, the statutory penalty for simple possession of crack cocaine is now the same as for simple possession of most other controlled substances: For a first offender, a maximum term of imprisonment of one year; for repeat offenders, maximum terms of 2 years or 3 years, and minimum terms of 15 days or 90 days, depending on the prior convictions. *See* 21 U.S.C. 844(a). To account for this statutory change, the amendment deletes the cross reference at § 2D2.1(b)(1) under which an offender who possessed more than 5 grams of

crack cocaine was sentenced under the drug trafficking guideline, § 2D1.1.

[FR Doc. 2010–27147 Filed 10–26–10; 8:45 am]

BILLING CODE 2210–40–P

DEPARTMENT OF VETERANS AFFAIRS

Post-9/11 GI Bill 2010–2011 Tuition and Fee In-State Maximums

AGENCY: Department of Veterans Affairs (VA).

ACTION: Notice.

SUMMARY: The purpose of this notice is to advise the public of the Post-9/11 GI Bill tuition and fee in-State maximum rates for the 2010–2011 academic year. The Post-9/11 GI Bill pays tuition and fees charged to eligible individuals up to the highest in-State undergraduate tuition and fees charged by a public institution of higher learning (IHL) in the State where the school is located. The amount of tuition and fees payable will vary based on the location of the IHL and the individual's eligibility percentage (40%–100%). VA will use the maximum amounts listed below to determine the amounts payable for training pursued under the Post-9/11 GI Bill after July 31, 2010, and before August 1, 2011.

FOR FURTHER INFORMATION CONTACT: Lakisha Rogers, Management and Program Analyst (225C), Education Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–9854.

HIGHEST IN-STATE MAXIMUM TUITION AND FEE RATES

[By State]

State	Maximum tuition per credit	Maximum fees per term
Alabama	329.17	20,787.00
Alaska	170.00	19,455.00
Arizona	725.00	15,000.00
Arkansas	210.15	1,774.78
California	391.75	2,264.75
Colorado	529.50	45,774.25
Connecticut	543.00	2,660.50
Delaware	425.33	584.00
District of Columbia	265.83	310.00
Florida	295.00	43,660.00
Guam	190.00	249.00
Georgia	505.00	15,440.00
Hawaii	316.00	1,325.70
Idaho	273.00	2,428.24
Illinois	629.75	16,367.00
Indiana	338.50	13,063.00
Iowa	343.66	17,222.00
Kansas	420.05	50,752.96
Kentucky	456.30	11,235.00
Louisiana	473.00	2,884.70
Maine	345.00	5,500.00
Maryland	471.86	16,308.00
Massachusetts	340.00	20,793.50
Michigan	1,001.00	19,374.50
Minnesota	450.00	37,808.00
Mississippi	584.75	805.00
Missouri	373.00	11,898.00
Montana	205.40	13,646.00
Nebraska	251.00	1,589.55
Nevada	156.75	4,072.46
New Hampshire	1,003.75	5,197.00
New Jersey	468.66	7,962.00
New Mexico	229.40	6,104.00
New York	1,010.00	12,293.00
North Carolina	606.63	2,293.40
North Dakota	464.46	25,686.00
Ohio	508.25	15,134.00
Oklahoma	188.60	15,058.05
Oregon	407.00	25,669.00
Pennsylvania	934.00	6,110.00
Puerto Rico	90.00	525.00
Rhode Island	376.00	5,187.00
South Carolina	829.00	2,798.00
South Dakota	99.80	25,685.00
Tennessee	270.00	13,426.00
Texas	1,549.00	12,130.00
Utah	238.70	85,255.00
Vermont	512.00	5,106.00
Virgin Island	125.00	706.00
Virginia	353.50	3,969.50
Washington	430.00	9,648.00
West Virginia	268.67	4,276.67
Wisconsin	673.00	30,963.00
Wyoming	99.00	4,335.00
Foreign	439.69	13,713.88

Approved: October 18, 2010.

John R. Gingrich,

Chief of Staff, Department of Veterans Affairs.

[FR Doc. 2010–27095 Filed 10–26–10; 8:45 am]

BILLING CODE 8320–01–P

Federal Register

Wednesday,
October 27, 2010

Part II

Department of Justice

Drug Enforcement Administration

21 CFR Part 1308

Schedules of Controlled Substances: Placement of Propofol Into Schedule IV; Proposed Rule

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1308

[Docket No. DEA–338]

Schedules of Controlled Substances: Placement of Propofol Into Schedule IV

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposed rule is issued by the Deputy Administrator of the Drug Enforcement Administration (DEA) to place the substance propofol, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible, into schedule IV of the Controlled Substances Act (CSA). This proposed action is based on a recommendation from the Assistant Secretary for Health of the Department of Health and Human Services (DHHS) and on an evaluation of the relevant data by DEA. If finalized, this action would impose the regulatory controls and criminal sanctions of schedule IV on those who handle propofol and products containing propofol.

DATES: Written comments must be postmarked on or before December 27, 2010, and electronic comments must be sent on or before midnight Eastern time December 27, 2010.

ADDRESSES: To ensure proper handling of comments, please reference "Docket No. DEA–327" on all written and electronic correspondence. Written comments sent via regular or express mail should be sent to the Drug Enforcement Administration, Attention: DEA Federal Register Representative/ODL, 8701 Morrissette Drive, Springfield, Virginia 22152. Comments may be sent to DEA by sending an electronic message to *dea.diversion.policy@usdoj.gov.* Comments may also be sent electronically through *http://www.regulations.gov* using the electronic comment form provided on that site. An electronic copy of this document is also available at the *http://www.regulations.gov* Web site. DEA will accept electronic comments containing Microsoft Word, WordPerfect, Adobe PDF, or Excel file formats only. DEA will not accept any file format other than those specifically listed here.

Please note that DEA is requesting that electronic comments be submitted before midnight Eastern Time on the day the comment period closes because *http://www.regulations.gov* terminates the public's ability to submit comments at midnight Eastern Time on the day the comment period closes. Commenters in time zones other than Eastern Time may want to consider this so that their electronic comments are received. All comments sent via regular or express mail will be considered timely if postmarked on the day the comment period closes.

FOR FURTHER INFORMATION CONTACT: Christine A. Sannerud, PhD, Chief, Drug and Chemical Evaluation Section, Office of Diversion Control, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, Virginia 22152, Telephone: (202) 307–7183.

SUPPLEMENTARY INFORMATION:

Posting of Public Comments: Please note that all comments received are considered part of the public record and made available for public inspection online at *http://www.regulations.gov* and in the Drug Enforcement Administration's public docket. Such information includes personal identifying information (such as your name, address, *etc.*) voluntarily submitted by the commenter.

If you want to submit personal identifying information (such as your name, address, *etc.*) as part of your comment, but do not want it to be posted online or made available in the public docket, you must include the phrase "PERSONAL IDENTIFYING INFORMATION" in the first paragraph of your comment. You must also place all the personal identifying information you do not want posted online or made available in the public docket in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it to be posted online or made available in the public docket, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted online or made available in the public docket.

Personal identifying information and confidential business information identified and located as set forth above will be redacted and the comment, in redacted form, will be posted online and placed in the Drug Enforcement Administration's public docket file. Please note that the Freedom of Information Act applies to all comments received. If you wish to inspect the agency's public docket file in person by appointment, please see the **FOR FURTHER INFORMATION CONTACT** paragraph.

Background

On March 18, 2008, the Drug Enforcement Administration (DEA) received a petition requesting that 21 CFR 1308.13 be amended so that propofol be controlled as a schedule III substance under the CSA. The basis of the petition was the reports of increased incidences of propofol abuse during the past decade. The petitioner stated as the main argument in support of the request that:

"*Propofol is the most common intravenous anesthetic in the United States today but over the course of the decade, documented cases of abuse have been steadily increasing over the past 10 years * * * Unfortunately, there is also a very high mortality rate (greater than 33%) associated with this abuse.*"

The petitioner stated that controlling propofol as a scheduled drug would require all practitioners to strictly monitor the access and use of propofol and possibly save lives.

Propofol was approved in 1989 and is an ultra-short acting intravenous (i.v.) anesthetic under the commercial name, Diprivan®. Propofol is also marketed as a generic drug under three trade names. Two veterinary versions, Rapinovet and PropoFlo/PropoVet were approved for marketing in 1999 and 2000, respectively. Propofol is indicated in adults for the initiation and maintenance of Monitored Anesthesia Care (MAC) sedation, combined sedation, and regional anesthesia. It is also indicated for Intensive Care Unit (ICU) sedation of intubated and mechanically ventilated patients. For children, propofol is indicated for induction and maintenance of general anesthesia. Diprivan® is an injectable emulsion (10 mg/mL).

Propofol, or 2,6-diisopropylphenol, is slightly soluble in water and is formulated in an oil-in-water emulsion that is milky-white in appearance. Fospropofol, the water-soluble O-methyl-phosphate disodium salt prodrug of propofol, has been recently controlled as a schedule IV substance under the CSA.

Propofol binds to the gamma-aminobutyric acid ($GABA_A$) receptors and acts as a modulator by potentiating the activity of GABA at these receptors. Other psychoactive drugs that are controlled under the CSA, *e.g.,* barbiturates (schedule II and III) and benzodiazepines (schedule IV), potentiate the activity of GABA at the $GABA_A$ receptors.

Animal self-administration studies demonstrate the reinforcing effects of propofol in rat, mouse, and primate models. It has been demonstrated that drugs that are self-administered by animals also have drug abuse potential in humans. Propofol has been demonstrated to have reinforcing effects comparable to methohexital, a schedule IV sedative-hypnotic. A study found that both drug-naïve and methohexital-trained (a schedule IV barbiturate) rats self-administer propofol under a fixed ratio schedule. In baboons, low-to-high levels of self-administration were maintained by subanesthetic doses of propofol after substituting for cocaine. There have been published abuse liability studies of propofol in humans in which the reinforcement and reward effects have been demonstrated. These studies showed that propofol produces subjective effects most comparable to schedule IV sedatives. Generally, the studies demonstrated that propofol dose-dependently increased the reporting by the subject feeling "high," relative to the placebo.

The motivation for abuse of propofol is generally for its sedative and relaxing properties and induction of euphoric effects. There have also been reports that propofol's ability to induce sexual illusions and disinhibition contributes to its appeal as a drug of abuse. Anecdotal reports of propofol abusers described their experiences as "pleasant," "euphoric," and "relaxing".

The current abuse profiles of propofol indicate that it is abused by medical professionals since they have access to the drug in medical facilities which perform anesthesia (Adverse Event Reporting System (AERS) DataMart database). In the AERS database, there are reports of propofol diversion and abuse, some of which resulted in death. In 96 percent of these cases, the abusers were health care providers or were in training programs to become health care professionals. Propofol is not currently controlled by either the Federal Government or State governments, and may not be a target or priority of law enforcement; therefore, information on reported seizures and cases from Federal, State and local law enforcement agencies is very limited.

Schedule IV sedative-hypnotics, such as methohexital and midazolam, are known to produce euphoric moods and have histories of abuse in the United States and other countries. There have been published case reports of individuals who became dependent on propofol. These reports indicated that the individuals expressed a "craving" for propofol, causing them to compulsively self-inject daily. They were abusing propofol for its relaxing and euphoric effects. In a survey of academic anesthesiology programs, 18 percent reported diversion or abuse of propofol. Twenty-eight percent of the reported abusers of propofol had died due to propofol overdose. The individuals who died were affiliated with health care facilities in which there were no pharmacy or security mechanisms to control access to propofol. In a published survey of certified registered nurse anesthetists, propofol was reported to be the fourth most preferred drug to misuse among this population. Propofol abuse is associated with significant adverse health effects, including death. The known major side effects include pancreatitis, pulmonary edema, cardiovascular depression, and respiratory depression. The cause of death with propofol toxicity is due to severe respiratory depression.

Withdrawal symptoms observed upon ceasing long-term administration of a substance are indicative of a substance's ability to produce physical dependence. There have been published reports of withdrawal symptoms upon an abrupt cessation of administration of propofol after a prolonged treatment. The symptoms include agitation, tremors, tachycardia, tachypnea, hyperpyrexia, confusion, and hallucinations. These symptoms are similar to the symptoms observed upon withdrawal from benzodiazepines. Withdrawal symptoms improve once administration of propofol is reinitiated. A delusional state lasting up to seven days may occur before full mental functioning returns. It should be noted that after a prolonged administration of propofol, the cessation of administration should be done cautiously and the patient should be monitored for any signs of a withdrawal syndrome.

Propofol has been on the market since 1989, but, due to propofol being unavailable to the general public, the seizures of propofol on the Federal, State and local levels are very low. Medical professionals are the predominant population who are abusers of propofol. Subsequent to DEA gathering and evaluating the available data on propofol, on July 2, 2009, DEA requested that DHHS provide a scientific and medical evaluation of the available information and a scheduling recommendation for propofol, in accordance with 21 U.S.C. 811(b). On May 14, 2010, the Assistant Secretary for Health, DHHS, sent the Deputy Administrator of DEA a scientific and medical evaluation and a letter recommending that propofol be placed into schedule IV of the CSA. Enclosed with the April 30, 2010, letter was a document prepared by the Food and Drug Administration (FDA) entitled, "Basis for the Recommendation for Control of Propofol and Its Salts in Schedule IV of the Controlled Substances Act (CSA)." The document contained a review of the factors which the CSA requires the Secretary to consider (21 U.S.C. 811(b)).

The references to the studies used in the evaluations for DHHS' scheduling recommendation and DEA's independent analysis can be found in both documents. These documents are available on the electronic docket associated with this rule making.

The factors considered by the Assistant Secretary of Health and DEA with respect to propofol were:

(1) Its actual or relative potential for abuse;

(2) Scientific evidence of its pharmacological effects;

(3) The state of current scientific knowledge regarding the drug;

(4) Its history and current pattern of abuse;

(5) The scope, duration, and significance of abuse;

(6) What, if any, risk there is to the public health;

(7) Its psychic or physiological dependence liability; and

(8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter. (21 U.S.C. 811(c))

Based on the recommendation of the Assistant Secretary for Health, received in accordance with section 201(b) of the Act (21 U.S.C. 811(b)), and the independent review of the available data by DEA, the Deputy Administrator of DEA, pursuant to sections 201(a) and 201(b) of the Act (21 U.S.C. 811(a) and 811(b)), finds that:

(1) Propofol has a low potential for abuse relative to the drugs or substances in schedule III. The abuse potential of propofol is comparable to the schedule IV substances, methohexital and midazolam;

(2) Propofol has a currently accepted medical use in treatment in the United States; propofol under the trade name Diprivan® was approved for marketing as a product indicated for monitored anesthesia care by FDA in 1989; and

(3) Abuse of propofol may lead to limited psychological dependence or physical dependence relative to the drugs or other substances in schedule III.

Based on these findings, the Deputy Administrator of DEA concludes that propofol, including its salts, isomers, and salts of isomers, whenever the existence of such salts, isomers, and salts of isomers is possible, warrants

control in schedule IV of the CSA (21 U.S.C. 812(b)(4)).

Comments and Requests for Hearing

In accordance with the provisions of the CSA (21 U.S.C. 811(a)), this action is a formal rulemaking "on the record after opportunity for a hearing." Such proceedings are conducted pursuant to the provisions of the Administrative Procedure Act (5 U.S.C. 556 and 557). All persons are invited to submit their comments or objections with regard to this proposal. Requests for a hearing may be submitted by interested persons and must conform to the requirements of 21 CFR 1308.44 and 1316.47. The request should state, with particularity, the issues concerning which the person desires to be heard and the requestor's interest in the proceeding. Only interested persons, defined in the regulations as those "adversely affected or aggrieved by any rule or proposed rule issuable pursuant to section 201 of the Act (21 U.S.C. 811)," may request a hearing (21 CFR 1308.42). Please note that DEA may grant a hearing only "for the purpose of receiving factual evidence and expert opinion regarding the issues involved in the issuance, amendment, or repeal of a rule issuable" pursuant to 21 U.S.C. 811(a). All correspondence regarding this matter including comments, objections, and requests for hearing should be submitted to DEA using the address information provided above.

Requirements for Handling Propofol

If this rule is finalized as proposed, propofol would be subject to CSA regulatory controls and administrative, civil, and criminal sanctions applicable to the manufacture, distribution, dispensing, importing, and exporting of a schedule IV controlled substance, including the following:

Registration. Any person who manufactures, distributes, dispenses, imports, exports, engages in research, or conducts instructional activities with propofol, or who desires to manufacture, distribute, dispense, import, export, engage in instructional activities, or conduct research with propofol, would need to be registered to conduct such activities in accordance with 21 CFR part 1301.

Security. Propofol would be subject to schedules III–V security requirements and would need to be manufactured, distributed, and stored in accordance with 21 CFR 1301.71, 1301.72(b), (c), and (d), 1301.73, 1301.74, 1301.75(b) and (c), 1301.76, and 1301.77.

Labeling and Packaging. All labels and labeling for commercial containers of propofol which are distributed on or after finalization of this rule would need to comply with requirements of 21 CFR 1302.03–1302.07.

Inventory. Every registrant required to keep records and who possesses any quantity of propofol would be required to keep an inventory of all stocks of propofol on hand pursuant to 21 CFR 1304.03, 1304.04 and 1304.11. Every registrant who desires registration in schedule IV for propofol would be required to conduct an inventory of all stocks of the substance on hand at the time of registration.

Records. All registrants would be required to keep records pursuant to 21 CFR 1304.03, 1304.04, 1304.21, 1304.22, and 1304.23.

Prescriptions. All prescriptions for propofol or prescriptions for products containing propofol would be required to be issued pursuant to 21 CFR 1306.03–1306.06 and 1306.21, 1306.22–1306.27.

Importation and Exportation. All importation and exportation of propofol would need to be in compliance with 21 CFR part 1312.

Criminal Liability. Any activity with propofol not authorized by, or in violation of, the CSA or the Controlled Substances Import and Export Act occurring on or after finalization of this proposed rule would be unlawful.

Regulatory Certifications

Executive Order 12866

In accordance with the provisions of the CSA (21 U.S.C. 811(a)), this action is a formal rulemaking "on the record after opportunity for a hearing." Such proceedings are conducted pursuant to the provisions of 5 U.S.C. 556 and 557 and, as such, are exempt from review by the Office of Management and Budget pursuant to Executive Order 12866, section 3(d)(1).

Regulatory Flexibility Act

The Deputy Administrator, in accordance with the Regulatory Flexibility Act (5 U.S.C. 601–612), has reviewed this proposed rule and by approving it certifies that it will not have a significant economic impact on a substantial number of small entities. Propofol products are used for the initiation and maintenance of MAC sedation, combined sedation, and regional anesthesia for adult and pediatric patients undergoing diagnostic or therapeutic procedures. Handlers of propofol will also handle other controlled substances used for sedation which are already subject to the regulatory requirements of the CSA.

Executive Order 12988

This regulation meets the applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988 Civil Justice Reform.

Executive Order 13132

This rulemaking does not preempt or modify any provision of State law; nor does it impose enforcement responsibilities on any State; nor does it diminish the power of any State to enforce its own laws. Accordingly, this rulemaking does not have federalism implications warranting the application of Executive Order 13132.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and Tribal governments, in the aggregate, or by the private sector, of $120,000,000 or more (adjusted for inflation) in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under provisions of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Congressional Review Act). This rule will not result in an annual effect on the economy of $100,000,000 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 companies to compete with foreign based companies in domestic and export markets.

List of Subjects in 21 CFR Part 1308

Administrative practice and procedure, Drug traffic control, Narcotics, Prescription drugs.

Under the authority vested in the Attorney General by section 201(a) of the CSA (21 U.S.C. 811(a)), and delegated to the Administrator of DEA by Department of Justice regulations (28 CFR 0.100), and redelegated to the Deputy Administrator pursuant to 28 CFR 0.104, the Deputy Administrator hereby proposes that 21 CFR part 1308 be amended as follows:

PART 1308—SCHEDULES OF CONTROLLED SUBSTANCES

1. The authority citation for 21 CFR part 1308 continues to read as follows:

Authority: 21 U.S.C. 811, 812, 871(b) unless otherwise noted.

2. Section 1308.14 is amended by redesignating paragraphs (c)(46) through

(c)(52) as paragraphs (c)(47) through (c)(53) and adding a new paragraph (c)(46) as follows:

§ 1308.14 Schedule IV.

* * * * *

(c) * * *

(46) Propofol	2139

* * * * *

Dated: October 19, 2010.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. 2010–27193 Filed 10–26–10; 8:45 am]

BILLING CODE 4410–09–P

Federal Register

Wednesday,
October 27, 2010

Part III

Department of Agriculture

Commodity Credit Corporation

7 CFR Part 1450

Biomass Crop Assistance Program; Final Rule

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1450

RIN 0560–AH92

Biomass Crop Assistance Program

AGENCY: Commodity Credit Corporation and Farm Service Agency, USDA.

ACTION: Final rule.

SUMMARY: This rule implements the new Biomass Crop Assistance Program (BCAP) authorized by the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill). BCAP is intended to assist agricultural and forest land owners and operators with the establishment and production of eligible crops in selected project areas for conversion to bioenergy, and the collection, harvest, storage, and transportation of eligible material for use in a biomass conversion facility. This rule specifies the requirements for eligible producers and participants, biomass conversion facilities, and eligible renewable biomass crops and materials.

DATES: *Effective Date:* October 27, 2010.

FOR FURTHER INFORMATION CONTACT: Martin Lowenfish, U.S. Department of Agriculture (USDA), Farm Service Agency (FSA), Conservation and Environmental Programs Division, Mail Stop 0513, 1400 Independence Ave., SW., Washington, DC 20250–0513; telephone 202–205–9804; Persons with disabilities who require alternative means for communication (Braille, large print, audiotape, etc.) should contact the USDA Target Center at 202–720–2600 (voice and TDD).

SUPPLEMENTARY INFORMATION:

Background

In 2005, Congress enacted the Renewable Fuel Standard that requires 7.5 billion gallons of corn starch ethanol in the national fuel supply by 2012. In 2008, Congress revised these goals by requiring 36 billion gallons of advanced biofuels in our national fuel pool by the year 2022. At present, stakeholders have far exceeded the earlier Congressional goals, producing approximately 10 billion gallons of corn starch ethanol at present, but the affordable production of next-generation advanced biofuels has not yet kept pace with the revised targets. These next-generation fuels require next-generation crops, and these unconventional crops typically require several years to become established. This is the principal goal of BCAP.

BCAP is a primary component of the domestic agriculture, energy, and environmental strategy to reduce U.S. reliance on foreign oil, improve domestic energy security, reduce carbon pollution, and spur rural economic development and job creation. While there are many complexities in the development of a national strategy for biofuels—the pursuit of more economical conversion technologies, transportation infrastructure upgrades, expanded and affordable consumer access, financial risk mitigation tools—the success of all of these efforts ultimately must rest upon a foundation of a strong biomass feedstock source.

The creation of that source, however, faces the classic chicken-and-egg challenge. An established, large-scale energy crop source must exist if commercial-scale biomass facilities are to have sufficient feedstock supplies. Conversely, a strong consumer base to purchase the crop must exist if profitable feedstock production is to occur. Also just as many such crop types need several years to become established, many promising biomass conversion technologies require similar time before proceeding to commercial scale. BCAP is designed to serve as catalyst to unite these multiple dynamics. By providing risk mitigation and production incentives, BCAP will encourage landowners to consider switching from familiar, revenue-generating crops to new, unconventional, non-food, non-feed crops that must be ready for a nascent marketplace.

Because BCAP is a voluntary program, its enrollment requirements cannot have such hurdles beyond standard practice so that interested participants would not instead choose to remain in conventional crop production. While BCAP is fundamentally a crop cultivation program, other considerations such as wildlife and conservation protection are nevertheless important parts of BCAP.

As BCAP is implemented, the public debate will continue on what may be the best approach for meeting our national energy strategy. There are no perfect solutions in the pursuit of these goals, no single feedstock that offers the affordability, reliability, regionality, and sensitivity to the environment, and transportability, in equal ways. It is not the feedstock, nor the technology, but the ability of both to meet the standards of our national strategy that is paramount. And as we pursue the best course of action for energy independence and environmental improvement, actions must begin today to forge a new path forward, accompanied by concurrent preparations for second and third generation choices built upon the experiences of the first-generation achievements in the cultivation of biomass crops.

Section 9001 of the 2008 Farm Bill (Pub. L. 110–246) authorizes BCAP to assist agricultural and forest land owners and operators with the collection, harvest, storage, and transportation of eligible material for use in a biomass conversion facility and to support the establishment and production of eligible crops for conversion to bioenergy in selected project areas. The 2008 Farm Bill authorizes such sums as are necessary to carry out BCAP. However, the 2010 Supplemental Appropriations Act (Pub. L. 111–212) limited BCAP funding to $552 million in fiscal year 2010 and $432 million in fiscal year 2011. This final rule, which implements BCAP, reflects comments received on previous notices and on a proposed rule, as described below. FSA will administer this program on behalf of the Commodity Credit Corporation (CCC).

On May 5, 2009, President Barack Obama issued a Presidential directive establishing a Biofuels Interagency Working Group, chaired by the Secretaries of Agriculture and Energy and the Administrator of the Environmental Protection Agency. Among other goals, the Presidential directive laid the groundwork for a policy development process that would aggressively accelerate the development of advanced biofuels (published in the **Federal Register** on May 7, 2009 (74 FR 21531–21532)). One aspect of the larger effort outlined in the directive was the issuance of guidance and support related to the collection, harvest, storage, and transportation of eligible materials for use in biomass conversion facilities—a component of BCAP.

On June 11, 2009 (74 FR 27767–27772), CCC published a BCAP notice of funds availability (NOFA) in the **Federal Register** for the collection, harvest, storage, and transportation of eligible materials. On February 8, 2010, (75 FR 6264–6288), CCC published the BCAP proposed rule. The proposed rule terminated the BCAP NOFA.

FSA also held a series of public meetings, as described in the notice published on May 13, 2009 (74 FR 22510–22511) and solicited comments, to collect public input needed to prepare an environmental impact statement (EIS) for BCAP. Specifically, CCC published four specific National Environmental Policy Act (NEPA)-related notices on BCAP in the **Federal Register**. A notice of intent (NOI) to prepare a programmatic EIS (PEIS) was published on October 1, 2008 (73 FR

57047–57048) to solicit public input on program implementation alternatives to be analyzed in the document; approximately 100 comments were received. CCC published an amended NOI on May 13, 2009 that identified the alternatives to be analyzed in the PEIS based on the input received on the previous NOI and announced six public scoping meetings around the country that began on May 29, 2009, and ended on June 11, 2009. CCC published a notice of availability of the draft PEIS on August 10, 2009 (74 FR 39915) or a 30-day public comment period; over 600 comments were received from environmental groups, Federal agencies, organizations, and the general public. The Environmental Protection Agency announced the availability of the final EIS on June 25, 2010 (75 FR 36386–36387) for public comment.

Comments from the public meetings and BCAP environmental notices were reflected in the BCAP proposed rule and in this final rule.

The BCAP proposed rule and this final rule cover the whole BCAP, including both the provisions that provide matching payments for collection, harvest, storage, and transportation of materials and the provisions that provide payment for the establishment and production of biomass crops in selected project areas.

The core structure and purposes of BCAP in this final rule are largely unchanged from those stated in the proposed rule. In response to comments received on the proposed rule, this final rule makes minor amendments to BCAP, as it was described in the proposed rule. This rule clarifies definitions and eligibility requirements and adds new provisions to enhance program integrity. Specific changes include:

- Biomass conversion facilities will be required to certify that eligible materials that are not crop residues are byproducts of preventative treatments that are removed to reduce hazardous fuels, to reduce or contain disease or insect infestation, or to restore ecosystem health.
- Related party transactions may be eligible for matching payments.
- Biomass conversion facilities will be required to treat all parties equally and pay fair market rates; this is intended to prevent biomass conversion facilities from paying different prices based on whether a person is receiving BCAP payments or not.
- BCAP requires a conservation plan, forest stewardship plan, or equivalent plan as an eligibility requirement to receive matching payments. Equivalent plans were previously included in some but not all references to plans in the proposed rule. In the proposed rule, compliance with existing plans was required for matching payments; however, a plan was not required if one did not already exist. Now conservation plan, forest stewardship plan, or equivalent plans are required for all BCAP payments.
- As specified in the 2008 Farm Bill, BCAP participants may receive matching payments for a maximum of 2 years; this rule specifies that CCC will take into account the NOFA period in an equitable manner consistent with the 2008 Farm Bill.
- Although, the proposed rule provided alternatives for different payment rates based on type of material, BCAP will provide a single rate of $1 for each $1 per dry ton provided by the biomass conversion facility, up to $45 per dry ton, with no "tiered" payments for different types of biomass. Similarly, provisions in the proposed rule for payments for wood wastes and wood residues converted to heat or power only above historical usage baselines cannot be implemented.
- This rule clarifies that to qualify for payment, that eligible materials and renewable biomass must be organic materials that are harvested or collected from the land, which was in the proposed rule. Specific references to vegetative and woody waste products that would not meet those requirements are not included. This rule clarifies the section on eligible materials to include specific requirements that are also clearly defined in the definitions section.
- Reductions to annual payments for sale of eligible crops and materials will be tiered based on the use for which the material or crops from the contract acres was sold and matching payments were paid. Conversion to advanced biofuels will result in the smallest reduction, while uses for purposes other than conversion to heat, power, biobased products, or advanced biofuels will result in the highest reduction.
- This rule also makes technical corrections and editorial changes that reflect both comments received and FSA's review of the rule.

This document describes BCAP in detail, then provides a detailed discussion of comments received on the proposed rule and FSA's response to those comments, and then a list of specific section-by-section changes made to the regulatory provisions in response to the comments received.

BCAP Overview

BCAP supports two main types of activities. First, it provides funding for agricultural and forest land owners and operators to receive matching payments for certain eligible material sold to qualified biomass conversion facilities for conversion to heat, power, biobased products, or advanced biofuels. These payments are referred to as "matching payments." Matching payments will assist producers with the cost of collection, harvest, storage, and transportation of certain eligible material to a qualified biomass conversion facility. Such payments to a particular participant can continue for up to 2 years after the first payment is issued. Second, BCAP provides funding for producers of eligible crops of renewable biomass within specified project areas to receive establishment payments of not more than 75 percent of the cost of establishment of eligible woody and non-woody perennial crops, and annual payments for up to 5 years for the production of eligible annual and non-woody perennial renewable biomass crops and for up to 15 years for the production of eligible woody perennial renewable biomass crops. These are referred to as "establishment payments and annual payments," respectively. To be eligible for payment, the establishment and production activities must take place in designated project areas, which may be proposed to CCC by biomass conversion facilities or by groups of producers. Producers in project areas may be eligible for both types of payments; producers outside the project areas are only eligible for matching payments. A table is provided later in this document summarizing the major eligibility requirements for both types of payments.

Definitions and Terms Used in This Rule

As defined in this rule, "advanced biofuel" means fuel derived from renewable biomass other than corn kernel starch, including biofuels derived from cellulose, hemicellulose, or lignin; biofuels derived from sugar and starch (other than ethanol derived from corn kernel starch); biofuel derived from waste material, including crop residue, other vegetative waste material, animal waste, food waste, and yard waste; diesel-equivalent fuel derived from renewable biomass including vegetable oil and animal fat; biogas (including landfill gas and sewage waste treatment gas) produced through the conversion of organic matter from renewable biomass; and butanol or other alcohols produced through the conversion of organic matter from renewable biomass and other fuel derived from cellulosic biomass. That definition, which is specified in the 2008 Farm Bill, did not change from the proposed rule.

To be considered a qualified biomass conversion facility, one of the activities that meets the criteria for qualification is converting eligible renewable biomass material to a biobased product. The 2008 Farm Bill defined biobased products as a product determined by the Secretary to be a commercial or industrial product (other than food or feed) that is—''(A) composed, in whole or in significant part, of biological products, including renewable domestic agricultural materials and forestry materials; or (B) an intermediate ingredient or feedstock.'' CCC will administer BCAP consistent with USDA's standards for biobased products specified in the BioPreferred Procurement Program, which establishes a minimum biobased content for specific items and generic groupings of biobased products and excludes certain biobased products including (1) motor vehicle fuels (biofuels) and electricity (heat and power); and (2) products with significant national market penetration as of 1972 (7 CFR 2902.5(c)).

This final rule also adds a definition of ''biofuel'' to mean ''a fuel derived from renewable biomass.'' Corn ethanol would be included in the definition of biofuel, but not the definition of advanced biofuel.

This rule uses the terms ''contract acreage'' and ''contract acres'' to mean land that is eligible for establishment payments and annual payments under Subpart C of the regulation. Some eligible materials only qualify for matching payments under Subpart B if they are grown on contract acres.

This rule uses the term ''eligible material'' for renewable biomass that may qualify for the matching payment component of BCAP and ''eligible crop'' for renewable biomass that may be eligible for the establishment payments and annual payments component of BCAP. The 2008 Farm Bill uses these two terms in this way and defines them as including different kinds of renewable biomass.

The purpose of this regulation is to provide incentives for the cultivation of new biomass for new markets rather than divert biomass from existing markets. This rule clarifies the definition of ''higher-value product'' as an existing market product that is comprised principally of an eligible material or materials and, in some distinct local regions outside of project areas, as determined by CCC, has an existing market as of the date of publication of this rule in the **Federal Register.** Higher-value products may include, but are not limited to, products such as mulch, fiberboard, nursery media, lumber, or paper, or a product manufactured from eligible materials from which eligible materials must be separated in order to be used for heat, power, biobased products, or advanced biofuels. Eligible materials that are considered to be used for a higher value product may differ according to region and may qualify for matching payments if no higher value product market exists in that region. Higher-value products may include products such as mulch, fiberboard, nursery media, lumber, paper, or other materials.

As specified in the 2008 Farm Bill and in this rule, the eligible material owner may be a person or legal entity who is (1) a producer of an eligible crop or (2) has the right to collect or harvest eligible material. A qualified biomass conversion facility that meets those requirements may be an eligible material owner and receive BCAP payments under subpart B of the regulation.

The term ''conservation district'' is used as defined in 7 CFR part 1410, the regulations for the Conservation Reserve Program (CRP).

This rule uses the term ''participant'' for the matching payments component of BCAP and the terms ''producer'' and ''participant'' for the establishment payments and annual payments component of BCAP. The distinction is an eligible participant for matching payments is not necessarily the person or legal entity who produced the material but may be the person who owns it or has the authority to collect or harvest and sell it to the biomass conversion facility. However, in all cases there may only be one BCAP payment made for any base material and the person claiming the BCAP payment must be the person who was entitled to receive and negotiate the payment being matched. In other words, all BCAP producers are participants, but not all BCAP participants are producers. Participants are those individuals or entities who have been approved and are bound to perform under a contract for matching payments, establishment payments, or annual payments. The term ''producer'' means either an owner or operator of BCAP project acreage that is physically located in a BCAP project area, or a producer of an eligible crop produced on that acreage.

This rule uses the term ''contract'' and ''agreement.'' A contract is between CCC and the participant for BCAP payments. The contract is legally binding on the participants in BCAP and specifies what the producer must do and the resulting payments that CCC will make to the producer or other BCAP participant entitled to receive a payment. An ''agreement'' is between CCC and a qualified biomass conversion facility or a project area sponsor. The agreement specifies what the qualified biomass conversion facility or the project area sponsor plans to do and how it will support the establishment and production of eligible crops for conversion to bioenergy in the BCAP project areas including the type of renewable biomass that will be used and the planned conversion methods of renewable biomass. In addition, there may be agreements between CCC and a qualified biomass conversion facility for the matching payments, which include items such as obligations of the facility to provide a purchase list, receipts and scale tickets for the eligible material owners and agreement to provide facility address and contact information to the general public.

Matching Payments

Matching payments will be available for the delivery of certain eligible material to qualified biomass conversion facilities to a producer of an eligible crop or a person with the right to collect or harvest eligible material.

The 2008 Farm Bill provides for matching payments at a rate of $1 for each $1 per dry ton paid by the qualified biomass conversion facility, in an amount up to $45 per dry ton, for a period of 2 years. The 2008 Farm Bill also provides that biomass conversion facilities are those that convert, or propose to convert, renewable biomass into heat, power biobased products, or advanced biofuels.

For the matching payment calculations, CCC proposed three options. As discussed in the Summary of Comments section below, after consideration of comments received, an amended version of the first option was selected, and is the one specified in this final rule.

CCC will provide matching payments at the rate of $1 for each $1 per dry ton paid by the qualified biomass conversion facility to the eligible material owner for delivery of eligible material that qualify for payment to the facility in an amount not to exceed $45 per dry ton. Participants will be eligible for payments for a period of 2 years beginning from the date of their first matching payment is made after the effective date of this rule. CCC will determine how to take into account participation in the NOFA period. At the least, the 2-year period will be considered stopped during the period between the end of matching payments received during the operation of the NOFA and the beginning of CCC matching payments for new deliveries

by the participant. If title to the material from a particular farm or locale is transferred to another party, the rule provides that the successor is subject to the 2-year requirement applicable to the previous participation at that locale. Otherwise, the 2-year requirement could be easily avoided contrary to the 2008 Farm Bill. Generally, however, the 2-year period is producer specific. If, for example, the producer changes delivery points after a year, the time period does not start anew.

Qualified Biomass Conversion Facility

In order for a delivery of eligible materials to a biomass conversion facility to qualify for a BCAP payment, the receiving biomass conversion facility must be qualified for BCAP. To become qualified, the biomass conversion facility must enter into an agreement with CCC, through the FSA State office in the State where the facility is physically located.

For BCAP, a biomass conversion facility is a facility that converts or proposes to convert renewable biomass into heat, power, biobased products, or advanced biofuels. For the purposes of BCAP, advanced biofuels do not include ethanol derived from corn kernel starch, because the 2008 Farm Bill specifically excludes it.

A biomass conversion facility does not have to be a project sponsor for the establishment payment and annual payment component of BCAP or be in operation to submit a successful application for qualification. For any facility, whether or not yet in operation, the entity requesting that a facility become qualified must provide proof of all applicable Federal, State, local, and Tribal permits and licenses required for operation or proof of application completions or letters of renewal submissions from the applicable governmental entity. Applicable permits and licenses may include, but are not limited to, business licenses, air quality permits, water discharge permits, storm water permits, or Bureau of Alcohol, Tobacco, Firearms and Explosives registrations.

Each biomass conversion facility must enter into a separate agreement with CCC regardless of whether a single owner has multiple facilities. CCC will issue a unique facility identification number to each qualifying biomass conversion facility. In addition, when a biomass conversion facility agrees to become "qualified," CCC will make general contact information available to the public through FSA county offices and on the FSA Web site.

Eligible Material Owners, Application for Matching Payments

To be eligible for matching payments, the eligible material owner must apply at an FSA county office and receive approval for that application before delivering the eligible material to the qualified biomass conversion facility. The qualified biomass conversion facility must issue a receipt or invoice on the date of delivery to the eligible material owner. The receipt will be the basis for the matching payment calculation.

The material owner will be eligible for the payment if the owner had the legal title to the material for collection or harvest, such as the operator or producer conducting farming operations on private land, or any other person designated by the owner of the private land. Consistent with the 2008 Farm Bill, the eligible material owner does not have to own the land where the eligible material was collected or harvested as a condition of eligibility. The eligible material owner may be a person with the right to collect or harvest eligible material, and who has the risk of loss with respect to that material, on certain Federal lands pursuant to a contract or permit with the U.S. Forest Service or Bureau of Land Management, such as a timber sale contract.

Eligible material owners must submit the documentation from the qualified biomass conversion facility to the FSA county office to be eligible for matching payments. The measure for the eligible material weight is a "dry ton," the weight at zero percent moisture content. The facility is required to have the necessary equipment (such as a moisture meter) to calculate the equivalent dry ton weight of the delivered material.

Eligible material owners may also be eligible to participate under the "establishment payments and annual payments" component of BCAP; however, eligible materials may differ from eligible crops and the annual payment that is received by a participant in that component will be reduced when a matching payment is issued. The "establishment payments and annual payments" component of BCAP is discussed later in this rule. If an eligible material owner or producer wishes to avoid the reduction in annual payment(s), the owner or producer must decline the matching payment(s).

The NOFA imposed an "arm's length transaction" requirement to be eligible for a matching payment. As discussed below in the Summary of Comments section, based on comments received, those provisions have been removed from this final rule. To achieve a fair price for all participants, provisions have been added requiring biomass conversion facilities to pay a fair market value to all participants, regardless of whether the participant is receiving BCAP payments or is a related party.

An eligible material owner needs to meet the following requirements to be eligible for a matching payment:

An eligible material owner must be one or more of the following:

- A producer within a project area; or
- A person or a non-Federal entity that has legal title to an eligible material, including Indian tribes and tribal members.

An eligible material owner may request a matching payment at the FSA county office after being approved to participate in the program and after delivery of eligible material to a qualified biomass conversion facility and receiving payment for that delivery.

However, eligible material owner(s) who meet the requirements listed above are not eligible for a matching payment if:

- Delivery is made or payment received for delivery before the biomass conversion facility is qualified by CCC;
- The eligible material owner did not receive approval from CCC to be considered an eligible material owner for matching payment from the FSA county office before delivery to the biomass conversion facility;
- The delivery contained ineligible material (for deliveries of otherwise eligible material, none of the eligible material will qualify for payment if it must be separated from other material which may be the higher-value product after delivery to the biomass conversion facility);
- The eligible material owner that collects or harvests the eligible material directly from the land sells the eligible material to any other entity other than the qualified biomass conversion facility;
- The eligible material owner does not present proof of payment and proof of delivery date for delivery of the eligible material;
- The eligible material was collected or harvested from the land not in accordance with the conservation plan, forest stewardship plan, or equivalent plan;
- The eligible material produced outside a project area may be used to produce higher-value products;
- The eligible material owner violates Executive Order 13112, "Invasive Species;"
- The eligible material owner knowingly supplied false information;

• The eligible material owner violated the associated conservation, forestry, or equivalent plan related to the land that produced the eligible material for which a matching payment is requested; or

• The formerly qualified biomass conversion facility failed to comply with the agreement it entered into with CCC and, accordingly, the agreement was terminated by CCC prior to delivery.

Eligible Materials

In general, eligible material is renewable biomass that qualifies for the matching payment component of BCAP. For guidance to potential eligible material owners and biomass conversion facilities, CCC will provide a chart of eligible materials that qualify for matching payments. The chart of eligible materials that qualify for matching payments will be provided to the public via the FSA Web site at *http://www.fsa.usda.gov/energy;* an example of the chart is included below. The chart is not exhaustive and will be periodically updated on the FSA Web site by CCC—in accordance with the parameters established by the 2008 Farm Bill. Because the contents of the eligible material list that qualify for payments are expected to change periodically, the list is not included in the BCAP regulations. When there is recommendation for an addition to the list of eligible materials that qualify for payments, CCC will review the material to make determinations. The review may include a site visit and comparison to related materials or uses. CCC will review the recommendation to ensure that the new material meets the requirements of the 2008 Farm Bill and the provisions in this final rule. As described later in this rule, eligible crops for the establishment payments and annual payment provisions will include some additional crops not eligible for matching payments and therefore not considered to be eligible materials.

CONDITIONS WHERE ELIGIBLE MATERIALS WILL QUALIFY FOR MATCHING PAYMENTS

Eligible material	Qualifies for matching payment?		
	If collected or harvested directly from the land before transport and delivery to the biomass conversion facility	*If collected or harvested by separation from a higher-value product collected or harvested directly from the land*	
		before transport and delivery to the biomass conversion facility	after transport and delivery to the biomass conversion facility
Forest thinnings	Y*	Y*	N
Post-disaster debris	Y*	Y*	N
Hardwood chips	Y*	Y*	N
Softwood chips	Y*	Y*	N
Cutoffs	Y*	Y*	N
Bark	Y*	Y*	N
Trees and shrubs without timber, lumber or wood pulp value	Y*	Y*	N
Trees and shrubs with timber, lumber or wood pulp value	Y* non-Federal land (N Federal land)	N	N
Forbs such as sunflower and clover	Y*	Y*	N
Legumes	Y*	Y*	N
Non yard waste grasses	Y*	Y*	N
Non yard waste vines	Y*	Y*	N
Mosses	Y*	Y*	N
Crop residues, including Title I crop residues	Y*	Y*	N
Corn cobs	Y*	Y*	N
Corn stover	Y*	Y*	N
Sugarcane bagasse	Y*	Y*	N
Rice hulls	Y*	Y*	N
Nut hulls	Y*	Y*	N
Rice straw	Y*	Y*	N
Wheat straw	Y*	Y*	N
Orchard waste and vineyard waste	Y*	Y*	N
Excluded from eligibility:			
Title I crops			
Algae			
Animal waste and byproducts (including fats, oils, greases, and manure).			
Food waste			
Yard waste			

"Yes" means material has been collected or harvested directly from the land in compliance with an approved conservation plan, forest stewardship plan, or equivalent plan, and in compliance with that plan, and, that eligible materials that are not crop residues are byproducts of preventative treatments that are removed to reduce hazardous fuels, to reduce or contain disease or insect infestation, or to restore ecosystem health.

* "Yes" becomes "no" if CCC rules that, within that distinct local market, the product is being diverted from higher-value (existing) markets.

There has been interest in and discussion about various materials and whether or not they are considered to be eligible materials and specifically whether they qualify to receive matching payments for BCAP. For

example bagasse, rice hulls, nut hulls, corn cobs, whole trees, bark, wood chips, sawdust, and black liquor. For some materials there is an important distinction as to whether they meet the basic definition of eligible material or whether they are a product versus a feedstock. A determination about whether a material qualifies for matching payments requires the item to be an eligible material and to meet the other requirements of the BCAP regulations, for example the collection, harvest, storage, transportation, and delivery requirements. Each of the example materials listed in this paragraph are discussed below.

Bagasse has been discussed above. It is the fibrous residue that remains after sugarcane stalks are crushed, is an eligible material, but cannot qualify for matching payments because it is not collected directly from the land, but rather it is separated from a higher-value product, such as a Title I crop (sugar extraction) after delivery to the facility, cannot qualify for a matching payment.

Hulls are eligible materials, but qualify for matching payments only if it is collected or harvested directly from the land, or separated from a higher-value product, in accordance with an approved conservation or equivalent plan, before delivery to a biomass conversion facility. Hulls separated from whole grain or nuts after delivery to the processing facility cannot qualify for a matching payment. Where they have not been separated by the farmer, the delivery of the hulls is merely incidental to the normal marketing of the crop. It is not a new collection or harvesting of the biomass at all. Changing practices to merely separate the hulls, for example, early (at the farm) will not, however lead to payment as that could itself be a scheme or device in violation of BCAP if the only purpose was to generate a BCAP payment.

Corn cobs are crop residues, and are eligible materials, but qualify for matching payments only if they are collected or harvested directly from the land, or separated from a higher-value product, in accordance with an approved conservation plan or equivalent plan, before delivery to a biomass conversion facility. Cobs collected not directly from the land, but rather separated from a higher-value product, such as a Title I crop (corn kernels) after delivery to a biomass conversion facility, cannot qualify for a matching payment for the reason we give above.

The same concerns apply with respect to forest matters. Under this rule, whole trees or logs are eligible materials that qualify for matching payments only if collected or harvested directly from the land, in accordance with an approved conservation plan, forest stewardship plan, or equivalent plan; are diseased, such as trees infested by the bark beetle; are byproducts of preventative treatments that are removed to reduce hazardous fuels; are removed to restore ecosystem health; and have not been determined by the CCC as a higher-value product in that market. The provisions of the 2008 Farm Bill provided for the preventative treatment qualification with respect to government land. However, that qualification is extended to trees or logs on private land in this rule so as, consistent with the 2008 Farm Bill, to avoid undue disturbance of forest lands consistent with the positive environmental intent of BCAP and consistent with other determinations specified in this final rule. This also reflects the concept that BCAP is for the use of materials that would otherwise be waste materials and that would go uncollected or unharvested. It is not intended to upset existing market relationship. It is for these reasons, on consideration of the comments, and further consideration of the operation of the portion of BCAP under the NOFA, that CCC determined that it is appropriate to apply this qualification to trees or logs on private lands as well.

Whole trees that CCC has determined have a higher value, such as for lumber or wood pulp, or have been removed without an approved forest stewardship plan or equivalent plan, cannot qualify for matching payments even if part of the tree is separated from the bulk of the tree and burned or otherwise used for biofuel—see the explanation given with respect to bagasse.

Accordingly, under this rule, bark is an eligible material that qualifies for matching payments only if it is (1) collected or harvested directly from the land, in accordance with an approved conservation plan, forest stewardship plan, or equivalent plan, before delivery to a biomass conversion facility, (2) separated from a higher-value product, and (3) has not been determined by CCC as having a higher-value product in that local market. The applicable provisions of the 2008 Farm Bill relative to the third of these qualifications are designed to generate new activities that will create biomass and not disturb existing markets that rely on biomass and may have beneficial effects of their own—such as the use of bark for mulch. This follows that view to assure a genuine biomass oriented collection and harvesting (one that would otherwise not occur) and also serves to assure that BCAP stays within the dollar limits set by Congress. If CCC determines that in a distinct local market, the bark is used for mulch, or nursery media, the bark will not qualify for matching payments in that market. Bark collected from processed trees after the trees are delivered to pulp and paper facilities cannot qualify for matching payments.

Wood chips are eligible materials that qualify for matching payments only if collected or harvested directly from the land, or separated from a higher-value product, in accordance with an approved conservation plan, forest stewardship plan, or equivalent plan, before delivery to a biomass conversion facility, and have not been determined by CCC as a higher-value product in that local market. If CCC determines that in distinct local markets, the wood chips are used for products such as particle board, the chips cannot qualify for matching payments in that market. Chips collected from delivered and processed trees after the trees are delivered to pulp and paper facilities cannot qualify for matching payments. Chips created in the field from diseased trees for ease of transport of that biomass to a conversion facility qualify for matching payments.

Sawdust is an eligible material that qualifies for matching payments only if it is (1) collected or harvested directly from the land, in accordance with an approved conservation plan, forest stewardship plan, or equivalent plan, before delivery to a biomass conversion facility, (2) separated from a higher-value product, and (3) has not been determined by CCC as having a higher-value product in that local market. Sawdust collected from processed trees after the trees are delivered to a wood products facility cannot qualify for matching payments under this rule. Sawdust collected directly from the forestland before delivery to a facility may qualify for matching payments. If CCC determines that in distinct local markets, the sawdust can be used for higher-value products such as particle board, the sawdust cannot qualify for matching payments in that market.

Black liquor, or pulp liquor, is an aqueous waste by-product of the kraft process of pulp manufacturing that is comprised of lignin, hemicellulose, and inorganic chemicals and used as fuel at these facilities. Any eligible material used in the manufacturing process that can be attributed to the creation of black liquor cannot qualify for matching payment because the eligible materials (non-Federal pulpwood trees) immediate, principal higher-value purpose is wood pulp for paper manufacturing and the creation of the

black liquor is a byproduct of the production process.

Renewable biomass, as specified in the 2008 Farm Bill and in this rule, includes materials, pre-commercial thinnings, or invasive species from U.S. National Forest System land and U.S. Bureau of Land Management (BLM) land that:

- Are byproducts of preventive treatments that are removed to reduce hazardous fuels, to reduce or contain disease or insect infestation, or to restore ecosystem health;
- Would not otherwise be used for higher-value products; and
- Are harvested in accordance with applicable law and land management plans and the requirements for old-growth maintenance, restoration, and management direction of subsections 102(e)(2), (3), and (4) of the Healthy Forests Restoration Act of 2003 (16 U.S.C. 6512) and large-tree retention provisions of subsection (f).

In other words, renewable biomass harvested on National Forest System and BLM land would be biomass removed for fire prevention purposes, biomass unsuitable for commercial timber harvest, invasive plant removal for treatment and control purposes, and diseased, damaged, or immature biomass culled in accordance with appropriate forest management practices. As discussed below in the Summary of Comments section, in response to the comments, this rule requires a conservation plan, forest stewardship plan, or equivalent plan for all eligible materials that qualify for payment.

As specified in the 2008 Farm Bill, renewable biomass also includes organic matter that is available on a renewable or recurring basis from non-Federal land or land belonging to an Indian or Indian Tribe that is held in trust by the United States including:

- Renewable plant materials such as feed grains, other agricultural commodities, other plants and trees, and algae; and
- Waste material, including crop residue, other vegetative waste material, including wood waste and wood residues, animal waste and byproducts, including fats, oils, greases, and manure, food waste, and yard waste.

However, that definition of renewable biomass from the 2008 Farm Bill applies to more than one program in Title IX of the 2008 Farm Bill. For BCAP specifically, the 2008 Farm Bill defines "eligible material" more narrowly, excluding any crop that is eligible to receive payments under Title I of the 2008 Farm Bill.

Crops that are eligible to receive payments under Title I of the 2008 Farm Bill would therefore not be included as eligible materials or crops for BCAP. Any crop that is eligible to receive payments under Title I of the 2008 Farm Bill or an amendment made by that Title includes a crop of barley, corn, grain sorghum, oats, rice, or wheat; honey; mohair; certain oilseeds such as canola, crambe, flaxseed, mustard seed, rapeseed, safflower seed, soybeans, sesame seed, and sunflower seeds; peanuts, pulse crops such as small chickpeas, lentils, and dry peas; dairy products; sugar; wool; and cotton boll fiber.

In accordance with the 2008 Farm Bill, crop residue or other similar byproducts of crop production and harvesting, such as stover, straw, or hulls, are considered eligible materials that qualify for payments under subpart B of the regulation provided that they are collected, harvested, transported, and delivered as required by the regulation. For such eligible material to qualify for payment, conservation plans must be updated or created to address the removal of the material.

The 2008 Farm Bill specifies that material removed from Federal land is not eligible if it would otherwise be used for higher-value products. Because the intent of BCAP is to spur new biomass for new markets rather than divert biomass from existing markets, and in response to comments, this rule extends the higher-value qualification to material from all land not under a BCAP contract (including non-Federal lands). The exemption for the BCAP contracts reflects that market displacement issues should be taken into account in the BCAP approval process.

The 2008 Farm Bill does not specifically exclude invasive or noxious species in the definition of "eligible material" which is the key term for the matching payment part of BCAP. After consideration of this issue, those materials are eligible materials that qualify for payment if collected, harvested, stored, transported, and delivered as specified in all applicable local, State, and Federal requirements on invasive and noxious species.

Accordingly, this rule includes invasive and noxious species as eligible materials that qualify for BCAP matching payment purposes; however, such eligible materials must be collected or harvested according to a new or amended conservation plan, forest stewardship plan, or equivalent plan and must not be collected, harvested, or transported during reproductive or other phases that may propagate the spread or establishment of those species. Eligible material owners must contact State and local weed boards or authorities and their local USDA Service Center staff about collecting, harvesting, storing, or transporting invasive or noxious species to ensure compliance with Executive Order 13112 (which addresses noxious weeds), USDA guidelines, and other requirements. Eligible material owners that violate Executive Order 13112 while carrying out activities related to receiving a matching payment will be in violation of the BCAP regulations and will be required to return all matching payments, as determined by the Deputy Administrator.

As required by the 2008 Farm Bill, the following materials are excluded from being considered eligible materials for BCAP, although they are eligible crops for BCAP establishment payments and annual payments:

- Animal waste and byproducts (including fats, oils, greases, and manure);
- Food waste such as food processing scraps and yard waste such as debris removal originating from municipal or commercial yard, lawns, landscaped areas or related sites; and
- Algae.

Consistent with the 2008 Farm Bill, this rule specifies that for eligible materials to qualify for a matching payment, they must be collected and harvested directly from lands including:

(1) U.S. National Forest System lands;

(2) BLM lands;

(3) All Non-Federal lands in the United States; and

(4) Land belonging to an Indian or Indian Tribe that is held in trust by the United States or subject to a restriction against alienation imposed by the United States. In other words, most publicly- and privately-held land is eligible to produce material for the BCAP matching payments program, except for certain Federal lands.

In accordance with the 2008 Farm Bill, matching payments may be made for all eligible materials, including those derived outside BCAP project areas. Advanced biofuels and intermediate ingredients or feedstock are not collected or harvested directly from the land, therefore, they do not qualify to receive matching payments. CCC recognizes that the production of some advanced biofuels and biobased products requires intermediate ingredients and intermediate feedstocks, such as chopped grasses or wood chips. As specified in this rule, the source material and the intermediate ingredient or feedstock are considered separate eligible materials; however, only the source material qualifies for a matching payment because intermediate

ingredients or feedstock are not collected or harvested directly from the land. Advanced biofuels and intermediate ingredients or feedstock are not collected or harvested directly from the land, therefore, they do not qualify to receive matching payments. The intent of BCAP is to provide matching payments for actual collections and harvestings not incidences to normal industrial processes.

Eligibility for Establishment Payments and Annual Payments

BCAP establishment payments and annual payments will be available for persons and legal entities with eligible land that is located within a project area designated by CCC. CCC will consider project area proposals from project sponsors on a continuous basis. Unlike the matching payments component of BCAP, where any owner of eligible materials can be eligible for BCAP, under the establishment payments and annual payments component, only producers in a designated project area may be eligible for payment. The establishment payments will cover not more than 75 percent of the cost of establishment of eligible woody and non-woody perennial crops, and annual payments for up to 5 years for the production of eligible annual and non-woody perennial renewable biomass crops and for up to 15 years for the production of eligible woody perennial renewable biomass crops. In response to comments received, this rule includes algae specifically as a non-woody perennial crop. By designating project areas, BCAP will support the development of renewable biomass production near biomass conversion facilities.

Proposing Project Areas

Project areas must be proposed by project sponsors, which could be groups of producers or biomass conversion facilities. There is no restriction in this rule on who can own or operate a biomass conversion facility, or sponsor a project area. Various parties may own a biomass conversion facility such as Federal entities, private entities, State or local government agencies, schools, or non-government organizations, provided that these parties have legal title to the facility.

CCC will accept project area proposals on a continuous basis. A complete proposal must include, at a minimum:

(1) A description of the eligible land and eligible crops of each producer that will participate in the proposed project area;

(2) A letter of commitment from a biomass conversion facility stating that the facility will use eligible crops intended to be produced in the proposed project area; and

(3) Information demonstrating that the biomass conversion facility has sufficient equity available to operate by the harvest of a crop in the project area if the facility is not operational at the time the project area proposal is submitted.

While the 2008 Farm Bill does not require conservation plans or forest stewardship plans as part of an acceptable proposal, it does require that all contracts within a project area provide for the implementation of a conservation plan, forest stewardship plan, or equivalent plan. As such, project area proposals must also include a description of the general conservation and forest stewardship measures that will be implemented in plans under contracts within the area.

For item 1 above, the project sponsor must submit a narrative of the proposed project and submit maps of the project area delineating the location of the current or proposed biomass conversion facility. The maps must show: (1) Current land use, (2) roads, (3) railroads, (4) rivers and barge access, (5) proposed land use change, and (6) resource inventory maps including soils and vegetation.

For item 3 above, evidence of sufficient equity must include documentation of the projected construction, start-up, operation, and maintenance costs.

The project sponsors must document the estimated cash-flow of the project (including assumptions on the production outputs and expected market prices for the products produced). In addition, the project sponsor must document its existing resources and short term and long term financing. The information provided to CCC as proof of sufficient equity will be confidential to the extent allowed by law and CCC will only use it to determine if sufficient equity is available for the facility and the project.

The project sponsor must also submit an analysis of the economic impacts of the proposed project area. At a minimum the analysis must address the anticipated timing and number for job creation and retention and likelihood of attracting additional private sector investment.

At a minimum, projects must demonstrate the ability to support the development and production of heat, power, biobased products, or advanced biofuels from renewable biomass production. The facility must demonstrate long-term economic viability and ability to comply with all environmental and regulatory requirements for the production of heat, power, biobased products, or advanced biofuels from renewable biomass. In addition, the project must demonstrate that sufficient quantity of eligible crops will be grown within an economically viable distance from the facility.

A project area must have specific geographic boundaries that are described in specific terms such as acres, watershed boundaries, mapped longitude and latitude coordinates, or counties. The project area must be physically located near a biomass conversion facility or multiple biomass conversion facilities. What constitutes an appropriate location will be determined on a case-by-case basis. Whether a project area is within an economically viable distance from a biomass conversion facility depends on the eligible crops being established and produced, as well as other transportation and logistics matters, and therefore these determinations will be made on a case-by-case basis. The biomass conversion facility or facilities may be within the geographic boundary of the project area, or near it. The project area must also include potential or established producers that would supply a portion or all of the renewable biomass needed by the biomass conversion facility or facilities.

Project Area Selection Criteria

CCC will evaluate project area proposals using these criteria:

(1) The volume of the eligible crops proposed to be produced in the proposed project area and the probability that such crops will be used for BCAP purposes;

(2) The volume of renewable biomass projected to be available from sources other than the eligible crops grown on contract acres;

(3) The anticipated economic impact in the proposed project area, such as the number of jobs created and retained;

(4) The opportunity for producers and local investors to participate in the ownership of the biomass conversion facility in the proposed project area;

(5) The participation rate by beginning or socially disadvantaged farmers or ranchers;

(6) The impact on soil, water, and related resources, such as effect on nutrient loads, or soil erosion;

(7) The variety in biomass production approaches within a project area, including agronomic conditions, harvest and postharvest practices; and monoculture and polyculture crop mixes; and

(8) The range of eligible crops among project areas.

Project sponsors that are biomass conversion facilities may be any size of operation including pilot facilities, research units, experimental or demonstration operations, or commercial operations. A biomass conversion facility not yet in operation can be a project sponsor. In that case, the biomass conversion facility must provide evidence that it has sufficient equity available.

Project Area Eligible Crops

After CCC approves a project area, persons and legal entities within the specific geographic boundaries of that area may be eligible for payment for the establishment and production of eligible crops.

An eligible crop is a crop of renewable biomass. Animal wastes, food and yard wastes, and algae are not excluded from the definition of eligible crop unlike the definition of eligible material; therefore, those categories of renewable biomass will be considered eligible crops. The 2008 Farm Bill specifies certain types of eligible crops that are excluded, including any crop that is eligible to receive payments under Title I of the 2008 Farm Bill, noxious weeds, and invasive species. For the invasive species or noxious weeds exclusion, the determination of whether a species is either invasive or noxious varies by State; therefore, if the crop is neither invasive nor noxious in a State, it would be eligible in that State for BCAP establishment payments and annual payments. FSA State committees will consult with the State technical committees for recommendations concerning the invasive and noxious status for otherwise eligible crops for the purposes of BCAP. Information on ineligible species will be available in FSA county offices.

Project sponsors may suggest the exact species and varieties of eligible crops allowable in a BCAP project area, provided that the crops are included in the BCAP definition of eligible crop. Project area proposals may limit the nature and types of eligible crops to be established within a project area.

Federal- and State-owned land, including land owned by local governments or municipalities, is excluded from the definition of eligible land in the 2008 Farm Bill and therefore is not eligible for the establishment payments and annual payments component of BCAP. The specification about the exclusion for land owned by local governments or municipalities is for consistency with other CCC programs; the terms "State" and "State government" mean any State or local government, including, but not limited to State, city, town, or county government, State Universities, and other units of State government.

Project Area Eligible Producers

Within the project area, to be eligible to receive establishment payments to convert agricultural lands or nonindustrial private forest lands to the production of eligible crops producers must enter into BCAP contracts enrolling their land as contract acreage. In addition, producers may also be eligible for annual payments for the production of eligible crops used for conversion to renewable energy, including advanced biofuels, or biobased products. The details for what is required to qualify for the annual payments will be specified in the individual contract between CCC and a producer, as discussed further below, and will include provisions for the implementation of a conservation plan, forest stewardship plan, or equivalent plan. The producer must demonstrate compliance with the plan through required self-certification and FSA will ensure that normal spot check rules and methods are followed to ensure compliance with the plan. Producers with previously established eligible crops as of the date this rule is effective may enter into a contract for annual payments to continue growing those crops; however, establishment payments will not be authorized in that case.

Project sponsors, regardless of whether they are a biomass conversion facility or a group of producers, may also be considered as a producer and be eligible to receive establishment payments and annual payments. The sponsor must own or operate eligible land to be eligible to enroll as a producer under a BCAP contract and be eligible to receive establishment payments and annual payments. Federal- or State-owned biomass conversion facilities may be project sponsors, but will not be eligible to enter into a BCAP contract with CCC because neither Federal- nor State-owned land is ineligible for establishment payments and annual payments.

The agreement between the project sponsor and CCC is not a contract in the sense that in return for some action a payment is made by CCC. A successful project sponsor is not paid by CCC for being a sponsor; the producers in the project area, who may also be the sponsor, are eligible for payment for the establishment and production of eligible crops. Because this arrangement with sponsors produces no payment as such, and is not a procurement of a good or service, biomass conversion facilities that are also project sponsors are not be subject to general Federal contracting requirements as a condition of a project area approval.

Project Area Contract Acreage and Terms

A producer within the project area may enter into a contract with CCC to commit acres, which would then be called contract acreage, to establish or produce eligible crops.

Contract terms include:

(1) Compliance with highly erodible and wetland conservation requirements contained in the 2008 Farm Bill and in 7 CFR part 12;

(2) The implementation of conservation plan as defined in 7 CFR 1410.2, a forest stewardship plan as defined in 16 U.S.C. 2103(a), or an equivalent plan as determined by the FSA Deputy Administrator for Farm Programs;

(3) A commitment to provide information to promote the production of eligible crops and the development of biomass conversion technology; and

(4) Other information deemed appropriate by CCC, such as the preservation of cropland bases and yield history.

Contract durations may be up to 5 years for annual and non-woody perennial crops, and up to 15 years for woody perennial crops. CCC will adjust the terms of the contract length on a per project basis in order to ensure the most efficient use of Federal government funding. The establishment time period may vary due to type of crop, agronomic conditions (such as establishment time frame and winter hardiness), and other factors. CCC will establish the time frame based on the recommendations received from the State Technical Committee.

Contracts will take into account an establishment period appropriate for an existing crop's harvest or for the establishment of a planned crop. BCAP contracts and plans will be designed to promote the production of a long-term source of biomass feedstock that can be collected and harvested in a reasonable period of time. The expectation, which will be reflected in the contract, is that eligible crops funded under BCAP will produce at least one harvest for biomass within the period of the contract.

Contracts are subject to modification and payment reductions if any of the contract terms are violated. Participants that chose to voluntarily withdraw from BCAP before the duration of their contract has ended will be subject to

early contract termination penalties and may be required to refund payments.

During the term of the contract, CCC will share not more than 75 percent of the cost with participants for establishing non-woody and woody perennial crops, pay an annual payment for enrolled land, and provide for the preservation of cropland base and yield history applicable for land enrolled in a BCAP contract.

Eligible and Ineligible Land

The contract acreage will consist of only the eligible lands that are covered under the producer's contract with CCC. A producer may own land outside the project boundary area, or choose not to sign up all their acreage for BCAP, in which case the contract provisions will only apply to the contract acreage. Eligible land for project areas is agricultural land and nonindustrial private forest land, subject to certain exclusions.

As specified in this rule, eligible agricultural land includes:

(1) Cropland;

(2) Grassland;

(3) Pastureland;

(4) Rangeland;

(5) Hayland; and

(6) Other lands on which food, fiber, or other agricultural products are produced or capable of being legally produced for which a valid conservation plan exists or is implemented.

Land considered ineligible to be enrolled under a BCAP contract includes:

(1) Federal lands;

(2) State-owned, municipal, or other local government-owned lands;

(3) Native sod; and

(4) Land that is already enrolled in CCC's CRP, Wetlands Reserve Program, or Grassland Reserve Program.

Agricultural lands with previously established eligible crops or previously contracted for eligible crops or planned eligible crops are eligible lands for contract acreage. In other words, as noted earlier, producers who started growing renewable biomass before BCAP was implemented may enter into a contract with CCC for annual payments. There is no intent to exclude "early adopters" producing biomass crops.

"Nonindustrial private forest land" is defined in this rule as rural land with existing tree cover, or suitable for growing trees, owned by any private individual, group, association, corporation, Indian Tribe, or other private legal entity. This definition allows for the inclusion of properties such as a privately held tree farm or a private forest landowners' cooperative. This is consistent with the definitions of "landowner" and "nonindustrial private forest land" in the Cooperative Forestry Assistance Act of 1978, as amended (16 U.S.C. 2103a), which includes private legal entities as landowners of such forest land. Existing nonindustrial private forest land with existing tree cover can be entered into contract acreage within an approved project area and be eligible for annual payments, subject to a forest stewardship plan or equivalent plan. Establishment payments will only be made for woody perennial crops with a projected initial harvest time occurring within the length of the contract period.

While land enrolled in other USDA programs may be eligible lands for contract acreage, the contracting producer may not receive multiple program benefits for purposes that are the same or substantially similar to the purposes of BCAP. While there are currently no other Federal programs incentivizing biomass, if in the future there are, duplicate payments will be prohibited. A contracting producer must choose whether to receive BCAP payments or other USDA or Federal program benefits where those benefits are designed to achieve the same purposes as BCAP.

BCAP contracts will not restrict uses of contract acres other than to require the production of eligible crops provided that CCC determines that the land uses would be consistent with the conservation plan, forest stewardship plan, or equivalent plan and any other BCAP conservation requirements.

Making Establishment Payments

Establishment payments of not more than 75 percent of the cost for establishing a perennial crop, which could include woody biomass, will include:

(1) The costs of seed and stock for perennials;

(2) The cost of planting the perennial crop;

(3) For non-industrial forest land, the costs of site preparation and tree planting; and

(4) Other proposed establishment activities that could include, but would not be limited to, site preparation for non-tree planting and supplemental or temporary irrigation.

In addition, partial payments may be authorized when identifiable components of the contract are completed; and supplemental establishment payments may be authorized if necessary.

Establishment payments will not be authorized for annual crops. In addition, prior to receiving establishment payments, producers must have planted their eligible crops and must provide their FSA county office with copies of receipts and invoices related to the cost of establishing such crops.

Making Annual Payments

Annual payments will be calculated on a per acre basis using market-based rental rates, as determined by CCC. The payments are intended to support the production of eligible crops. Annual payment rates will be established at levels required to ensure sufficient participation in a project area.

As specified in the regulations in 7 CFR 1410.42, which set the rental payment rate procedures for land in CRP, and as determined by CCC, annual payments will include a payment based on:

(1) A weighted average soil rental rate for cropland;

(2) The applicable marginal pastureland rental rate for all other agricultural land; and

(3) For forest land, the average county rental rate for cropland as adjusted for forest land productivity for nonindustrial private forest land.

This rate information will be posted at FSA county offices (as FSA posts information for CRP). There are site-specific factors including type of soil and land use that determine the exact rate. CCC will post in FSA county offices the county-specific base-line rental rates for cropland, marginal pastureland, and forest land. In addition, the applicable additional incentive payments (premiums) will be posted for the project area or specific crop mixes within the project area. The large number of factors used to determine the rates for specific crops, land uses, soil types, counties, and project areas preclude this information being suitable for posting on the FSA Web site.

In determining the applicability of incentive payments (premiums) to the annual base-line soil rental rates, the Deputy Administrator will consider the costs of establishing the crop, and the potential of specific perennial eligible crops that are not primarily grown for food or animal feed.

CCC must reduce payments to avoid duplicate benefits, but the annual payment reduction for delivery to a biomass conversion facility will be a percentage of the payments received (not dollar-for-dollar) if the crop is converted to heat, power, biobased products, or advanced fuels, because the purpose of BCAP is to encourage biomass energy production. The reduction will be relatively small if the crop is converted to cellulosic biofuels

or advanced biofuels, in order to encourage the production of fuels that meet the National renewable fuel standard. If the harvested production is sold for any reason other than conversion to heat, power, biobased products, or advanced biofuel, a dollar-for-dollar reduction for each dollar received for the sale will apply, not to exceed the total annual payment.

Specifically, annual payments will be reduced:

(1) By 1 percent if the eligible crop is delivered to a biomass conversion facility for conversion to cellulosic biofuels as defined in 40 CFR 80.1401;

(2) By 10 percent of the total of the sales price and matching payment if the eligible crop is delivered to a biomass conversion facility for conversion to advanced biofuels, as determined by CCC;

(3) By 25 percent of the total of the sales price and matching payment if the eligible crop is delivered to a biomass conversion facility for conversion to heat, power, or biobased products, as determined by CCC;

(4) By 100 percent of the sales price and matching payment if the eligible crop is used for a purpose other than conversion to heat, power, biobased products, or advanced biofuels, as determined by CCC;

(4) If the producer violates a term of the contract; or

(5) In other circumstances necessary to carry out BCAP, as determined by CCC.

Annual payments will be made for agricultural land and nonindustrial private forest land. CCC will calculate market-based rental rates for cropland consistent with the CRP regulations in 7 CFR part 1410; and for all other agricultural land at the rate that would be paid for pastureland, consistent with CRP.

CCC will calculate the market-based payment rate for nonindustrial private forest land using the average county rental rate for cropland developed for CRP and adjusting that rate by comparing the average productivity of cropland compared to the average productivity of forest land.

Half of the first year's annual payment will be made, if practicable, to the producer within 30 days of the date of contract approval and the balance will be paid on the annual contract enrollment anniversary. Subsequent annual payments, if practicable, will be made every year within 30 days after the contract anniversary date. Payments may cease and producers may be subject to contract termination and associated penalties for failure to establish eligible crops.

Key Provisions Comparison of BCAP Matching Payment Versus Establishment Payment and Annual Payment Provisions

This table compares the key provisions of matching payments versus establishment payments and annual payments:

	Matching payments	Establishment payments and annual payments
Geographic Eligibility	Not limited	Limited to geographically designated project area.
Project Sponsor	Not applicable	A project sponsor proposes project areas and may be a: • Biomass conversion facility, including facilities owned by Federal entities, State entities, local government entities, or privately or publicly held entities; or • Group of producers.
Eligible Material Owner or Eligible Producer.	An eligible material owner may be: • A producer within a project area; • A biomass conversion facility; or • A person or a non-Federal entity that has legal title to eligible material, including Indian Tribes and Tribal members. • An eligible material owner cannot be a Federal government entity.	An eligible producer may be a: • Biomass conversion facility that owns or operates eligible land and produces an eligible crop; or • Person or entity with the legal title to privately held lands or land held in trust by the Federal government (but only one person in any case for any material on any land can qualify for the matching payment). An eligible producer cannot be a: • Federal government entity, or State or local government entity.
Land Limitations or Eligible Land.	To qualify for payments, eligible material must be collected or harvested directly from certain: • U.S. National Forest System and BLM lands, • Non-government lands including non-Federal lands, and State- and locally-held government lands, or • Tribal land held in trust by the Federal government.	Eligible land is certain: • Agricultural land, such as cropland, pastureland, rangeland, grassland, or other lands on which food, fiber, or other agricultural products are produced or capable of being produced; or • Nonindustrial private forest lands that are: ○ Rural lands with existing tree cover, or are suitable for growing trees; and ○ Owned by any private individual, group, or association. • Eligible land cannot be: • Federal- or State-owned land; • Land that is native sod; or • Land enrolled in: ○ CRP; ○ Wetlands Reserve Program; or ○ Grassland Reserve Program.

	Matching payments	Establishment payments and annual payments
Eligible Crop or Material	To qualify for payments, eligible material is certain: • Materials, pre-commercial thinnings, or invasive species from National Forest System land and U.S. Bureau System land that: ○ Are byproducts of preventive treatments that are removed to reduce hazardous fuels, to reduce or contain disease or insect infestation, or to restore ecosystem health; ○ Would not otherwise be used for higher-value products; and ○ If from Federal lands, are harvested in accordance with applicable law and land management plans and the requirements for old-growth maintenance, restoration, and management direction of section 102 (e)(2), (3), and (4) of the Healthy Forests Restoration Act of 2003 (16 U.S.C. 6512) and large-tree retention of subsection (f). • Any organic matter that is available on a renewable or recurring basis from non-Federal land or land belonging to an Indian or Indian Tribe that is held in trust by the United States or subject to a restriction against alienation imposed by the United States, including:. ○ Renewable plant materials such as feed grains, other agricultural commodities, and other plants and trees; and. ○ Waste materials including vegetative waste including crop residues and Title I crop residues, and other vegetative waste materials including wood wastes and wood residues. Eligible material does not include: • Any crop that is eligible to receive payments under Title I of the 2008 Farm Bill or an amendment made by that Title including a crop of barley, corn, grain sorghum, oats, rice, or wheat; honey; mohair; certain oilseeds such as canola, crambe, flaxseed, mustard seed, rapeseed, safflower seed, soybeans, sesame seed, and sunflower seeds; peanuts; pulse crops such as small chickpeas, lentils, and dry peas; dairy products; sugar; wool; and cotton boll fiber Animal waste and animal waste byproducts (including fats, oils, greases, and manure); • Food waste and yard waste; • Algae	Eligible crop is: • Renewable plant materials such as feed grains, other agricultural commodities, other plants and trees, and algae; • Waste materials including vegetative waste, such as crop residues, other vegetative waste materials, such as woods wastes and wood residues, animal waste and byproducts, such as fats, oils, greases, and manure, food waste, and yard waste; Ineligible crops include: • Any crop that is eligible to receive payments under Title I of the 2008 Farm Bill. • Any plant that is invasive or noxious or has the potential to become invasive or noxious.
Authorized Payments	A matching payment at a rate of $1 for each $1 per dry ton equivalent paid by the qualified biomass conversion facility in an amount up to $45 per dry ton.	Establishment payments at a rate of not more than 75 percent of establishment costs based on: • The costs of seed and stock for perennials; • The cost of planting the perennial crop; and • For non-industrial forest land, the costs of site preparation and tree planting(s). Annual payments equal to the market rate plus any incentive as provided for in a specific project area.
Payment Reductions	Matching payments must be refunded to CCC if an eligible material owner violates the terms of their contract with CCC including, but not limited to: • Not adhering to the provisions in the conservation plan, forest stewardship plan, or equivalent plan including establishing or spreading noxious or invasive species, as determined by the Deputy Administrator; • Delivering eligible material not harvested directly from the land by the eligible material owner; • Delivering eligible material prior to COC application approval; • Delivering eligible materials that would otherwise be used to produce higher-value products; or • Delivering otherwise eligible material that must be separated from materials used to produce higher-value products.	Annual payments will be reduced if: • An eligible crop is sold for any purpose, including a matching payment for collection, harvest, storage, or transportation; or • The producer violates a term of the contract. Payments may cease and producers may be subject to contract terminations for failure to establish eligible crops.

	Matching payments	Establishment payments and annual payments
Payment Timing	Matching payments are paid within 30 days after the request for payment by the eligible material owner is submitted at the FSA county office, including submission of sales invoice(s) issued by the qualified biomass conversion facility.	Establishment payments are paid when the perennial eligible crop practice or identifiable portion of the practice has been completed according to the BCAP conservation plan, forest stewardship plan, or equivalent plan. Annual payments are paid: • As an advance payment in an amount equal to 50 percent within 30 days of contract approval with the remaining 50 percent within 30 days of the first-year contract anniversary date, and • Within 30 days of the contract anniversary beginning with the second-year contract anniversary.
Duration	Payment duration is 2 years from the date on which the first matching payment is issued to an eligible person or entity taking in account the NOFA period as determined appropriate by the Deputy Administrator.	Contract duration is up to: • 5 years for annual and non-woody perennial crops, and • 15 years for woody perennial crops.
Project Area Proposals or Matching Payment Applications.	Applications for matching payments will be accepted on a continuous basis. To apply for a matching payment an eligible material owner must submit an application to the FSA county office prior to the delivery of the eligible material and then submit the request for payment at the FSA county office after delivery of eligible material is made to the qualified biomass conversion facility.	Project area proposals may be submitted at any time. After a project area has been approved, eligible persons and legal entities within that project area may enroll in a BCAP contract at the FSA county office.

Summary of Comments

CCC received 24,008 comments on the proposed rule from all States, the District of Columbia, the Virgin Islands, Puerto Rico, Northern Mariana Islands, U.S. Minor Islands, and 88 other countries.

We received comments from individuals, trade groups and other organizations, State and local government entities, Federal entities, Tribes, and Alaska native corporations. The majority of the comments were submitted as one of 4 different form letters. One form letter dominated the comments, although many commenters edited the form letter for their personal submission. The letters represented the comments of associations, a corporation, and another interested organization.

This final rule is based on consideration of the comments received and on CCC's experience in implementing matching payments under the NOFA. In addition to the substantive comments discussed below, minor editorial and technical changes have been made to the regulations for clarity and to facilitate implementation. Comments that addressed issues outside the scope of BCAP were not addressed in this rule because CCC does not have the authority to address those issues in this rule. Similarly, CCC does not have the authority to limit the scope of BCAP to a smaller or more restrictive program than the 2008 Farm Bill authorizes, or to expand it beyond our authority except as may be needed to keep BCAP within spending limits specified in the 2010 Supplemental Appropriations Act.

There were general comments both supporting and opposing BCAP that did not provide specific suggestions for changes to a specific section or subpart of the proposed rule. General comments are discussed below followed by a section-by-section analysis of comments in order by the section number of the regulations. Out of scope comments, such as those about solar and wind technology, on-farm storage costs, and other issues outside of the authority for BCAP are not included in the discussion and no change was made based on those comments.

Comment: BCAP is necessary beyond 2012.

Response: The 2008 Farm Bill does not authorize this program beyond 2012. Contracts for establishment payments entered into before 2012 may continue beyond 2012. Accordingly, no change was made to the rule in response to this comment.

Comment: BCAP project areas should be the top priority for BCAP and matching payments spending should be significantly reduced to 20–50 percent of BCAP expenditures, perhaps in conjunction with an annual cap for matching payments above which no additional applications will be accepted.

Response: The 2008 Farm Bill provides such CCC funds "as are necessary" to carry out BCAP. However, the 2010 Supplemental Appropriations Act effectively caps BCAP funding at $552,000,000 and $432,000,000 in FY 2010 and FY 2011, respectively. CCC is required to administer the program within these limits. No change was made to the rule in response to this comment.

Comment: More emphasis should be placed on forest land ownership and more resources should be spent on creating harvesting opportunities on national forests.

Response: Land devoted to forest and trees may be eligible for matching payments and for establishment payments to establish trees and other woody perennials. CCC believes that significant opportunities for eligible materials exist on private as well as public land and will administer the program accordingly. No change to the rule was made in response to this comment.

Comment: The proposed budget is inadequate considering the size of the renewable biomass markets.

Response: The 2010 Supplemental Appropriations Act establishes the funding to carry out the program.

Comment: BCAP will create an oversupply of biomass products, distorting prices for biomass. Biomass conversion facilities are able to pay less than market value for participants' biomass due to having a captive market. BCAP distorts markets and costs too much in a time of deficits.

Response: The purpose of the BCAP program is to encourage the development of commercial demand and supply where none currently exists for non-traditional biomass crops used for heat, power, biobased producers and biofuels. This rule was changed in response to this comment and requires that biomass conversion facilities pay a fair market rate for biomass and that they do not have a different rate for

BCAP participants than for other biomass suppliers.

Comment: Limit payments to foreign-owned companies.

Response: The 2008 Farm Bill does not prohibit enrollment by otherwise eligible foreign citizens or foreign-owned entities. Therefore, no change to the rule was made in response to this comment.

Comment: There is a need for intermediate facilities to receive, process, store, and disburse raw biomass fuel feedstock.

Response: Intermediate facilities may be a critical part of the biomass feedstock supply chain. However, in order for material to be eligible for BCAP matching payments, an eligible material owner must retain beneficial interest in that material until it is delivered to a qualified biomass conversion facility. No change to the rule was made in response to this comment.

Comment: Coupling BCAP with other FSA programs, such as CRP, may support efforts to promote additional tree plantings and may support acres that need to be thinned to improve their quality for wildlife habitat.

Response: FSA implements a number of programs that assist farmers and ranchers in managing risk levels. We agree that producers may want to enroll in multiple FSA programs, including BCAP and CRP, to meet a particular farming operation's goals. We are not changing the regulations to specifically link requirements for the two programs, because we do not have authority to do so—the 2008 Farm Bill specifically excludes CRP land from eligible land for BCAP establishment payments and annual payments. Where possible, efforts will be made to coordinate FSA and CCC programs with complementary goals. Although land in CRP is not eligible for BCAP establishment payments and annual payments, production on such land, if consistent with the CRP contract, may be eligible for matching payments.

Comment: The structure of other FSA programs prohibits producer participation in BCAP and imposes hurdles or provides incentives against producer participation in BCAP. The public needs further guidance on participation in multiple FSA programs and on how BCAP may impact base acres.

Response: BCAP is being implemented with the intent to minimize conflicts between programs. For instance, the 2008 Farm Bill provides for the preservation of base acres and yield history for land enrolled under a BCAP contract. Participation in BCAP will not preclude eligibility for the direct and counter-cyclical payment program (DCP) or the average crop revenue election program (ACRE). No change to the rule was made in response to this comment.

Comment: Complete this rulemaking expeditiously and resume payments under BCAP immediately.

Response: Payments will start after this final rule becomes effective, which is after the date this rule is published in the **Federal Register.** No change to the rule was made in response to this comment.

Comment: The NOFA stimulated a considerable amount of capital investments by both eligible material owners and biomass conversion facilities. The temporary termination of matching payments under the NOFA and the potential changes in BCAP may result in a loss of their ability to participate and loss of capital investments.

Response: We are aware of the concerns regarding continuity between the NOFA and this final rule. We have made adjustments to the final BCAP rule that are consistent with BCAP purposes, maintain continuity, and meet the overall program objectives of supporting the long-term supply of renewable biomass.

Comment: FSA should provide adequate training and support for FSA State and county staff that will be implementing BCAP.

Response: As we do with other FSA and CCC programs, we will be providing training to the field staff that will implement BCAP.

Common Provisions in Subpart A

Administration (§ 1450.1)

Comment: Provide sufficient personnel to expeditiously support project area sponsors in developing project area proposals and quantitatively monitor BCAP's productivity for both matching payments and establishment payments and annual payments.

Response: FSA has more than 2,200 county offices serving rural America. FSA county offices are available to assist in the development of project proposals. Performance indicators will be developed to document and monitor BCAP's benefits, ultimately enhancing delivery of BCAP by identifying those practices and locations that provide the greatest benefits per dollar invested. No change to the rule was made in response to this comment.

Definitions—General, New Terms (§ 1450.2)

Comment: Create a glossary of terms that accurately and clearly defines terms based on their use in industry and the academic community.

Response: BCAP definitions are based on the 2008 Farm Bill, where applicable, or other regulations, as appropriate. In other cases, the terms are a result of consultation and collaboration with Federal experts and other stakeholders. Terms not specifically defined in this rule have their common dictionary meaning and are not used in a specialized way in this rule. No change to the rule was made in response to this comment.

Comment: Clearly define "aggregator of eligible material," "algae," "biofuel," "biofuel refinery," "biomass," "biomass processor," "cellulosic biofuel," "Federal land," "landowner," "sustainably managed forest land," and "wood."

Response: We made changes to the definitions section of the rule in response to comments. We have added a definition of "biofuel", consistent with Sec. 9001 of the 2008 Farm Bill, to provide clarity to the related definition of "advanced biofuel" The terms "aggregator," "aggregator of eligible material," "biofuel refinery," "biomass," "biomass processor," "cellulosic biofuel," and "sustainably managed forest land" were not included in the proposed or final rule and, therefore, do not require a definition for BCAP. The definition of "landowner" is synonymous to the definition of "owner" in 7 CFR part 718 that also applies to 7 CFR part 1410. Finally, the meaning of "algae," "Federal land," and "wood" are commonly understood terms that do not need further definition because they are not used in a special way in this rule.

Comment: Define "substantial" as it relates to the related-party transaction, "ownership," and "opportunity" as they relate to ownership and levels of biomass conversion facility ownership.

Response: The term substantial does not need to be defined in this rule because the prohibition on related-party transactions has been removed from matching payments.

Comment: Define "invasive species" and "noxious weed," and reference definitions in Executive Order 13112 and the Plant Protection Act, respectively.

Response: The rule does reference Executive Order 13112 specifically. Since these terms are defined in the Executive Order and the Plant Protection Act, this rule will not re-define them. CCC will use those

definitions in determining the list of invasive species and noxious weeds for each applicable area. As specified in this rule, the list will be available at the FSA county office.

Comment: Clarify the terms "eligible persons" and "legal entities."

Response: We agree the terms "person" and "legal entity" need to be defined. For ease of administration and consistency with other CCC programs, a reference to the definitions in 7 CFR part 1400 was added to this rule.

Definitions—Advanced Biofuel (§ 1450.2)

Comment: Do not include pellets, wood chips, and briquettes as advanced biofuels.

Response: Although pellets and briquettes would be considered to be advanced biofuels under the 2008 Farm Bill definition if comprised of eligible materials under BCAP, as wood chips would be considered an eligible material, such eligible materials may only qualify for matching payments if these materials meet other qualifications for payment as specified in this rule. However, if these materials have a higher value (existing market) in a distinct region, they would not qualify for matching payments.

Definitions—Biobased Product (§ 1450.2)

Comment: Include pulp and paper as a biobased product.

Response: CCC will use a number of criteria in determining whether a particular product will be considered a biobased product. Products that have a mature market, such commercially produced timber, lumber, wood pulp, paper or other finished wood products, will not be considered to be biobased products for the purposes of BCAP. This is consistent with the general intent to stimulate the production of new biobased products and to energize emerging markets for those products. In making the determination, we will administer BCAP consistent with the standards of the BioPreferred Procurement Program, as authorized by section 9001 of the 2008 Farm Bill.

Comment: The definition of biobased products may cause unintended issues or may allow products not oriented toward renewable energy to be included in BCAP.

Response: The definition of "biobased product" in the 2008 Farm Bill gave the Secretary of Agriculture discretion to determine which products could be considered "a commercial or industrial product (other than food or feed) that is composed, in whole or in significant part, of biological products, including renewable domestic agricultural materials and forestry materials or an intermediate ingredient or feedstock." In determining whether a commercial or industrial product will be considered "biobased" for BCAP, CCC will use the standards set by USDA's Biopreferred Procurement Program under the regulations at 7 CFR part 2902.

Definitions—Biomass Conversion Facility (§ 1450.2)

Comment: Keep the definition of biomass conversion facility as it appears in the proposed rule.

Response: In response to other comments (discussed in other sections), the definition of biomass conversion facility was amended in this final rule to replace the term "eligible material" with "renewable biomass," to clarify that a qualified biomass conversion facility is not restricted to only using eligible material, but may also process other types of renewable biomass that are not eligible for BCAP matching payments.

Definitions—Conservation Plan (§ 1450.2)

Comment: Define "conservation plans," "forest stewardship plans," and "equivalent plans." Make the requirements for all such plans consistent.

Response: The rule defines "conservation plan" and "forest stewardship plan." The definitions have been amended slightly to be consistent with the relevant authorizing legislation for each while also being specific to BCAP. The term "conservation plan" is generally consistent with the definition applicable to Title II conservation programs in the 2008 Farm Bill, modified slightly to apply to eligible crops and eligible material, as appropriate. The definition for "forest stewardship plan" is consistent with the Cooperative Forestry Assistance Act of 1978, as amended (16 U.S.C. 2103a). There may be land eligible for BCAP with similar plans approved by States or other agencies that serve the same purpose and have similar goals, objectives, and terms. A definition for "equivalent plan" is included in the regulation as a result of the comments. Our intention is to review those situations and determine whether they are consistent and, if so, permit those equivalent plans to be used. References to "equivalent plan" were added throughout the rule.

Definitions—Eligible Crop (§ 1450.2)

Comment: Do not consider trees as a form of renewable biomass.

Response: The definition of renewable biomass is specified by the 2008 Farm Bill and includes trees. Therefore, no change to the rule was made in response to this comment.

Comment: Use the IRS definition of closed-loop biomass for the definition of eligible crops.

Response: CCC understands that the IRS definition of "closed loop biomass" is inconsistent with the 2008 Farm Bill's definition of "eligible crop" that, among other things, permits eligible crops to be converted to heat, biobased products, and advanced biofuels as well as electricity. Therefore, no change to the rule was made in response to this comment.

Comment: Sugarcane should be considered as an eligible crop.

Response: The 2008 Farm Bill specifically excludes from the definition of eligible crops or eligible materials any crop that is eligible to receive payments under Title I of the 2008 Farm Bill. "Payments" are not made under Title I of the 2008 Farm Bill with respect to sugarcane, but rather, nonrecourse loans are made to eligible entities. Therefore sugarcane is not excluded from BCAP. Crops eligible for Title I payments for which producers have elected not to enroll those crops in Title I programs remain ineligible for BCAP.

Comment: Exclude all Title I crops and crop residues from being considered as eligible crops.

Response: Title I crops are explicitly excluded as eligible crops; however, Title I crop residues may qualify for matching payments so long as they meet all other requirements for collection, harvest, storage, and delivery.

Comment: Exclude noxious or invasive species as eligible crops.

Response: Under the 2008 Farm Bill's definition of "eligible crop," any plant that is noxious or invasive or has the potential to become noxious or invasive is excluded. Noxious or invasive status is generally established at the State level. No change to the rule was made in response to this comment.

Comment: Eligible crops should include giant miscanthus, pennycress, black locust, guayule, hemp, high-biomass sorghum, and energy cane.

Response: Project sponsors must specify eligible crops for the project area; those crops cannot include plants that are considered noxious or invasive or have the potential to become noxious or invasive in the State. Therefore these crops may be eligible crops in some States, but not in others. No change to the rule was made in response to this comment.

Comment: Expand the definition of eligible crop and renewable biomass to include crops cultivated on Federal property.

Response: The 2008 Farm Bill excludes Federal- or State-owned land from eligibility for the establishment payments and annual payments portion of BCAP, so crops from that land, including privately owned biomass, cannot be eligible crops. Privately owned biomass grown on Federal- or State-owned land is ineligible for BCAP project areas. No change to the rule was made in response to this comment.

Definitions—Eligible Material (§ 1450.2)

Comment: Include Title I grains and oilseeds as eligible for matching payments if the farmer does not receive Title I subsidies for these crops. Barley dockage, which may include barley grain, should also be eligible for matching payments.

Response: As specified in the 2008 Farm Bill, the definition of "eligible material" excludes, among other things, any crop eligible to receive payments under Title I of the 2008 Farm Bill. The definition in the 2008 Farm Bill does not include an option for a producer to choose between BCAP matching payments or Title I benefits. Crops eligible for Title I programs where producers have elected to not enroll those crops in Title I programs are ineligible under BCAP. Likewise, any dockage or foreign material from non-contract acreage would be ineligible if it is comingled with ineligible Title I commodities. No change to the rule was made in response to this comment.

Comment: CCC should remove the 20 percent cap on payments for Title I residues that was in the NOFA.

Response: The rule was changed and the cap is not included in the regulation.

Definitions—Eligible Material Owner (§ 1450.2)

Comment: Clarify the definition of eligible material owner, particularly with regard to stumpage.

Response: "Owner" or "ownership" are commonly understood terms that do not need further definition and are not used in a special way in this rule. In the case of stumpage, the person who has purchased the right to harvest timber on the land clearly meets the definition of "a person or entity having the right to collect or harvest eligible material." No change to the rule was made in response to this comment.

Definitions—Native Sod (§ 1450.2)

Comment: Clarify the definition of "native sod," refer to the 2008 Farm Bill definition, and be explicit in its relation to eligible lands such as grasslands, rangelands, and pasturelands.

Response: Under BCAP, land that is "native sod" as of the date of the 2008 Farm Bill's enactment is excluded from eligible land. This rule uses the 2008 Farm Bill's definition of native sod found at section 12020 of the 2008 Farm Bill, which amends the Federal Crop Insurance Act (7 U.S.C. 1508) to add that definition. Native sod determinations must be made on a case-by-case basis because all three land uses (grasslands, rangelands, and pasturelands) may have been plowed at some point prior to the date of enactment of the 2008 Farm Bill; therefore, the rule does not clarify a specific relationship between native sod and grasslands, rangelands, and pasturelands. No change to the rule was made in response to this comment.

Comment: Include "native sod" as eligible land.

Response: The 2008 Farm Bill explicitly excludes "native sod" from the definition of eligible land. Therefore, no change to the rule was made in response to this comment.

Definitions—Nonindustrial Private Forest Land (§ 1450.2)

Comment: Clarify the definition of nonindustrial private forest land and reference language in the Cooperative Forestry Assistance Act.

Response: We corrected to the definition to refer to section 5(c) of the Cooperative Forestry Assistance Act of 1978, as amended (16 U.S.C. 2103a), as required by the 2008 Farm Bill definition of eligible land.

Comment: Replace the "publicly traded corporations" exclusion in the definition of nonindustrial private forest land with a per producer acreage limit. Include publicly traded land as nonindustrial private forest land and limit the number of nonindustrial private forest land acres a producer may enroll in contract acreage.

Response: The definition for nonindustrial private forest land in the proposed rule incorrectly excluded publicly traded corporations and accordingly has been revised in this final rule to remove that exclusion. That is consistent with the 2008 Farm Bill. However, implementing a contract acreage limit is not consistent with the 2008 Farm Bill. Therefore, that suggestion was not adopted. Project area applications, however, may propose the geographic boundaries within which contract acreage may be offered, will limit contract acreage for some producers.

Definitions—Producer (§ 1450.2)

Comment: Be consistent with the use of "participant" and "producer" throughout the rule.

Response: The terms "participant" and "producer" are not synonymous. The term "producer" is a generic reference to those individuals and entities who are owners, operators, and tenants who may or may not be enrolled in an FSA program. A "participant" is an individual or entity who is an owner, operator, or tenant who is enrolled in an FSA program. No change to the rule was made in response to this comment. A "producer" is an owner or operator of contract acreage that is physically located within a BCAP project area so long as the person or entity has a risk of loss in the crop.

Definitions—Related-Party Transaction (§ 1450.2)

Comment: The provisions on related-party transactions are inappropriate because of the vertically, geographically, and otherwise integrated nature of the forestry products industry. Add provisions to the definition of related-party transactions to encourage cooperatives.

Response: We have removed "related-party transactions" as a limitation under the matching payments. However, to ensure fair and consistent implementation, in becoming "qualified" as described under § 1450.101, a biomass conversion facility must agree, among other things, that all transactions will be market based regardless of whether an individual or entity will receive a matching payment. If it is determined by CCC that a person or business has restructured or engaged in related party transactions for the purpose of defeating the intent of BCAP, or to circumvent the provisions of this rule and its related requirements, or to obtain payment not otherwise entitled, then any part of any program payment otherwise due or paid to such person during the applicable period may be required to be refunded with interest as determined appropriate by CCC. Any eligibility determination that was based, in whole or part, on a scheme or device will be rescinded. A scheme or device includes, but is not limited to coercion, fraud, misrepresentation, depriving any other person of a payment, or obtaining a payment that otherwise would not be payable.

Definitions—Socially Disadvantaged Farmer or Rancher (§ 1450.2)

Comment: Include Native Hawaiians in the definition of socially disadvantaged.

Response: The definition has been corrected to include Native Hawaiians.

Definitions—Yard Waste (§ 1450.2)

Comment: For yard waste, include brush and chips, construction and demolition and municipal solid wastes, and material generated as planned management or urban forests.

Response: The 2008 Farm Bill does not explicitly define yard waste. CCC considers yard waste to be any renewable biomass generated from municipal or residential land, such as urban forestry materials, construction or demolition materials, trimmings from grasses and trees, or biomass removed due to invasive species or weather-related disaster, that can be separated from and has low potential (such as contamination with plastics, metals, chemicals or other toxic compounds that cannot be removed) for the generation of toxic byproducts resulting from conversion, and that otherwise cannot be recycled for other purposes (such as post-consumer waste paper).

General (§ 1450.3)

Comment: There should be stringent guidelines to biomass production to promote environmental and climate sustainability, including provisions to prevent over-harvesting, guidelines being developed by the Council of Sustainable Biomass Production, favoring harvesting practices that have been recognized as sustainable.

Response: Eligible material owners must obtain conservation plan, forest stewardship plan, or equivalent plan in order to receive a matching payment. The establishment payments and annual payments part of BCAP already required such plans. These plans address natural resource concerns including the sustainable harvesting of biomass, when appropriate, by addressing the site-specific needs of the landowner.

Comment: Matching payments should be targeted to certain businesses (for example, those with less than 60 employees) where local ownership and local economic benefits are involved, to help small town economies and encourage investment in infrastructure and equipment, so resources can be directed to increase plantings of biomass crops.

Response: The 2008 Farm Bill does not authorize limiting payments to any subset of eligible participants except as might be produced by a cap on the funding for BCAP or other restrictions that flow from the 2008 Farm Bill. The statute, however, does require the Secretary to consider the opportunity for producers and local investors to participate in the ownership of the biomass conversion facility when selecting BCAP project areas. No change to the rule was made in response to this comment.

Comment: Target payments to aid the development of new sustainable biomass used for approved facilities such as for newly emerging biomass resources that require development of specialized equipment for harvest.

Response: A project sponsor may propose a project area to develop new sustainable biomass that will be considered according to § 1450.202. However, BCAP funding is not authorized to develop specialized harvesting equipment under either the matching or establishment and annual parts of BCAP. No change to the rule was made in response to this comment.

Comment: The proposed options for matching payments would penalize early adopters by tying those payments to a historical baseline of biomass consumption or biomass conversion facility output.

Response: The options in the proposed rule that required documentation of a historical baseline, and paid only for the amount above that baseline, were not adopted in this final rule. Therefore, we believe that the matching payments provisions in this rule will not penalize early adopters.

Violations (§ 1450.4)

Comment: Strengthen or increase penalties for violations.

Response: This rule has similar violation provisions to other CCC and FSA programs. The section on violations provides remedies up to termination of the contract. Other civil and criminal actions may also apply as they generally apply for other CCC and USDA programs. No change to the rule was made in response to this comment.

Scheme or Device (§ 1450.11)

Comments: Clarify what constitutes a "scheme or device."

Response: A "scheme or device" is generally an action that tends to defeat the purpose of a program. As specified in the regulation, "A scheme or device includes, but is not limited to, coercion, fraud, misrepresentation, depriving any other person or legal entity of any payments, or obtaining a payment that otherwise would not be payable." Scheme or device determinations are made on a case-by-case basis due to the unique nature and circumstances surrounding specific scenarios or actions. BCAP participants who think that a particular activity might be considered a "scheme or device" should seek an official clarification from FSA. No change to the rule was made in response to this comment.

Filing of False Claims (§ 1450.12)

Comments: Establish a formal reporting mechanism to report when a false claim has been filed.

Response: There are established reporting options. Violations of laws and regulations relating to USDA programs that may include criminal activity such as bribery, smuggling, theft, fraud, endangerment of public health or safety; mismanagement or waste of funds; workplace violence; employee misconduct; and conflict of interest may be reported by calling (800) 424–9121, (202) 690–1622, or (202) 690–1202 (TDD), by writing to USDA, Office of Inspector General, P.O. Box 23399, Washington, DC 20026–3399, or by e-mailing usda-hotline@oil.usda.gov. No change to the rule was made in response to this comment.

Matching Payments in Subpart B

Comment: Matching payments create an uneven playing field for producers and consumers of renewable biomass by subsidizing existing renewable biomass in a way that may delay expansions of new biomass crops.

Response: BCAP provides funding for both existing renewable biomass and for the establishment of new biomass crops. The BCAP regulation requires that qualified biomass conversion facilities pay a fair market price for biomass.

Comment: Biomass conversion facilities should be eligible material owners.

Response: Biomass conversion facilities may be eligible material owners if they meet all other requirements.

Comment: Only provide matching payments for eligible materials converted to advanced biofuels that support the Renewable Fuel Standard Program of the Energy Independence and Security Act of 2007.

Response: For BCAP, the 2008 Farm Bill includes renewable biomass to be converted to advanced biofuels as well as to be converted to heat, power, and biobased products. Where appropriate, BCAP is intended to work in harmony with other legislation and other Federal government programs. The programmatic outcomes of BCAP will help ensure that the goals of the Renewable Fuel Standard Program of the Energy Independence and Security Act of 2007 are met. No change to the rule was made in response to this comment.

Comment: There are ways to limit and target the matching payments portion, including a national approach where all

eligible material owners would be eligible to receive matching payments regardless of project area boundaries, a regional approach that recognizes regional differences in renewable biomass markets, a local approach that limits matching payments to eligible material owners within project areas, and an eligible material owner cap approach that would limit the total amount of matching payment funds an eligible material owner may receive in order to ensure a fair distribution of funds among all eligible material owners.

Response: Matching payments are available nation-wide regardless of project area boundaries. Regional markets will be taken into consideration when determining if there is the potential for eligible material to be used to produce a higher-value product. Other than the 2-year duration limit on payment availability for an eligible material owner, there is no authority under the 2008 Farm Bill to limit BCAP matching payments as the commenters suggest.

Comment: Base matching payments language on industry standards, refer to and address the major biofuels currently in production including ethanol, biodiesel, and biojetfuel, and adopt standard industry language when discussing advanced biofuels.

Response: The language in this final rule is generally based on the 2008 Farm Bill language and definitions. The purpose of BCAP is to develop a non-traditional crop base of biomass feedstocks. The manufacture of biofuels in accordance with industry standards is outside the scope and authority of this rule. No change to the rule was made in response to this comment.

With regards to units of measurement, BCAP is a biomass feedstock supply program, so it is appropriate for the operational units of the program to be tons rather than gallons as is more common for biofuel programs. For example, forest trimmings are not conventionally measured in gallons.

Comment: Is BCAP meeting its stated purpose to assist agricultural and forest landowners, given the long chain of actors (landowners, harvesters, aggregators, and facilities) involved in the matching payments?

Response: This rule clarifies § 1450.103 requiring that the eligible material must be harvested or collected directly from the land by the eligible material owner and provides that BCAP participants receive a fair market price for all eligible material delivered to qualified biomass conversion facility.

Comment: There is not enough information collected regarding eligible material point-of-origin. The administrative burden associated with BCAP should be reduced to the extent practicable.

Response: Our goal is only to collect the information that is necessary for the proper operation and oversight of BCAP and to ensure that BCAP payments are proper. Therefore, required information includes identifying appropriate farm and tract information related to the source of the eligible material.

Comment: The matching payments should be distributed to all renewable biomass producers and consumers, maintaining fairness and competition in the renewable biomass markets, and encouraging long-term investments.

Response: This rule, which implements the authority in the 2008 Farm Bill, is structured to provide all eligible material owners equal opportunities to receive matching payments, maintain fairness and competition, and encourage long-term investments in renewable biomass markets. No change to the rule was made in response to this comment.

Comment: Redirect the funding for matching payments to biomass conversion facility equipment investments, tax credits, conversion processes that show potential in the long run, and for upgrading existing biomass conversion facilities.

Response: BCAP funding for those activities are not authorized by the 2008 Farm Bill.

Comment: Matching payments will not be effective in achieving program purposes unless new or additional activities by existing biomass conversion facilities are supported. Existing biomass conversion facilities will be placed at an unfair disadvantage if matching payments support new or additional activities rather than all activities equally.

Response: All biomass conversion facilities meeting the qualification requirements will be approved. No change to the rule was made in response to this comment.

Comment: There may be adverse environmental impacts of matching payments because there is not an enforcement mechanism to ensure that agricultural and forest resources are sustainably harvested on a renewable or recurring basis.

Response: Under this final rule, eligible material owners will be required to obtain a conservation plan, forest stewardship plan, or equivalent plan as a condition of receiving a matching payment. These plans generally address natural resource concerns including the sustainable harvesting of biomass, when appropriate, by addressing the site-specific needs of the landowner. The plan must include the purpose of the harvest, the volume of eligible materials to be harvested, the total number of acres harvested, and the name of the eligible material owner.

Comments: Woody eligible materials should be harvested according to a plan supported by the American Loggers Council's Certified Master Logger Program.

Response: Under this final rule, eligible material owners will be required to obtain a conservation plan, forest stewardship plan, or equivalent plan as a condition of receiving a matching payment.

Qualified Biomass Conversion Facility (§ 1450.101)

Comment: Why are matching payments made to eligible material owners rather than to qualified biomass conversion facilities?

Response: The 2008 Farm Bill specifies that matching payments be made to eligible material owners for the collection, harvest, storage, and transportation of eligible material to a biomass conversion facility. No change to the rule was made in response to this comment.

Comment: Favor more efficient or advanced conversion processes over less efficient or advanced conversion processes.

Response: The purpose of BCAP is to develop a non-traditional crop base of biomass feedstocks. The manufacture of biofuels in accordance with varying degrees of conversion efficiency is outside the scope and authority of this rule. No change to the rule was made in response to this comment.

Comment: Some conversion processes that qualified under the NOFA should not be allowed to qualify under the final rule. Specifically, facilities generating power as a byproduct or in support of their normal operations or facilities that directly convert renewable biomass into power should not qualify under the final rule.

Response: The definition of biomass conversion facility as specified in the 2008 Farm Bill specifically includes a facility that converts renewable biomass into power, so we cannot exclude those facilities. Any biomass conversion facility that qualified under the NOFA will be required to enter into a new agreement with CCC that contains provisions based on this final rule, which reflects changes made in response to these and other comments. The major changes that will impact the agreement include clarifications to the collection, harvest, storage, transportation and delivery

requirements in § 1450.103 and removal of the "related-party transaction." Also, biomass conversion facilities will be required to certify that the eligible material for which BCAP payment was issued that are not crop residues are byproducts of preventative treatments that are removed to reduce hazardous fuels, to reduce or contain disease or insect infestation, or to restore ecosystem health.

Comment: All renewable biomass consuming facilities should qualify under the final rule, specifically including plant nurseries, sawmills, anaerobic digesters, particleboard facilities, composting facilities, and briquette, wood pellet, wood shaving, wood chipping, and charcoal producing facilities.

Response: Based on the definition specified in the BioPreferred Procurement Program, which states that products with significant market penetration as of 1972 are not considered biobased products, then plant nurseries, sawmills, particleboard, facility, composing facilities, and charcoal facilities may not qualify as biomass conversion facilities because these products do not meet the definition. The facilities, however, can qualify as biomass conversion facilities for purposes of heat, power or biofuels generation provided that the eligible materials meet the specifications of § 1450.103. No change to the rule was made in response to this comment.

Comment: Provide assistance to facilities for marketing biomass conversion facility products.

Response: The 2008 Farm Bill does not authorize such assistance. No change to the rule was made in response to this comment.

Comment: Biomass conversion facilities should offer investment opportunity to local producers to help keep more of the funding within the community.

Response: There is no requirement in the 2008 Farm Bill, and therefore no requirement in the rule, to require local investment opportunities as a condition to become a qualified biomass conversion facility. The 2008 Farm Bill, however, does require the Secretary to consider the opportunity for producers and local investors to participate in the ownership of the biomass conversion facility when selecting BCAP project areas. Project proposals submitted under Subpart C for the establishment payments and annual payments must address criteria that consider the opportunity for producers and local investors to participate in the ownership of the biomass conversion facility in the proposed BCAP project area. No change to the rule was made in response to this comment.

Comment: Legally-binding contracts should be required between eligible material owners and biomass conversion facilities.

Response: We amended the final rule to require a contract, agreement, or legally binding letter of intent with an application for a matching payment.

Comment: Verify biomass conversion facility procurement practices to ensure that biomass conversion facilities allow all eligible material owners the opportunity to sell eligible material. There are concerns due to the "captive market" nature of renewable biomass supply chains.

Response: The final rule adds a provision that requires biomass conversion facilities to pay fair market value for eligible material regardless of whether the seller has applied for or receives a BCAP matching payment.

Comment: Biomass conversion facilities should be allowed to charge a BCAP administrative or service fee.

Response: Charging an administrative, service, processing or similar fee because an eligible material owner is a BCAP participant is not authorized by the 2008 Farm Bill. The payment being matched should reflect the net output of the facility. A payment by the facility of $20 with a return of a $5 fee should only produce a $15 match since that was the actual net outlay to be matched. CCC has no authority over the private contractual arrangements between an eligible material owner and a biomass conversion facility. Because the intent of BCAP matching payments to eligible material owners also provides an indirect incentive to facilities to consider biomass as an option for heat, power, biobased products, or biofuels, it is presumed that eligible material owners would be disinclined to increase the indirect benefit to the facility by the payment of an administrative fee. Such instances are encouraged to be reported to the FSA county office for evaluation. Should any arrangement between the eligible material owner and the biomass conversion facility, however, comprise any portion of BCAP matching payment, or its equivalent, as determined by CCC, it may be considered a scheme or device to circumvent the BCAP program and all appropriate penalties will ensue.

Comment: Require a chain-of-custody certification using the Forest Stewardship Council, Sustainable Forestry Initiative Program, or other mechanism to demonstrate the reliability of the biomass source.

Response: Establishing chain-of-custody that would ensure that the identity of eligible material would be preserved would be overly burdensome. Accordingly, this comment was not adopted. However, CCC will collect farm and tract data through FSA's farm records system to identify the source of the eligible material for which a matching payment is requested. No change to the rule was made in response to this comment.

Comment: Make the biomass conversion facility qualification process more flexible. For example, reduce permit requirements to allow a facility to apply for qualification before it is operational and when permits are only applied for, because feedstock development may require several years.

Response: A biomass conversion facility may become qualified before it is operational, but only after it obtains all necessary permits. No change to the rule was made in response to this comment.

Comment: Biofuel companies may require farmers to sign long-term contracts to ensure low-cost feedstock supply. Mills may be dropping payment rates due to BCAP matching payments by as much as 40 percent while landowners are simultaneously raising stumpage prices.

Response: A producers' decision whether to enter into a long-term contract with a biofuel company does not involve CCC and is outside the scope of BCAP. Such a contract between a farmer or landowner and a biofuel company is a private transaction that is separate and distinct from the activities and authority of CCC.

Comment: Biomass conversion facilities with gross sales values exceeding $25 million should be ineligible.

Response: That restriction on eligibility is not authorized by the 2008 Farm Bill. No change to the rule was made in response to this comment.

Comment: There were many comments about the standards for moisture content and measurement that did not represent a consensus. Suggested approaches included adopting industry standards for moisture content, adopting standard moisture contents of 45–50 percent, real-time moisture testing, testing of every load, and randomly testing moisture contents. Recommendations on measuring moisture content included taking regional, weekly, monthly, quarterly, bi-annual, and annual moisture averages.

Response: The proposed rule and this final rule include provisions for matching payments to be adjusted to a "dry ton" basis. This ensures that the many different kinds of eligible material are treated similarly. Because of the

significant differences between types of eligible materials, industry practices, and the potential for technological change, specific moisture measurement protocols are not specified in the BCAP regulation. No change was made to the final rule as a result of this comment. CCC believes that specifying the technology or methods used to measure dry tons is unnecessarily limiting and not required.

Comment: The exclusion of satellite delivery sites or biomass conversion operations from BCAP participation creates a competitive disadvantage for biomass conversion facilities with off-site chipping facilities.

Response: Satellite delivery sites may be an important component of certain biomass conversion facilities and we will consider materials delivered to a satellite facility of a conversion facility as delivered to the facility. All other eligibility conditions for eligible material will continue to apply.

Eligible Material Owner (§ 1450.102)

Comment: Loggers who are not BCAP participants need a way to recover lost revenue if the market responds to BCAP by lowering the cost of biomass feedstock.

Response: The requirements in this section for eligible material owner are specified in the 2008 Farm Bill. If loggers meet the definition of eligible material owner, they are eligible for BCAP. The purpose of BCAP is to develop a non-traditional crop base of biomass feedstocks. The revenue of participants and non-participants is outside the scope and authority of this rule.

Comment: The eligibility of eligible material owners should be tied to the person that can present legal title for harvest and transport of material.

Response: An eligible material owner is one who has the right to collect or harvest the eligible material, as specified in this rule with the risk of loss in the product. As specified further in § 1450.3, "Eligible Material," the material must have been harvested or collected directly from the land. Language about risk of loss has been added.

Comment: There should be a definition for "related-parties." The restrictions on related party transactions are not authorized by the 2008 Farm Bill. Some commenters provided alternative definitions for "related party" and "related party transaction." Others suggested exceptions that should apply to the "related parties" provisions.

Response: This rule removes all references to "related-party transactions." CCC has replaced references to "related-party transactions" with a requirement at § 1450.103 for market-based transactions to provide that a facility may not pay different rates for the same product based on whether the seller is participating in BCAP or pay inflated rates for whatever reason.

Eligible Material (§ 1450.103)

Comment: Oppose CCC discretion to modify the definition of eligible material when determining whether specific materials are eligible for matching payments and subsequent placement on the eligible materials list.

Response: Determining whether a specific material is on the eligible materials list is not a modification of the definition. CCC does not have the discretion to modify the 2008 Farm Bill definition of eligible material. The 2008 Farm Bill defines eligible material as renewable biomass, with a number of exceptions. As we did for the NOFA, we intend to continue consulting with USDA experts and other stakeholders when evaluating whether a specific material should be considered an eligible material, within the 2008 Farm Bill definition.

Comments: Commenters had various suggestions for eligible materials.

Include Title I crop residues as eligible for matching payments.

Corn stover and sugarcane bagasse should be eligible for matching payments.

Corn stover, wheat straw, and rice hulls should not be eligible for matching payments.

Response: The 2008 Farm Bill excludes from eligible material those crops that are eligible for assistance under Title I; however, this exclusion applies only to the commodity itself and not to any crop residue associated with producing that commodity. For example, corn grain is excluded from receiving matching payments, but, provided that it is otherwise eligible, other parts of the corn plant may be eligible for a BCAP matching payment. Title I crop residues that are separated from the Title I grain, kernel, or oilseed at the point of collection or harvest are eligible for matching payments; however, crop residues that are separated from the Title I grain, kernel, or oilseed after the crop is collected or harvested are not eligible for matching payments. No change to the rule was made in response to this comment. Bagasse, corn stover, wheat straw, and rice hulls are eligible if they are collected, harvested, transported, and delivered as specified in the BCAP regulations; see the table above for details about when these materials may be eligible versus ineligible. The separation must have occurred on the land and not occurred because the material would normally have been delivered along with the higher valued parts of the plant.

Comment: CCC should consider non-Title I materials as eligible for matching payments including dried distillers grains, nut shells, energy cane, and sweet or high-biomass sorghum.

CCC should propose a formal process for determining which eligible materials may otherwise be used for higher-value products and the processes would include consultation with State Foresters.

Response: The 2008 Farm Bill provides the definition for eligible material. CCC will provide a public list of eligible materials that meet the 2008 Farm Bill definition of eligible material, specifying which qualify for BCAP payments, and will make that list available electronically and through FSA field offices. When new materials are proposed, such as, nut shells, energy cane, and sweet or high-biomass sorghum, FSA will consult other USDA and Federal agency experts to determine whether the new materials are additions to the eligible materials list and whether or not they qualify for BCAP payment. No change to the rule was made in response to this comment.

Comment: Materials from urban sources should not be considered yard waste including: tree trimmings, disaster debris, and pallets.

Response: BCAP's purpose is generally limited to agricultural and forest land owners and operators for matching payment purposes. No change to the rule was made in response to this comment, because the rule already excludes yard waste from any source as an eligible material.

Comment: Need clarification on eligible materials that may otherwise be used for higher-value products, such as forest thinning materials, bark, slash, wood chips (hard and soft), wood waste, and wood residues (including sawdust), some of which should be eligible to receive a matching payment.

Response: We expanded and clarified the provisions in § 1450.103 in response to this comment. Otherwise eligible materials that may be used to produce higher-value products do not qualify for matching payments under the final rule regardless of whether the material comes from Federal or non-Federal land. Payments are not authorized for otherwise eligible materials if they must be separated from a higher-value product after delivery to the biomass conversion facility. In many cases, wood waste materials would not be eligible because they could be used for higher-

value products or are included with non-organic industrial materials. Local or regional markets will be used to determine if particular deliveries will be eligible for BCAP matching payments.

Comment: There should be partial payments for eligible materials that are comingled with ineligible material. How will partial payments for comingled loads be verified?

Response: This rule adds a requirement to § 1450.103 that payments are not authorized for otherwise eligible material that must be separated from a higher-value product after delivery to a biomass conversion facility.

Comment: Eligible material owners that violate Executive Order 13112 on Invasive Species should not be responsible for the removal costs associated with the spread or establishment of noxious or invasive species as a result of activities related to receiving matching payments.

Response: As a condition of applying for a matching payment, an eligible material owner must obtain a conservation plan, forest stewardship plan, or equivalent plan. Violation of Executive Order 13112 would be considered a violation of the plan. No change to the rule was made in response to this comment. The issue of removal costs is outside the scope of BCAP; material owners who violate Executive Order 13112 may be subject to penalties under State or other Federal laws.

Comment: The eligible materials list should be published in the final rule.

Response: We included an example list of how eligible materials qualify for payment. As discussed above, the up to date list will be publicly available through the FSA Web site and at FSA county offices. Instead, this rule provides the criteria upon which decisions will be made to determine whether a material is an eligible material and whether or not it qualifies for BCAP payments and the responses to comments in this final rule clarify examples already determined to be eligible or ineligible. No change to the rule was made in response to this comment.

Comments: Include black liquor as an eligible material and as an advanced biofuel.

Response: Black liquor, an inorganic waste industrial by-product of the kraft process used in pulp manufacturing, is a product that historically was discharged into waterways, and today is processed through recovery boilers to retrieve chemicals for cost-efficiency purposes, with the process generating heat for power. The establishment of BCAP in the 2008 Farm Bill was designed to cultivate a new nationwide crop base of non-food, non-feed biomass for new uses of energy. Black liquor is not an eligible or ineligible material, it is not a feedstock, but rather a product of feedstocks. Eligible materials that can be attributed to the creation of black liquor are materials that were delivered principally for the manufacture of a higher-value product that is not heat, power, biobased products, or biofuels, not for the recovery of chemicals where energy is an ancillary side effect and therefore do not qualify for matching payments.

Signup (§ 1450.104)

Comments: Use qualified biomass conversion facility settlement sheets to issue matching payments rather than documents provided by the eligible material owner.

Response: As with other FSA and CCC programs, the recipient of the payment is responsible for the accuracy and completeness of the information on the application for payment. As specified in this rule, a settlement sheet is one of the pieces of documentation that an eligible material owner must provide to FSA to receive payment. Qualified biomass conversion facilities are required to retain all documentation for a period of 3 years from the date of delivery should it become necessary for auditing or other purposes to validate data. No change to the rule was made in response to this comment.

Comments: There should be a 2 week signup period each quarter for matching payments.

Response: Having a continuous signup is more flexible for eligible material owners accommodates seasonal and geographic differences in the local marketplace and permits county offices to better manage heavy workloads. No change to the rule was made in response to this comment.

Payments (§ 1450.106)

Comment: Spatial distance should be considered when determining matching payment rates.

Response: The 2008 Farm Bill requires that payment be made based on the payment made by the biomass conversion facility, with no provision for an additional requirement that the material be harvested within a certain distance of the facility. No change to the rule was made in response to this comment.

Comment: Allocate funds quarterly to ensure equal distribution of funds across all quarters. Only approve requests for payments for sales receipts within one year from the date the receipt was issued. Extensions should be considered for contracts when delivery was delayed at no fault of the eligible material owner.

Response: When the final rule becomes effective, FSA intends to begin regular allocations of funding to meet local needs. When an application is submitted, the approval will provide a reasonable period of time for biomass deliveries, after which, the approval may be withdrawn and the funds de-obligated. Where appropriate, FSA county offices will consider extension requests to the dates of delivery that were included in the application. No change to the rule was made in response to this comment.

Comment: CCC should issue early partial payments for large volume contracts.

Response: Partial payments will be authorized for discrete, segregable deliveries that are part of a single application. Payments, or payment advances, are prohibited before the delivery period starts, or before proof of payment for delivery is presented to the FSA county office. No change to the rule was made in response to this comment.

Comments: Commenters had various suggestions related to the 2-year payment period for matching payments.

CCC should address an eligible material owner's lost time due to the NOFA termination.

CCC should start the 2-year clock of all eligible material owners, or at least stop the clock on the date the proposed rule was published or the last date of performance, whichever was later.

CCC should make the 2-year period shorter. CCC should extend the time period to 3 to 7 years.

Response: The 2008 Farm Bill requires a payment limit of 2 years, which is not changing with this rule. Payments will be for a term not to exceed 2 years beginning from the date that CCC issues the first payment. New participants will be eligible for payments for a period of 2 years beginning from the date their first matching payment is made after the effective date of this rule. CCC will determine how to take into account participants during the NOFA period. At the least, the 2-year period will be considered stopped during the period between the end of matching payments received during the NOFA and the beginning of CCC matching payments for new deliveries by the participant.

Anyone who wants to participate in BCAP, including eligible material owners and biomass conversion facility owners, will need to apply under the BCAP regulations, no one will be grandfathered in based on applications approved under the NOFA.

The authorizing statute provides for a 2-year limitation on matching payments; no additional limitations are authorized.

Efforts by BCAP participants to restructure after the 2-year limitation expires in order to obtain additional matching payments may be considered a scheme or device and may result in permanent debarment from BCAP. If it is determined by CCC that a person or business has restructured or engaged in related party transactions for the purpose of, or having the effect of, defeating the intent of BCAP (including an action to defeat the 2-year limit on payments), or to circumvent the provisions of this rule and its related requirements, or to obtain payment not otherwise entitled, then any part of any program payment otherwise due or paid to such person during the applicable period may be required to be refunded with interest as determined appropriate by CCC. Any eligibility determination that was based, in whole or part, on a scheme or device will be rescinded. A scheme or device includes, but is not limited to coercion, fraud, misrepresentation, depriving any other person of a payment, or obtaining a payment that otherwise would not be payable.

Comment: Reduce the $45 per dry ton payment limit to $30 per dry ton.

Response: The 2008 Farm Bill provides that the upper limit on matching payments be "* * * equal to not more than $45 per ton." CCC will issue payments at rates lower than $45 per ton where local market prices reflect lower rates—hence the term "matching payments." No change to the rule was made in response to this comment.

Comment: The proposed rule included several options for calculating payments. Commenters had various suggestions for all three options, as well as suggestions for alternative rate structures including structures to favor dedicated energy crops, based on greenhouse gas reductions, fossil fuel displacement, whether the materials were derived from land with a conservation plan, forest stewardship plan, or equivalent plan and based on biomass conversion facility output. Some commenters suggested giving "bonus payments" for eligible materials that are carbon neutral or negative. Commenters also suggested implementing a price floor or minimum that biomass conversion facilities must pay to eligible material owners.

Response: The rule reflects that the 2008 Farm Bill provides for matching payments to be paid at a rate of $1 for each $1 per dry ton provided by a qualified biomass conversion facility for the market-based sale of eligible material in an amount not to exceed up to $45 per dry ton. There are no tiered payments based on type of biomass or on use above a historical baseline.

Comment: Matching payments should be based on the actual "collection, harvest, storage and transportation costs" of eligible materials rather than the biomass conversion facility gate price of eligible materials.

Response: The 2008 Farm Bill requires that payments be based on matching the amount paid by a qualified biomass conversion facility. No change to the rule was made in response to this comment.

Establishment Payments and Annual Payments in Subpart C

General (§ 1450.200)

Comment: Please clarify the time frame in which contract acreage is expected to become enrolled in BCAP.

Response: Eligible persons may signup eligible land into contract acreage once a project area is approved. The exact time frame for when signup will occur will vary based on the amount of time project sponsors need to submit a project area proposal and the level of technical and environmental review required for the project area proposal.

Comment: Clarify whether land enrolled in contract acreage will be eligible to receive base-acre payments under the Direct and Counter-Cyclical Payment Program (DCP).

Response: BCAP does not prohibit participation in other programs; however, requirements of other programs may apply. In the case of DCP, contract acreage is considered to be an acceptable agricultural use of DCP cropland.

Comment: CCC should discuss the process for determining the appropriate number of project areas that will be selected and how that process relates to the findings of the PEIS.

Response: As indicated in the preamble to the proposed rule, we indicated that all project proposals would be considered acceptable provided those proposals met the selection criteria outlined in § 1450.202. The PEIS included an in-depth discussion of the selection criteria and can be located at this Web address: *http://www.fsa.usda.gov/Internet/FSA_File/bcapfinalpeis062510.pdf.*

Comment: BCAP project areas should have additional goals, including providing additional wildlife habitat, increasing resources and opportunities to small- and mid-sized farms, and encouraging the establishment of several categories of potential eligible crops including native grasses and trees, dedicated annual and perennial energy crops, only dedicated perennial crops, short-rotation woody crops, and crops that are ecologically appropriate based on the geographic location of the project area.

Response: These additional goals are largely compatible with the BCAP as specified in this final rule. Land enrolled under a BCAP contract may be capable of producing multiple benefits including additional wildlife habitat and additional resources and opportunities to agricultural and forest land owners. BCAP, however, is not a wildlife or conservation program as is CRP, rather BCAP is to promote the establishment and cultivation of new biomass crops.

Comment: Apply the project area selection criteria to evaluate offers to enroll land into BCAP contracts.

Response: We expect project areas to cover all or parts of multiple counties. Applying potentially multi-county project area criteria to individual offers from the farm level would impose an undue administrative burden on USDA as well as individual farmers and ranchers. Therefore, this suggestion was not adopted.

Comment: There are better ways to select project proposals. Some alternatives include: (1) First-come, first-serve; (2) all eligible land within 100 miles of a qualified biomass conversion facility; (3) a regional approach to ensure an even distribution of project areas across the country; (4) a competitive approach to ensure the best project areas are selected; and (5) a nation-wide project area that allows all eligible producers to enter into a BCAP contract.

Response: The first approach, first-come first-serve, is similar to the approach as described in the proposed rule except that project area proposals would also be required to meet the requirements of the selection criteria as provided in § 1450.202.

Requiring a distance-based model arbitrarily limits enrollment even if there were potential participants beyond that distance who wanted to participate. It is not clear if the comment intended to address what seems to be a natural barrier due to the transportation costs involved. However, setting an arbitrary distance may work well in some regions, but preclude promising technologies and feedstocks elsewhere.

With respect to the regional approach to ensure an "even distribution," this would only be an issue if there was a competitive evaluation comparing merits of all project area proposals.

It is also important to note that the key criteria for a project area proposal is having an established or planned biomass conversion facility in or near the area. It is not clear how having a nation-wide project is compatible with this criteria. No change to the rule was made in response to this comment.

Comment: Contract acreage will compete for land that produces food and feed. It will also compete with land that is native wildlife habitat, specifically land enrolled or potentially enrolled in CRP (7 CFR part 1410).

Response: While BCAP-eligible land within project areas could conceivably be used to grow food or used for wildlife habitat, growing dedicated energy crops instead, is unlikely to have a discernable adverse impact on food markets or the environment for several reasons. First, dedicated energy crops are relatively well suited for cultivation on marginal crop and pasturelands, which, by definition, do not significantly contribute to food production. Second, recent trends in grain supplies suggest that they are not being driven primarily by biomass feedstock production. Third, U.S. food prices are only marginally impacted by changes in grain prices when they do occur. Fourth, BCAP may motivate a shift away from fossil fuels, as well as from corn-based ethanol as a means by which to satisfy the standards referenced above that will favorably impact environmental quality. Fifth, it is true that some marginal land that could otherwise be enrolled in CRP may be enrolled in BCAP instead. However, research has shown actively managed dedicated energy crops also confer significant wildlife benefits. Further, the conservation, forest, or equivalent plans required for BCAP-eligible land will serve to mitigate any adverse impacts from dedicated energy crop production. Each project will be reviewed individually to provide maximum consideration of the costs and effects, including environmental effects, of the project. No change to the rule was made in response to this comment.

Comment: BCAP may cause shortages of seed stock necessary to establish dedicated energy crops.

Response: Under CRP, early enrollments created a demand for vegetative and tree covers that exceeded the available supply. Then, the seed trade mobilized to develop, market, and sell seed to meet the demand. We expect a similar response under BCAP.

Comment: There is a difficult, expensive time-lag associated with establishing and harvesting dedicated energy crops.

Response: Yes, there will be a period of time before eligible crops can be harvested according to a conservation plan, forest stewardship plan, or equivalent plan. That is why there are annual payments. However, fundamentally, establishing a renewable energy crop is as much subject to conditions beyond farmers' control as establishing any other vegetative or tree cover; the risks of growing crops are not unique to BCAP.

Comment: Will matching payments be available to producers with land enrolled under a BCAP contract at time of harvest?

Response: As provided in this rule, matching payments are available for eligible materials harvested from land enrolled under a BCAP contract after the materials have been delivered to the biomass conversion facility. There will be a reduction to the annual payment based on a percentage (1 percent to 100 percent) of the matching payment and sale price received, as specified in this rule. In no case will the reduction be greater than the annual payment.

Project Area Submission Requirements (§ 1450.201)

Comment: We oppose the sufficient equity requirement for project areas. Provide more clarification about it.

Response: The 2008 Farm Bill states that sufficient equity must be demonstrated by a biomass conversion facility that is not operational at the time the project area proposal is submitted, so this rule includes the provision. Demonstration of sufficient equity can be included in the project area proposal as part of the business feasibility description, which may include items such as an outline of efforts made toward securing financing, facility specifications, or projected operating costs. For further clarification on specific cases, please contact your FSA county office.

Comment: An FSA representative should be available to provide support for groups intending to sponsor a project area because the proposed language is unclear and would be difficult to consistently implement.

Response: The commenters did not provide detailed information describing how the proposed rule was unclear. FSA county office employees will be available to assist project sponsors in developing proposals.

Comment: Include the production of eligible material as selection criteria for project areas.

Response: It is unclear what purpose this would serve, except to promote only establishment of eligible materials, rather than the wider group of renewable biomass. The 2008 Farm Bill is clear that one purpose of the establishment payments part of BCAP is to promote the establishment of the wider group of renewable biomass.

Comment: There should be a longer plant establishment timeframe.

Response: CCC has extensive experience with establishing vegetative and tree covers under CRP, which we used in developing BCAP. Under CRP, as well as BCAP, CCC requires that practices be established within 3 years for longer-term practices. Under BCAP, the establishment time for annual and non-woody perennial crops is reduced because the contract duration is significantly less than CRP. In all cases, CCC takes into consideration the circumstances where cover establishment is delayed through no fault of the contract participant. No change to the rule was made in response to this comment.

Comment: Project sponsors should identify other potential local sources of biomass so that proposals could be evaluated in the context of local biomass availability and demand.

Response: We amended the regulation in § 1450.201(a)(1) to clarify that it is required.

Comment: Project sponsors should identify proposed feedstocks (including crop mixes) they plan to use, what land types biomass will be sourced from, and expected production.

Response: Under § 1450.201(a), project sponsors must provide a description of the eligible land and eligible crops with a proposed project area.

Comment: Only require general information about acres targeted for planting, such as general region, land history, current use and acres that will not be planted. Project area boundaries should be used to document current land use, eligible crops, and cropland and projected land use change, rather than on a more detailed producer basis.

Response: The 2008 Farm Bill requires a description of the eligible land and eligible crops "of each producer" that will participate in the proposed project area. However, we recognize that a project proposal cannot assume future participation. CCC will only require a generalized assessment of eligible land and eligible crops in project area proposals.

Further, project sponsors must provide sufficient information for us to determine whether the requirements of §§ 1450.201 and 1450.202 have been met. Incomplete proposals will be returned to the project sponsor, but may be resubmitted. No change to the rule was made in response to this comment.

Comment: Project sponsors should provide information on conservation plans, forest stewardship plans, or equivalent plans and should consult with State Forester to determine scope and scale of the plan needed.

Response: Project sponsors are not required to do so, but all producers who have a BCAP contract in the project area will be required to have such a plan. It is not reasonable to require project sponsors to develop such a plan for the large geographic area covered by the project area, much of which may not be under BCAP contracts. One of the criteria used to select project areas, as specified in this rule, is the impact on soil, water, and related resources.

Comment: Project sponsors should have a business plan and an economic feasibility study and a summary of where and how the energy will be marketed. Add a selection criterion to show that the business plan is sustainable. Project sponsors should consult with State sustainable biomass planting and harvesting guidelines.

Response: The purpose of BCAP is to develop a non-traditional crop base of biomass feedstocks. Project area proposals reuqis a business feasibility description. Requiring project sponsors to submit economic feasibility studies, marketing plans and business plans does not appear necessary and could add an undue burden of cost which could discourage worthwhile participation in BCAP. No change to the rule was made in response to this comment. Producers in BCAP project areas, however, are required to have conservation plan, forest stewardship plan, or equivalent plan, and one of the criteria used to select project areas, as required by statute, is the impact on soil, water, and related resources.

Comment: Long-term should be defined as a 7-year minimum, to support biomass conversion facility viability.

Response: Defining what would be considered "long term" with a specific time would arbitrarily disadvantage some proposals that may otherwise have promising technological or feedstock viability. The viability of the conversion facilities will be reviewed on a case-by-case basis. No change to the rule was made in response to this comment.

Comment: Project sponsors should lead information gathering and communication with CCC.

Response: After approval of a project area, FSA county offices will work directly with farmers and ranchers to enter into contracts, make payments, ensure contract terms are followed, and other duties similar to the other programs that FSA provides to farmers. No change to the rule was made in response to this comment.

Comment: Proposals should include protocols to be used by the facility in verification and audits of plan compliance.

Response: There were no detailed recommendations accompanying this suggestion; however, biomass conversion facilities that become qualified under Subpart B and producers enrolling in BCAP contract may be reviewed or audited by FSA as appropriate. No change to the rule was made in response to this comment.

Comment: Additional information should be provided to outline and simplify project area submission requirements. This may include information regarding acceptable project area sizes, how a proposal may "demonstrate" each submission requirement, and requiring a description of eligible land and eligible crops.

Response: Project area proposals will inherently be unique depending on what the project sponsor chooses to propose. Providing a template that applies to all potential issues and variability across the country will arbitrarily exclude proposals for technologies and feedstocks that could delay achieving the goals of the renewable fuel standard. No change to the rule was made in response to this comment.

Comment: Simplify proposal criteria to facilitate a single facility or group of facilities (with no intention of farming crop), to organize and submit a proposal, without which such groups may be unable to submit project area proposals.

Response: The submission requirements in this rule do not prohibit a proposal submitted by multiple facilities. There is no restriction on project area proposals by groups or for groups of facilities. FSA designed the proposal criteria to meet the requirements of the 2008 Farm Bill, for the effective implementation of BCAP, and to minimize the burden on respondents.

Comment: There should be a "conditional approval" status for potential BCAP project areas that meet the basic requirements for a project area, with final approval being contingent upon requirements to fund the projects, obtain contracts, and other provisions.

Response: FSA's intention is to approve project areas that meet the requirements of § 1450.202 and to provide additional support and guidance at the FSA county office level so that contracts can be entered into at the appropriate time. No change to the rule was made in response to this comment.

Project Area Selection Criteria (§ 1450.202)

Comment: All alternative energy programs should target local ownership.

Response: The establishment payments and annual payments part of BCAP will target local ownership. Opportunity for local investors to participate in ownership of the biomass conversion facility will be considered in evaluating project area proposals. No change to the rule was made in response to this comment.

Comment: The selection criteria regarding the "variety of biomass production approaches within a project area" may negatively impact biomass conversion facilities using a single eligible crop for conversion to bioenergy.

Response: The 2008 Farm Bill specifies this criteria; it requires consideration of proposals using this criteria, in addition to the other criteria. A project area proposal that is strong on the other criteria, but only proposes a single eligible crop should not be negatively impacted.

Comment: Clarify the weighting and evaluating of the project area selection criteria.

Response: The 2008 Farm Bill specifies the criteria that will be used to select project proposals. CCC will evaluate the proposals in coordination with technical experts based on relevant technical standards. The weighting of the factors will vary over time as BCAP matures. No change to the rule was made in response to this comment.

Comment: Clarify how the definition of a BCAP project area is related to the project area selection criteria and specifically what distance is considered "economically viable."

Response: Delineating the project area is one of the project area submission requirements under § 1450.202. A geographic delineation outlines the eligible area for enrollment in a BCAP contract and provides the basis for performance reporting, monitoring, and evaluation. The distance for "economic viability" will vary depending on local conditions. Absent geography, the distance is generally set by transportation costs to move eligible material from the farm to the biomass conversion facilities. This distance may also vary over time depending on the relative costs of transportation. Also, natural formations such as rivers, lakes, and mountains also serve as geographic barriers. There is no specific distance that will automatically be considered to represent the limit for economically

viable. No change to the rule was made in response to this comment. The project sponsor will propose what will be economically viable based on their geographic location, their proposal, and the eligible crops.

Comment: Consider the following environmental impacts as project area selection criteria: positive and negative indirect impacts such as land-use change and landscape fragmentation, long-term impacts on natural resources such as water, carbon, and wildlife, agronomic considerations such as genetic diversity of crops, sustainability of annual versus perennial crops, and whether or not the crops are native or are ecologically appropriate to the project area.

Response: The purpose of BCAP is to promote the cultivation of annual and perennial crops that are not primarily grown for food or animal feed. The proposed rule and the final PEIS listed the minimum selection criteria developed for participation in the BCAP project area. The selection criteria seek to address: (1) The amount of feedstock available from multiple sources and grown through multiple techniques to supply a biomass conversion facility; (2) the potential economic impact within the project area; (3) the potential for local investment in the biomass conversion facility; and (4) participation by socially disadvantaged producers. We also must assess the impact on soil, water, and related resources. We may also take into account other selection criteria, as appropriate. Additional selection criteria may be developed, if necessary, at the national level or on a region-by-region basis, depending on the need and flexibility of specific areas to change.

The cumulative effects within each project area would be addressed through the site-specific environmental screening and resulting NEPA analysis at the appropriate level (that is, categorical exclusion, environmental assessment, or environmental impact statement). The appropriate level of NEPA analysis would include an assessment of the potential effects to wildlife, including landscape or habitat fragmentation; water quality and quantity; and soil carbon. Some of the potential impacts cannot be fully assessed due to conflicting methodologies for the assessment of some areas or lack of sufficient data to make appropriate determinations, such as indirect land-use changes and life-cycle analysis of new crop types. The genetic diversity of crop types is primarily assessed through USDA's Animal and Plant Health Inspection Service on-going testing, field trials, and NEPA analyses of new crop varieties and introduced plant species for commercial uses. Also, local State technical committees, in association with State-level agencies that regulate invasive species will have input on the plant species that would be considered invasive or noxious within each State, limiting the overall pool of potential candidate species for dedicated energy crop production. Therefore, BCAP as specified in the final rule addresses this comment. No change to the rule was made in response to this comment.

Comment: Target local ownership and economic benefits and benefits to socially disadvantaged and beginning farmers and ranchers as project selection criteria.

Response: These selection criteria are specifically included in the rule.

Comment: Allow BCAP project area boundaries to be modified to allow additional producers to enter into BCAP contracts after a project area has been selected.

Response: BCAP project area boundaries may be modified by the project sponsor post-project area approval; however, additional environmental review may be necessary if such modifications significantly deviate from the initial scope of the original approved BCAP project area.

Eligible Persons and Legal Entities (§ 1450.203)

Comment: Use the NOFA definition of "foreign entity."

Response: The 2008 Farm Bill does not preclude participation in BCAP by foreign entities. Accordingly, foreign entities may participate in BCAP provided they are otherwise eligible. No change to the rule was made in response to this comment.

Comment: Clarify the terms "eligible persons" and "legal entities."

Response: The terms "person" and "legal entity" are defined in 7 CFR part 1400. For ease of administration and consistency with other CCC programs, a reference to the definitions found at 7 CFR part 1400 was added to this rule in the Definitions section.

Eligible Land (§ 1450.204)

Comments: Is native sod ever eligible land?

Response: CCC has offered greater clarification in this rule to identify native sod as ineligible land for contract acreage in project areas. "Native sod" is defined in this rule as land that has never been tilled for the production of an annual crop as of June 18, 2008, which was the date of enactment of the 2008 Farm Bill. This definition of native sod may affect large portions of rangelands that have never been tilled and on which the plant cover is composed principally of native grasses, grasslike plants, forbs, or shrubs suitable for grazing and browsing. This rule corrects the date for native sod from the effective date of this rule to the date of the enactment of the 2008 Farm Bill.

Comments: Consider land not in agricultural production to be eligible land.

Response: For BCAP, the 2008 Farm Bill specifies that nonindustrial private forests and agricultural lands are considered to be eligible lands for establishment payments and annual payments. Agricultural lands include cropland, grassland, pastureland, rangeland, hayland, and other land on which food, fiber, or other agricultural products are produced or capable of being produced. "Or capable of being produced" would include lands not in current agricultural production, so long as they are not native sod. However, these lands must meet the environmental review requirements and, as a condition of enrollment, must comply with conservation plans, forest stewardship plans, or equivalent plans. No change to the rule was made in response to this comment.

Comments: There should be a "crop history requirement" for eligible land.

Response: A crop history requirement is an eligibility requirement for CRP; the 2008 Farm Bill included no such crop history requirement for BCAP. FSA will track information of the land use for BCAP contracts.

Comments: Only marginal cropland should be considered as eligible land.

Response: The 2008 Farm Bill included a definition of "eligible land" that includes agricultural land and nonindustrial private forest land. Targeting only marginal land is contrary to the purpose of BCAP, which includes promoting diversification of dedicated energy feedstock. One of the purposes of BCAP is to encourage the production of bioenergy crops on otherwise marginal land that is poorly suited to other agricultural uses. No change to the rule was made in response to this comment.

Comments: Nonindustrial private forest land should not be eligible land due to concerns over converting native forests and savannahs to commercial-production plantations.

Response: BCAP will not incentivize the conversion of old growth, other natural forests, or savannahs to biomass plantings. The majority of old growth forest that exists in the United States is located on Federal land, managed predominantly as part of the National Forest System and by the Bureau of Land Management. The laws,

regulations, and procedures that govern the management of these lands preclude the liquidation of old growth as well as the establishment of non-native forests. While the same laws and other restrictions do not generally apply to privately held land, the BCAP regulation provides that provisions of the Healthy Forests Restoration Act (16 U.S.C. 6512), must be followed on private land in order for material harvested from that land to qualify for a BCAP matching payment. Therefore, BCAP does not provide an incentive to harvest old growth forest for conversion to energy. Further, under the BCAP regulation, only woody biomass outside contract acreage that is removed as a preventative treatment to address fire danger, insect or disease outbreaks, or ecosystem health, and has no other higher-value purpose, is eligible for matching payments. In addition to legal restriction, analysis of forest product markets show that prices of saw logs and other timber is significantly higher than wood for energy, even with matching payments up to $45 per dry ton. Little economic reason exists to convert a forest producing hard or softwood timber to an energy plantation. This assessment by forestry experts agrees with the BCAP PEIS analysis that shows that land conversion driven by BCAP would happen primarily on marginal cropland and pastureland. Also, the 2008 Farm Bill does not authorize the conversion of savannahs to commercial production plantations for purposes of BCAP; native sod is explicitly excluded from eligibility for BCAP project areas.

Comments: Land enrolled in CRP should be eligible to enroll in BCAP once the CRP contract has expired and the land meets all other eligible land requirements.

Response: Under CRP, when a contract nears expiration, CCC notifies the CRP participant of the pending expiration and that the land may be eligible to be re-enrolled in CRP or enrolled under the Direct and Counter-Cyclical Program. CCC will add BCAP as a potential use for the land, too. No change was required to the rule to implement this comment.

Comments: Abandoned and reclaimed mine land should be considered as eligible land for establishment payments and annual payments.

Response: The 2008 Farm Bill does not exclude abandoned or reclaimed mine land from contract acreage under a project area, so it could be eligible land under this rule. However, the land must meet all the contractual obligations, including environmental screening and planning. Establishment payments cannot be used for the cleanup of contamination and related remediation that are not a part of the BCAP conservation plan, forest stewardship plan, or equivalent plan. No change to the rule was made in response to this comment.

Comments: Clarify the eligibility of non-Federal lands including whether State and other local-government lands are eligible land.

Response: The 2008 Farm Bill does not allow for Federal- or State-owned lands to be eligible land for contract acreage within project areas. Local governments are considered a sub-division of the State, and therefore local government-owned land is ineligible for enrollment as BCAP contract acreage.

Duration of Contracts (§ 1450.205)

Comment: BCAP contracts should be renewable.

Response: The 2008 Farm Bill does not provide authority to renew contracts after 2012. No change to the rule was made in response to this comment.

Comment: BCAP contracts should use a delayed effective date in order to accommodate the time it may take for eligible crops to become established.

Response: Because BCAP is designed to promote the cultivation of unconventional biomass crops where a market to purchase those crops does not yet exist, or is at its earliest stages of development, providing a delay in BCAP contracts until the non-conventional crops become established would result in little incentive for landowners to switch from known, revenue-generating conventional crops; this lead time is also necessary so that the required base of non-conventional crops is established to coincide with the operations of biomass conversion facilities. For more than a quarter of a century, CCC has managed long-term contracts for CRP; the annual income of CRP contracts provides a distinct, but equitable incentive to conventional crop revenues so as to recognize an important value of land unrecognized by the conventional crop marketplace. By delaying the annual income of the BCAP contract, it is unlikely the non-conventional BCAP crop would be established. This comment was not adopted.

Comments: Duration of contract should consider geographic and environmental factors.

Response: The duration of contracts is limited by the 2008 Farm Bill to no more than 5 years for herbaceous crops and no more than 15 years for woody crops. No change to the rule was made in response to this comment.

Comments: Non-woody perennial crops should have contract durations between 7 to 10 years.

Response: The contract duration for non-woody perennial crops is specified as up to 5 years in the 2008 Farm Bill. No change to the rule was made in response to this comment.

Obligations of Participant (§ 1450.206)

Comments: Producers should not be required to implement a conservation plan, forest stewardship plan, or equivalent plan on all contract acreage regardless of the number of acres enrolled or the amount of eligible crops produced by the producer(s).

Response: The 2008 Farm Bill requires that any eligible land within the project area that is enrolled under the contract must include a conservation plan, forest stewardship plan, or equivalent plan. We do not have discretion to remove this requirement. In addition, eligible land within a proposed project area will be included in the environmental screening and must comply with the prescribed environmental requirements. No change to the rule was made in response to this comment.

Comments: While we generally support the requirements for producers to make information available to CCC or institutions of higher education concerning the production of eligible crops and the development of biomass conversion technology, we are concerned about the release of proprietary information.

Response: The 2008 Farm Bill requires that BCAP contracts include terms that require participants to make available information to the Secretary, to institutions of higher education, or any other entity designated by the Secretary, such information as the Secretary considers to be appropriate to promote the production of eligible crops and the development of biomass conversion technology. CCC will comply with all applicable transparency and privacy laws, regulations, or Executive Orders, for example, the Freedom of Information Act. No change to the rule was made in response to this comment.

Conservation Plan, Forest Stewardship Plan, or Equivalent Plan (§ 1450.207)

Comments: There were many comments suggesting alternatives and additions to the requirements for conservation plans and forest stewardship plans. Commenters made a number of related recommendations including:

- Do not require anything beyond what may be required for an annual crop such as wheat or corn;
- Following sustainable biomass establishment and harvesting guidelines including harvesting strategies that allow for the producer to determine the exact area for harvest each year as a part of the conservation plan, forest stewardship plan, or equivalent plan;
- Expedite the approval of plans for the first fiscal year;
- Make plan requirements voluntary;
- Make plan requirements consistent;
- Propose third-party verification, re-establishment of grasses or trees post-harvest, harvest timing, residual height, crop diversity, greenhouse gas life-cycle assessments, standard soil erosion rates, and considerations for threatened and endangered species, pollinators, nesting birds, buffers, and pests;
- Use the State of Minnesota standards, the Forest Stewardship Council standards, and standards sets by the respective State, and National standards;
- Use the NRCS Soil Conditioning Index to evaluate the impacts to soil resources; and
- Consider the costs of conservation plan, forest stewardship plan, or equivalent plans, specifically in relation to the size of the tract of land.

Response: CCC will use technical assistance providers such as NRCS and State Foresters to provide assistance with conservation plan, forest stewardship plan, and equivalent plans. Non-government private providers of technical assistance may also be used. These technical assistance providers will use the most appropriate data and standards for harvesting to conduct the planning for contract acreage within the context of the applicable geography.

Implementing conservation plans, forest stewardship plans, or equivalent plans for all land involved in BCAP is a critical factor in conserving natural resources, regardless of the size of particular tracts of land.

The BCAP regulations provide general requirements, including the requirements for the plans. The required plans will be site specific plans and will vary based on the specific location and eligible crops. Specific standards suggested by the commenters may make sense in a specific location, but may not fit for another location. For example, requiring particular harvesting practices may not be suitable for all eligible land. Therefore, we will work with technical assistance providers to ensure that applicable BCAP practices are applied on a case-by-case basis for contract acreage in the project areas. The determination regarding harvesting will be executed in compliance with environmental review and planning. No change to the rule was made in response to this comment.

Comments: There may be impacts to threatened and endangered species if potentially noxious and invasive species are considered as eligible crops.

Response: No species that is noxious or invasive in that State will be considered as an eligible crop. No change to the rule was made in response to this comment.

Comments: Do not waive the requirement for a conservation plan if the conservation district declines to review or approve a conservation plan.

Response: CCC will not waive the requirement for a conservation plan, forest stewardship plan, or equivalent plan. However, in the case where the conservation district declines to review or approve a conservation plan, then CCC retains the authority to waive the requirement for conservation district review—this does not waive the requirement for the plan. If a conservation district declines to review a conservation plan, farmers and ranchers should not be harmed by precluding enrollment. No change to the rule was made in response to this comment.

Comments: Do not use local soil and water conservation districts; such districts are not funded for work on BCAP.

Response: FSA has a long and valued partnership with the conservation districts for implementation of CRP, and expects BCAP to be one of many continued partnership opportunities. No change to the rule was made in response to this comment.

Comments: Consider the following to be "equivalent plans:" the American Tree Farm Program, the Sustainable Forestry Plan, plans created by foresters or third-party forester licensed by the State, and the State Best Management Practices Program.

Response: CCC works with the U.S. Forest Service and State Foresters to ensure that equivalent plans meet the criteria outlined in this rule and with applicable State law. The determination of the applicability of certain plan types for BCAP will be made at a local level. No change to the rule was required in response to this comment.

Eligible Practices (§ 1450.208)

Comments: Provide examples of the eligible practices for annual crops, non-woody perennial crops, and woody perennial crops.

Response: Eligible practices will be developed in consultation with the U.S. Forest Service and the Natural Resources Conservation Service. Actual practice standards may vary by region due to climatic conditions, moisture, elevation, and other technical considerations. No change to the rule was made in response to this comment. For more information on appropriate practices for a particular crop in a particular area, please contact your FSA county office.

Comments: Land rental payments, equipment purchases, general maintenance, chemical inputs, weed and pest control, and inter-planting costs should be considered reimbursable under eligible practices.

Response: Rental payments and equipment will not be reimbursable. Some of the other items may be reimbursable, depending on the specific practice. CCC and FSA will draw on our long experience with establishing practices under CRP, the Emergency Conservation Program, and other programs to determine eligible costs and the reimbursement rate for these costs. Generally, the practice standards for those programs provide funding to establish a practice, which in some cases may include the suggested items. BCAP does not include funding for land rental payments as such, but the BCAP annual payments provide a similar support. Equipment purchases are not authorized by the 2008 Farm Bill. Generally, weed and pest control, chemical inputs, and inter-planting costs are authorized under the contract. In summary, many of the suggested items could be funded if appropriate as part of a particular establishment practice. No change to the rule was made in response to this comment.

Comments: Conversion of existing covers including non-native vegetative cover to eligible crops should be considered eligible for enrollment.

Response: Where suited for the area, this would be consistent with BCAP purposes. In general, that would be an acceptable practice so long as all other eligibility requirements are met.

Comments: Algae production should specifically be included as a non-woody perennial eligible practice.

Response: Because algae does not have to be established on an annual basis or shorter time period, CCC anticipates treating it as a perennial crop. However, because this is an emerging crop, CCC will make this determination based on project proposals and technical practices as they become available. No change to the rule was made in response to this comment.

Acceptability of Offers (§ 1450.210)

Comments: CCC should use the environmental benefits index (EBI) tool under CRP to score BCAP contract offers and to favor marginally-productive land.

Response: This is unworkable for BCAP. CRP enrolls land through two ways: a competitive or "general" sign-up and a non-competitive or "continuous" sign-up. BCAP is analogous to CRP continuous sign-up, where all eligible offers will accepted, rather than the competitive "general" sign-up. Under CRP general sign-up, offers for CRP are ranked according to an EBI. FSA collects data for a number of factors based on the relative environmental benefits for the land offered. EBI rankings are unique for each piece of ground offered into CRP. Each offer is assigned a point score based on its relative environmental factors and competes with all other offers. Offer acceptability is determined based on the ranking results. Under CRP continuous sign-up, FSA accepts all offers of certain high priority practices including grass waterways, riparian buffers, and filter strips. CCC will accept land to be enrolled under BCAP under a similar "continuous" approach that provides flexibility for farmers and ranchers and biomass conversion facilities to manage their respective operations. No change to the rule was made in response to this comment.

BCAP Contract (§ 1450.211)

Comments: Producers should retain the right to determine what section of land to harvest each year.

Response: Contract participants will work closely with technical service providers to develop a conservation plan, forest stewardship plan, or equivalent plan that will include harvesting provisions. Producers will have the right to determine which section of land to harvest, as long as that is compliant with the plan. No change to the rule was made in response to this comment.

Comments: Producers should be afforded maximum establishment payments, but not be required to harvest all eligible crops for BCAP purposes. Clarify the annual payment reductions when eligible crops are not harvested or not harvested for BCAP purposes within the contract period.

Response: For BCAP, the 2008 Farm Bill sets the maximum establishment payment rate at 75 percent of the costs of establishing an eligible perennial crop. With respect to annual payment reductions, one of BCAP's purposes is to support the production of eligible crops for conversion to energy. However, the 2008 Farm Bill also provides for instances where an eligible crop may be used for other purposes. As specified in the rule, annual payments will be reduced by a percentage of the sale price and matching payments received if an eligible crop is converted to heat, power, biobased products, or advanced biofuels. Payments will be reduced on a dollar-for-dollar basis if an eligible crop is used for a purpose other than conversion to heat, power, biobased products. No change to the rule was made in response to this comment.

Comments: The use of eligible crops should be contractually restricted to producing bioenergy.

Response: BCAP was designed to provide incentives to farmers and forest landowners to establish a non-traditional biomass crop base that can be used for heat, power, biobased products, and biofuels. No change was made to the rule in response to this comment.

Comment: The BCAP contract should include a mutually-agreeable withdrawal clause that allows producers to terminate their BCAP contract early.

Response: The BCAP contract will include a provision for contract termination before the scheduled expiration of the contract if the participant(s) under the BCAP contract fully refunds CCC for all payments plus interest from date of disbursement and liquidated damages equal to 25 percent of one year's annual payment to reflect the administrative costs associated with a termination and to reflect that the termination may, even with a full refund, undermine the accomplishment of the goals of BCAP in a way that may otherwise be difficult to convert to dollars and cents. This is similar to CCC's CRP contract. No change to the rule was made in response to this comment, but the provision for contract termination will be in the contract.

Establishment Payments (§ 1450.212)

Comment: The subsidy process for establishment should be expedited since it can take up to 3 years to achieve a marketable feedstock.

Response: CCC will expedite establishment payments for contract acreage, following compliance with establishment of BCAP practice standards and related conservation plans, forest stewardship plans, or equivalent plans.

Comments: Previously established crops and annual crops should be eligible for establishment payments.

Response: The 2008 Farm Bill does not provide for making establishment payments for pre-existing eligible crops or for annual crops. Accordingly, this comment was not adopted.

Comment: Clarify whether animal waste, food waste, and yard waste will be eligible for establishment payments.

Response: Animal waste, food waste, and yard waste are all considered renewable biomass and a crop of any of these waste materials would by definition be eligible for establishment payments. At this time, there are no technical standards for establishing these "crops" so it is not known what if any establishment costs would be eligible for an establishment payment.

Levels and Rates for Establishment Payments (§ 1450.213)

Comments: Under what circumstances would a producer receive less than 75 percent of the establishment costs?

Response: Establishment payments may be less than 75 percent of the producer's costs when, for example, an unapproved component was used or the producer's actual costs were greater than average costs. CCC will establish market-based rates for standard components of practices such as land preparation, seed, and chemicals. No change to the rule was made in response to this comment.

Comments: CCC should provide higher establishment payments for native grasses and forbs.

Response: Establishment payment is limited to 75 percent by the 2008 Farm Bill. There may be annual payment incentives for certain practices.

Comments: There should be per acre limitations for establishment payments.

Response: CCC intends to adopt its long-standing practice that has been used for CRP to apply market-based limits to individual practices, seed varieties, and other components. This approach ensures that establishment costs meet the needs of BCAP and are not excessive. No change to the rule was made in response to this comment, but BCAP will implement such limitations.

Annual Payments (§ 1450.214)

Comments: Annual payments based on soil rental rates will create competition between BCAP and CRP.

Response: CRP and BCAP are more directly competing with other land uses than with each other. BCAP and CRP must compete in the open market with other land uses including production of food and feed. The CRP's soil rental rates are intended to be market-based rates for a particular area of land that is offered. CRP and BCAP both provide for making incentive payments to meet targeted goals. No change to the rule was made in response to this comment.

Comments: Annual payments based on CRP's soil rental rates, as proposed, are insufficient.

Response: Where appropriate, CCC will authorize the use of incentive payments to offset the uncertainty associated with adding production of renewable biomass to a farming operation. CCC's intent is to authorize incentive payments only as proposed in a particular project area and only after the project area proposal includes sufficient analysis to justify authorizing the additional expense. No change to the rule was made in response to this comment, but we believe that the rule already addresses this comment.

Comments: Annual payments should be based on the remaining costs of establishment and maintenance amortized over the life of the contract.

Response: Not all eligible crops for annual payments will also be eligible for establishment payments. Only perennial crops can receive establishment payments, and existing "early adopter" biomass crops cannot receive establishment payments. As a result, implementing payments with an amortized methodology would not meet BCAP purposes, unfairly advantage certain crops, and add considerable administrative burden. Accordingly, this suggestion was not adopted.

Comments: There should be a uniform annual payment rate across the Nation.

Response: This would only work well if in all markets the national rate was similar to the otherwise applicable market rate. Where there are lands with market rates above the national rate, BCAP could not compete with other purposes and there would be little renewable biomass crops produced. Accordingly, this comment was not adopted.

Comments: Annual payments should end after the first harvest.

Response: Contract termination after first harvest would not provide sufficient market certainty or incentivize long-term energy feedstock supply in a nascent bioenergy market. Therefore, this comment was not adopted. This alternative is, however, analyzed in the cost benefit analysis for this final rule. Also, some crops will take the entire period of the contract to be ready for a single harvest, so in those cases, the annual payments effectively end after the first harvest.

Comments: Annual payments should be dependent on geographic and environmental factors.

Response: There may be such a relationship between the payments and other factors to the extent that other factors affect local market conditions given that the soil rental rates may be based on local market conditions. No change to the rule was made in response to this comment.

Comments: Annual payments should be tiered based on the type and variety of crops established.

Response: BCAP will contribute to the local crop mix by providing opportunities for a nonconventional biomass crop base along with existing conventional crops. Also, using the CRP soil rental rates will ensure market-based rental rates. However, a project sponsor may propose using incentive payments with appropriate justification. No change to the rule was made in response to this comment.

Comments: Annual payments for nonindustrial private forest land should be equal to the tax value of the land.

Response: The tax value could approximate the purchase value (or significant percentage) of the land, which would be inconsistent with an annual payment based on the annual rental value of the land. Accordingly, this comment was not adopted.

Comments: Offer incentives on annual payments to encourage certain crops, management activities, and locations. Offer incentives for the level of conservation practices established, crops that would receive higher carbon credits, mixtures of native perennials, leaving environmentally sensitive areas unharvested, and implementing practices that improve forest ecosystem health.

Response: CCC will authorize an incentive for annual payments for certain contract acreage when appropriate and justified to meet enrollment and feedstock production costs on a project area basis. No change to the rule was made in response to this comment, but we believe that the final rule does address this comment.

Comments: Reduce annual payments if any use occurs on contract acreage during the primary nesting season.

Response: All BCAP participants will be required to adopt a conservation plan, forest stewardship plan, or equivalent plan as a condition of enrollment. Use restrictions during primary nesting season may be addressed in the plan, and failure to comply with such plan will result in a contract violation, which will reduce annual payments. No change to the rule was made in response to this comment.

Comments: Do not reduce annual payments beyond a certain level (suggestions ranged from 20 percent to 100 percent).

Response: CCC has further clarified the terms of reduction in this final rule. Reductions will be made when biomass is harvested or collected from contract acreage. Biomass that is converted to heat, power, biobased products, or advanced biofuels at a biomass conversion facility will receive a payment reduction of 10 to 25 percent. If the biomass is used for another purpose the payment reduction will be based on a dollar-for-dollar reduction from the annual payment. In no case, except contract violation, in which case liquidated damages may apply, will the reduction be greater than dollar for dollar.

Comment: Commenters suggested that annual payments should not be reduced in the cases when: (1) Eligible crops are delivered to an intermediate biomass conversion facility that delivers the processed biomass to a project area biomass conversion facility or (2) eligible crops are harvested for seeds.

Response: Reduction of annual payments will occur when renewable biomass is harvested and collected from contract acreage and then sold and delivered to any biomass conversion facility. Annual payments will be reduced by a percentage of the total of the sale price and matching payments based on the use of the eligible crop, including harvest for seed. It is permissible, and would not be a violation of the BCAP contract, to harvest eligible crops for uses other than conversion to heat, power, advanced biofuels, or biobased products; however, producers who do so will forfeit payments as a result. This provision will adequately address the issue raised in the comment.

Substantive Changes and Corrections in This Final Rule as Versus the Proposed Rule

This section lists the substantive changes made in this final rule to the regulatory language in response to comments on the proposed rule. The list also includes technical corrections that will have little or no impact on program implementation.

Throughout all three subparts, this rule clarifies the requirement for conservation plans to include forest stewardship plans or equivalent plans, as specified in the 2008 Farm Bill.

Substantive changes and technical corrections in subpart A for common provisions include:

- Adding a definition for "biofuel" to clarify the distinction between "biofuels" and "advanced biofuels." The distinction is that biofuels include corn ethanol.
- Correcting the definition of "biomass conversion facility" by removing "eligible material" and inserting "renewable biomass." This clarifies that qualified biomass

conversion facilities may accept for processing renewable biomass that is not eligible material for BCAP matching payments.

• Amending the definition of "conservation plan" to remove general conservation provisions that are relevant to conservation plans developed for other FSA and CCC programs such as CRP and to add instead specific references to BCAP eligible crops and eligible material.

• Adding a definition of "legal entity" that references the definition in 7 CFR part 1400 used for other FSA and CCC programs.

• Correcting the date applicable to the definition of "native sod" from the date of publication of the final rule in the **Federal Register** to the date of enactment of the 2008 Farm Bill, which was June 18, 2008.

• Correcting the definition of "nonindustrial private forest land," by replacing a reference to an applicable US Forest Service regulation that defines that term to the authorizing legislation for that definition, which is the Cooperative Forestry Assistance Act of 1978 (16 U.S.C. 2103(a), as amended).

• Adding a definition of "person" that references the definition in 7 CFR part 1400 used for other FSA and CCC programs.

• Removing the definition of "related-party transaction" because this rule also removes all the provisions using that term.

• Clarifying the definition of "renewable biomass" by removing the phrase "that would not otherwise be used for higher-value products" from the parenthetical remark describing vegetative waste as "(including wood waste and wood residues that would not otherwise be used for higher-value products)." The higher-value product limitation on matching payments applies to all woody biomass, not just waste and residues. In addition, it is a regulatory requirement and was incorrectly included in the definition. Also, this rule clarifies that payment is not authorized for otherwise eligible material that must be separated from higher-value products after delivery to a biomass conversion facility.

• Correcting the definition of socially-disadvantaged farmer or rancher to conform to section 2501(e) of the Food, Agriculture, Conservation, and Trade Act of 1990 (7 U.S.C. 2279(e)).

• Removing the definition of "United States" because no such definition is required in the BCAP regulations,

• In § 1450.3, "General," in the paragraph on the objectives of BCAP, adding a reference to the establishment of crops for conversion to biobased products.

Substantive changes in subpart B for matching payments include:

• Adding a new § 1451.100 to provide a general description of subpart B.

• Amending § 1450.101(a)(2)(ii) to clarify that a qualified biomass conversion facility must retain all records for a period of 3 years after delivery of the eligible material (rather than 3 years after the application).

• Amending § 1450.101(a)(2)(vii) to remove provisions related to vegetative waste and historical baselines, and to add a new provision requiring that the biomass conversion facility pay fair market value for the eligible material regardless of whether the seller has applied for or will receive a BCAP matching payment.

• Adding a new § 1450.101(a)(2)(viii) to require a certification that eligible material will be converted into heat, power, biobased products, or advanced biofuels.

• Removing the reference to "related-party transaction" in § 1450.102.

• Revising § 1450.103, "Eligible Material," to remove references to black liquor, and to clarify that the material owner must have harvested the material directly from the land in accordance with a conservation plan, forest stewardship plan, or other equivalent plan.

• Revising § 1450.103, "Eligible Material," to remove the provisions allowing partial payment for comingled materials on non-contract land. Payment is not authorized for any otherwise eligible material that must be separated from higher-value product after delivery to a biomass conversion facility.

• Revising § 1450.103, "Eligible Material," to clarify that in order to qualify for a matching payment, woody biomass harvested or collected from non-Federal land outside of BCAP contract acreage (acreage under an establishment payments and annual payments contract) must be by-products of preventative treatments, must not have a higher value use, and must meet the other requirements for renewable biomass obtained from Federal land.

• Amending § 1450.104 to require that letters of intent be binding.

• Revising § 1450.106, "Payments," to provide that the 2-year payment period is for BCAP as implemented through the regulation and to address the BCAP NOFA, and that payments will be paid at a rate of $1 for each $1 per dry ton provided by a qualified biomass conversion facility for the market-based sale of eligible material in an amount up to $45 per dry ton. The "fair market value" is a new requirement that biomass conversion facilities not have a different payment rate for BCAP participants than for other biomass sellers. Options discussed in the proposed rule for tiered payment rates and for biomass production above a historical baseline are not included in this final rule.

Substantive changes in subpart C for establishment payments and annual payments include:

• Amending § 1450.201 to clarify that a project area proposal must include a description of the sources of the renewable biomass within the project area. Adding a provision to § 1450.204 that eligible land must be physically and legally capable of producing an eligible crop to be considered eligible land.

• Removing specific references to types of agricultural land in § 1450.204 because the list of the types of land included in the term "agricultural land" is specified in the definitions section.

• Removing a specific date that eligible land must not be native sod, because that date is provided in the definitions section.

• In § 1450.212, removing a reference to specific reasons that establishment payments may be authorized for practices that have previously been paid for, to give CCC more flexibility for funding replacement or restoration practices.

• In § 1450.214, adding a reference to incentive payments, to give CCC flexibility to implement such payments as needed for specific priority biomass crops.

• In § 1450.214, clarifying the amount of reduction in payment for delivery of eligible crops to a biomass conversion facility and for other uses.

Executive Order 12866

This rule has been determined to be economically significant and was reviewed by the Office of Management and Budget (OMB) under Executive Order 12866. The Cost Benefit Analysis is summarized below and is available from the contact information listed above.

Cost Benefit Analysis Summary

BCAP is intended to assist agricultural and forest land owners and operators with the establishment and production of eligible crops for conversion to bioenergy in selected project areas and with the collection, harvest, storage, and transportation of eligible material for use in a biomass conversion facility.

BCAP is authorized through fiscal year (FY) 2012. The limited time remaining in the 2008 Farm Bill cycle,

the specific provisions in the 2008 Farm Bill on materials and crops eligible to receive payments, and the short time window for developing and submitting project proposals associated with establishment and annual payments essentially limits the impact of BCAP to that of a transfer payment to biomass producers who deliver their materials and crops to existing biomass conversion facilities. Establishment payments and annual payments are provided for eligible crops on eligible land within project areas that satisfy selection criteria. Based on USDA and Department of Energy data on existing facilities and facilities nearing operational status, we assume that 32 project areas will be approved. All of these project areas are assumed to be associated with acreage that receives annual payments and most of these acres—those growing perennial energy crops—will also receive support to defray establishment costs. A small amount of technical assistance will be provided to assist producers in establishing biomass crops. Matching payments are provided to assist producers with the collection, harvest, storage, and transportation costs of biomass feedstock delivered to qualifying biomass conversion facilities, which may or may not be associated with project areas. Eligible material that qualifies for payment is specified in the rule as material that is collected directly from the land, is harvested and transported solely for bioenergy and biobased products purposes, and would not otherwise be used to produce higher-value products. Further, qualified biomass conversion facilities must pay fair market value for eligible material.

BCAP will help to sustain and accelerate the development of the renewable energy sector. In conjunction with other Federal and State government policies, BCAP will facilitate the transition to renewable energy by helping to produce and supply feedstock for the conversion to bioenergy and biobased products. In the short term, establishment, annual, and matching payments can contribute to the financial viability of BCFs, providing them greater opportunity to innovate and mature sufficiently so that they might compete with fossil fuels.

Annual and total costs for BCAP are presented in Table 1. Total outlays are $461 million in constant (2011) dollars and $442 million in Net Present Value (NPV) terms.[1] Because BCAP benefits are essentially transfer payments to BCAP producers and indirectly to BCFs, the costs to the government (outlays) equal the benefits to those producers and BCFs.

TABLE 1—BCAP COSTS AND BENEFITS BY YEAR

[2011 $ millions]

Fiscal Year	Establishment Cost Share	Annual Payments	Matching Payments	Technical Assistance	Annual Total
2011	61	4	132	3	199
2012	61	6	132	3	201
2013	.....	6	–	.....	6
2014	.....	5	.....	.....	5
2015	.....	5	.....	.....	5
2016	.....	6	.....	.....	6
2017	.....	4	.....	.....	4
2018	.....	4	.....	.....	4
2019	.....	5	.....	.....	5
2020	.....	3	.....	.....	3
2021	.....	3	.....	.....	3
2022	.....	5	.....	.....	5
2023	.....	4	.....	.....	4
2024	.....	4	.....	.....	4
2025	.....	5	.....	.....	5
2026	.....	3	.....	.....	3
Totals	122	71	264	5	461

Note: Due to rounding, the sum of reported figures may not equal totals.

Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601, CCC has determined that there will not be a significant economic impact on a substantial number of small entities. Entities affected by this rule are producers of eligible crops, eligible biomass material owners, and biomass conversion facilities. The small business size standards for these types of entities are no more than:

- $750,000 per year gross revenue for crop production (producers of eligible crops—NIACS 111);
- $7 million per year gross revenue for post harvest crop activities (eligible material owners—NIACS 115114); and
- 4 million megawatt hours per year for other electric power generation (biomass conversion facilities—NIACS 221119).

Given these size standards, it is reasonable to assume that many of businesses involved in BCAP will be small businesses.

We expect that approximately 5,000 producers of eligible crops and 32 biomass conversion facilities may receive establishment payments and annual payments and approximately 975 eligible material owners (that are not affiliated with a biomass conversion facility) may deliver biomass that qualifies for a matching payment and 87 biomass conversion facilities may be affected (which includes the 32, above) may receive biomass for which a matching payment was made. However, since the final rule requires that biomass conversion facilities pay producers for deliveries of eligible material based on fair market value, producers of eligible crops and materials and eligible biomass material owners are not expected to be significantly impacted. And given the scale of biomass conversion facility

[1] All NPV calculations assume a 3% discount rate.

output, as well as the limited duration of BCAP, biomass conversion facilities are also not expected to be significantly impacted by BCAP.

Environmental Review

FSA prepared a Final Programmatic Environmental Impact Statement (PEIS) for BCAP and the NOFA was published in the **Federal Register** on June 25, 2010 (75 FR 36386). The Record of Decision (ROD) regarding FSA implementation of BCAP according to the provisions of the 2008 Farm Bill is being published in today's **Federal Register**. The BCAP PEIS is being completed in accordance with the National Environmental Policy Act (NEPA, 42 U.S.C. 4321–4347) and FSA regulations (7 CFR part 799). The decision record summarizes the reasons for FSA selecting the proposed action alternatives based on the program's expected environmental and socioeconomic impacts and benefits as documented in the PEIS, all of which were considered in the decision.

Executive Order 12372

This program is not subject to Executive Order 12372, which requires consultation with State and local officials. See the notice related to 7 CFR part 3015, subpart V, published in the **Federal Register** on June 24, 1983 (48 FR 29115).

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This final rule is not retroactive and it does not preempt State or local laws, regulations, or policies unless they present an irreconcilable conflict with this rule. Before any judicial action may be brought regarding the provisions of this rule the administrative appeal provisions of 7 CFR parts 11 and 780 must be exhausted.

Executive Order 13132

The policies contained in this rule do not have any substantial direct effect on 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. Nor does this rule impose substantial direct compliance costs on State and local governments. Therefore, consultation with the States is not required.

Executive Order 13175

The policies contained in this rule do not have Tribal implications that preempt Tribal law.

FSA conducted two formal consultations with Tribal governments on BCAP prior to the publication of this final rule. Both of the Tribal consultations were conducted through teleconferences. All Federally recognized Tribes were invited to the first consultation, which was held on July 21, 2010. A transcript of the teleconference call is available upon request (*see* **FOR FURTHER INFORMATION CONTACT** above or contact Ben Horter, USDA FSA, Federal Preservation Officer, (202) 690–1164). The Forest County Potawatomi Community requested a separate government-to-government consultation on BCAP, which was held on July 22, 2010. Each of the Tribal consultations was led by the FSA Deputy Administrator for Farm Programs with representation from the FSA Administrator's office as well as the USDA Office of Tribal Relations.

During the Tribal consultations, Tribes commented on aspects of BCAP that they support and other aspects that they oppose. The full discussion of the issues presented during the Tribal consultations and the FSA responses are included above as the issues were also raised by other commenters and each of the Tribes had submitted in written comments including the same issues during the comment period for the proposed rule.

Positions and issues presented during the Tribal consultations included:

- Support for the establishment payment and annual payment provisions of the proposed rule.
- Support for the use of soil rental rates similar to those used under CRP for determining annual payments.
- Support for the proposed rule and the definition of eligible material owner.
- Opposition to the baseline concept in the proposed rule matching payment options.
- Concern about and request for clarification on the restriction on related-party transactions.
- Suggestion that biomass conversion facilities producing wood chips and wood pellets should be eligible to become a qualified biomass conversion facility for converting renewable biomass to advanced biofuels.
- Request for confirmation that a biomass conversion facility may be an eligible material owner.
- Request for confirmation that only wood waste and wood residues could not be used for higher-value products.
- Opposition to the matching payment options that favored advanced biofuels over heat, power, and biobased products.

For the full discussion of these issues, see the comments and responses sections above for §§ 1450.101, 1450.102, 1450.103, 1450.106, 1450.200 and 1450.214.

Unfunded Mandates

Title II of the Unfunded Mandate Reform Act of 1995 (UMRA) (Pub. L. 104–4) establishes requirements for Federal agencies to assess the effects of their regulatory actions that impose "Federal Mandates" that may result in expenditures to State, local, or Tribal governments, in the aggregate, or the private sector, of $100 million or more in any one year. This rule contains no Federal mandates as defined by Title II of UMRA for State, local, or Tribal governments or for the private sector. Therefore, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule has been determined to be Major under the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121) (SBREFA). SBREFA requires that an agency delay the effective date of a major rule for 60 days from the date of publication to allow for Congressional review. CCC finds that it is contrary to the public interest to delay the effective date of this final rule pending a 60-day Congressional review period. Because the program is tied to the agricultural production cycle, a 60-day delay risks deferring the establishment of biomass crops by an additional crop year, significantly diminishing the prospects of the public to obtain both critical information for the reauthorization of this program as well as physical feedstocks for meeting national energy goals.

The purpose of BCAP is to begin the cultivation of unconventional, non-food non-feed biomass crops for energy. The planting season for many promising herbaceous biomass feedstock crops, including switchgrass and miscanthus, begins in the early spring. Most woody biomass crops, such as hybrid poplar and willow, are established in the fall. Because of the new and voluntary nature of BCAP, producers must know well in advance the details of the final BCAP regulation in order to evaluate the risk of participating in a BCAP project area, compared with the revenue security of maintaining conventional practices. Allowing the rule to become effective immediately provides the opportunity for FSA to immediately evaluate proposals submitted by the public and for project sponsors to initiate environmental assessments that may take from 3 to 6 months to complete. If this is the case, project

areas may be approved with sufficient time for producers to establish biomass crops for the upcoming growing season.

Additionally, with the enactment of the updated Renewable Fuel Standard Program in 2008, the affordable production of next-generation advance biofuels has not yet kept pace with the revised Federal targets. The success of these next-generation fuels requires a sufficient base of next-generation crops—crops that typically requires several years to become established. Should the BCAP rule not take effect in time for the 2011 crop year, insufficient information will exist for Congress to evaluate this program during its reauthorization in 2012, further delaying any contributions BCAP can make to national Renewable Fuel Standard Program targets.

Federal Assistance Programs

The title and number of the Federal assistance program in the Catalog of Federal Domestic Assistance to which this proposed rule would apply is 10.087—Biomass Crop Assistance Program.

Paperwork Reduction Act

In general, FSA will use information submitted for BCAP to determine program eligibility, qualifications for payments, and calculate the amount of payments. For the matching payments, applicants will request to become a qualified biomass conversion facility, applicants will register as an eligible material owner and then, after delivery of eligible material, provide actual delivery information to request matching payments for the collection, harvest, storage, and transportation of eligible material for use in a biomass conversion facility. For the administration of project areas, FSA will use proposal information from project sponsors to review project area criteria for the selection of BCAP project areas. After the selection of project areas, FSA will use information submitted by producers to determine eligibility, award contracts for establishment and annual production payments, and determine the need for an amount of the payments. Furnishing the data is voluntary; however, the failure to provide data could result in program benefits being withheld or denied.

In accordance with the Paperwork Reduction Act of 1995, FSA requested comments from all interested individuals and organizations on a revision of new information collection activities associated with BCAP. Several comments included issues concerning information collection. Detailed discussion of all comments and responses are provided earlier in this document. Comments specific to the information collection requirements associated with this rule are highlighted here, and all of the comments and responses related to information collection are included in the full information collection request submitted for OMB approval.

One comment (*see* § 1450.201 comments and responses above) suggested that general information rather than producer specific information should be required as part of the information collected for project area proposals. FSA had intended to collect general information in the project area proposal under the proposed rule, but clarified the language in this rule.

One comment (*see* § 1450.100 comments and responses above) was concerned that FSA should collect information concerning the point-of-origin of eligible materials while minimizing the administrative burden of participating in the program. FSA modified the forms (BCAP–10A and BCAP–10B) to record farm and tract data for all land producing eligible materials.

One comment (*see* § 1450.201 comments and responses above) suggested that FSA provide a template project area proposal that outlines an acceptable proposal. Project area proposals will inherently be unique depending on what the project sponsor chooses to propose. It would be administratively infeasible to provide a template that applies to all potential issues and variability across the country.

BCAP will provide financial assistance for collection, harvest, storage, and transportation of eligible material nationwide. BCAP will provide financial assistance in the form of establishment payments for perennial crops and annual rental payments for perennial and annual crops in approved BCAP project areas.

Copies of all forms, regulations, and instructions referenced in this rule may be obtained from FSA. Data furnished by the applicants will be used to determine eligibility for program benefits. Furnishing the data is voluntary; however, the failure to provide data could result in program benefits being withheld or denied.

In addition to requesting comments on the information collection included in the proposed rule, FSA also had a 60-day comment period for the BCAP NOFA that was published in the **Federal Register** on June 11, 2009 (74 FR 27767–27772) to solicit public for the information collection request for the matching payment funds available for the collection, harvest, storage, and transportation of eligible material.

The information collection required by this rule has been approved by OMB under the Paperwork Reduction Act of 1995. The approved burden hours will be incorporated into the existing approval under OMB control number 0560–0082, which includes much of the same information for other conservation programs.

E-Government Act Compliance

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

List of Subjects in 7 CFR Part 1450

Administrative practice and procedure, Agriculture, Energy, Environmental protection, Grant programs—agriculture, Natural resources, Reporting and recordkeeping requirements, Technical assistance.

■ For the reasons discussed in the preamble, the Commodity Credit Corporation (USDA) adds 7 CFR part 1450 to read as follows:

PART 1450—BIOMASS CROP ASSISTANCE PROGRAM (BCAP)

Subpart A—Common Provisions

Sec.

Subpart B—Matching Payments

Subpart C—Establishment Payments and Annual Payments

Authority: 7 U.S.C. 8111.

Subpart A—Common Provisions

§ 1450.1 Administration.

(a) The regulations in this part are administered under the general supervision and direction of the Executive Vice President, Commodity Credit Corporation (CCC), or a designee. In the field, the regulations in this part will be implemented by the Farm Service Agency (FSA) State and county committees ("State committees" and "county committees," respectively).

(b) State executive directors, county executive directors, and State and county committees do not have the authority to modify or waive any of the provisions in this part unless specifically authorized by the FSA Deputy Administrator for Farm Program (Deputy Administrator).

(c) The State committee may take any action authorized or required by this part to be taken by the county committee, but which has not been taken by such committee, such as:

(1) Correct or require a county committee to correct any action taken by such county committee that is not in accordance with this part; or

(2) Require a county committee to withhold taking any action that is not in accordance with this part.

(d) No delegation of authority to a State or county committee will preclude the Executive Vice President, CCC, or a designee, from determining any question arising under this part or from reversing or modifying any determination made by a State or county committee.

(e) Data furnished by participants will be used to determine eligibility for program benefits. Furnishing the data is voluntary; however, the failure to provide data could result in program benefits being withheld or denied.

§ 1450.2 Definitions.

(a) The definitions in part 718 of this chapter apply to this part and all documents issued in accordance with this part, except as otherwise provided in this section.

(b) The following definitions apply to this part:

Advanced biofuel means fuel derived from renewable biomass other than corn kernel starch, including biofuels derived from cellulose, hemicellulose, or lignin; biofuels derived from sugar and starch (other than ethanol derived from corn kernel starch); biofuel derived from waste material, including crop residue, other vegetative waste material, animal waste, food waste, and yard waste; diesel-equivalent fuel derived from renewable biomass including vegetable oil and animal fat; biogas (including landfill gas and sewage waste treatment gas) produced through the conversion of organic matter from renewable biomass; and butanol or other alcohols produced through the conversion of organic matter from renewable biomass; and other fuel derived from cellulosic biomass.

Agricultural land means cropland, grassland, pastureland, rangeland, hayland, and other land on which food, fiber, or other agricultural products are produced or capable of being produced.

Animal waste means the organic animal waste of animal operations such as confined beef or dairy, poultry, or swine operations including manure, contaminated runoff, milking house waste, dead poultry, bedding, and spilled feed. Depending on the poultry system, animal waste can also include litter, wash-flush water, and waste feed.

Annual payment means the annual payment specified in the BCAP contract for BCAP project areas that is issued to a participant for placing eligible land in BCAP.

Beginning farmer or rancher means, as determined by CCC, a person or entity who:

(1) Has not been a farm or ranch operator or owner for more than 10 years,

(2) Materially and substantially participates in the operation of the farm or ranch, and

(3) If an entity, is an entity in which at least 50 percent of the members or stockholders of the entity meet the first two requirements of this definition.

Biobased product means a product determined by CCC to be a commercial or industrial product (other than food or feed) that is:

(1) Composed, in whole or in significant part, of biological products, including renewable domestic agricultural materials and forestry materials; or

(2) An intermediate ingredient or feedstock.

Bioenergy means renewable energy produced from organic matter. Organic matter may be used directly as a fuel, be processed into liquids and gases, or be a residual of processing and conversion.

Biofuel means a fuel derived from renewable biomass.

Biomass conversion facility means a facility that converts or proposes to convert renewable biomass into heat, power, biobased products, or advanced biofuels.

Conservation district is as defined in part 1410 of this chapter.

Conservation plan means a schedule and record of the participant's decisions and supporting information for treatment of a unit of land or water, and includes a schedule of operations, activities, and estimated expenditures for eligible crops and the collection or harvesting of eligible material, as appropriate, and addresses natural resource concerns including the sustainable harvesting of biomass, when appropriate, by addressing the site-specific needs of the landowner.

Contract acreage means eligible land that is covered by a BCAP contract between the producer and CCC.

Delivery means the point of delivery of an eligible crop or eligible material, as determined by the CCC.

Deputy Administrator means the FSA Deputy Administrator for Farm Programs, or a designee.

Dry ton means one U.S. ton measuring 2,000 pounds. One dry ton is the amount of renewable biomass that would weigh one U.S. ton at zero percent moisture content.

Eligible crop means a crop of renewable biomass as defined in this section excluding:

(1) Any crop that is eligible to receive payments under Title I, "Commodity Programs," of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110–246) or an amendment made by that title, including, but not limited to, barley, corn, grain sorghum, oats, rice, or wheat; honey; mohair; certain oilseeds such as canola, crambe, flaxseed, mustard seed, rapeseed, safflower seed, soybeans, sesame seed, and sunflower seeds; peanuts; pulse crops such as small chickpeas, lentils, and dry peas; dairy products; sugar; wool; and cotton boll fiber; and

(2) Any plant that CCC has determined to be either a noxious weed or an invasive species. With respect to noxious weeds and invasive species, a list of such plants will be available in the FSA county office.

Eligible material is renewable biomass as defined in this section excluding:

(1) Material that is whole grain from any crop that is eligible to receive

payments under Title I of the Food, Conservation, and Energy Act of 2008 or an amendment made by that title, including, but not limited to, barley, corn, grain sorghum, oats, rice, or wheat; honey; or material that is mohair; certain oilseeds such as canola, crambe, flaxseed, mustard seed, rapeseed, safflower seed, soybeans, sesame seed, and sunflower seeds; peanuts; pulse crops such as small chickpeas, lentils, and dry peas; dairy products; sugar; wool; and cotton boll fiber;

(2) Animal waste and by-products of animal waste including fats, oils, greases, and manure;

(3) Food waste and yard waste; and

(4) Algae.

Eligible material owner, for purposes of the matching payment, means a person or entity having the right to collect or harvest eligible material, who has the risk of loss in the material that is delivered to an eligible facility and who has directly or by agent delivered or intends to deliver the eligible material to a qualified biomass conversion facility, including:

(1) For eligible material harvested or collected from private lands, including cropland, the owner of the land, the operator or producer conducting farming operations on the land, or any other person designated by the owner of the land; and

(2) For eligible material harvested or collected from public lands, a person having the right to harvest or collect eligible material pursuant to a contract or permit with the US Forest Service or other appropriate Federal agency, such as a timber sale contract, stewardship contract or agreement, service contract or permit, or related applicable Federal land permit or contract, and who has submitted a copy of the permit or contract authorizing such collection to CCC.

Equivalent plan means a plan approved by a State or other State agency or government entity that is similar to and serves the same purpose as a forest stewardship plan and has similar goals, objectives, and terms. These plans generally address natural resource concerns including the sustainable harvesting of biomass, when appropriate, by addressing the site-specific needs of the landowner.

Establishment payment means the payment made by CCC to assist program participants in establishing the practices required for non-woody perennial crops and woody perennial crops, as specified in a producer contract under the project portion of BCAP.

Food waste means, as determined by CCC, a material composed primarily of food items, or originating from food items, or compounds from domestic, municipal, food service operations, or commercial sources, including food processing wastes, residues, or scraps.

Forest stewardship plan means a long-term, comprehensive, multi-resource forest management plan that is prepared by a professional resource manager and approved by the State Forester or equivalent State official. Forest stewardship plans address the following resource elements wherever present, in a manner that is compatible with landowner objectives concerning:

(1) Soil and water;

(2) Biological diversity;

(3) Range;

(4) Aesthetic quality;

(5) Recreation;

(6) Timber;

(7) Fish and wildlife;

(8) Threatened and endangered species;

(9) Forest health;

(10) Archeological, cultural and historic sites;

(11) Wetlands;

(12) Fire; and

(13) Carbon cycle.

Higher-value product means an existing market product that is comprised principally of an eligible material or materials and, in some distinct local regions, as determined by the CCC, has an existing market as of October 27, 2010. Higher-value products may include, but are not limited to, products such as mulch, fiberboard, nursery media, lumber, or paper.

Highly erodible land means land as determined as specified in part 12 of this title.

Indian tribe has the same meaning as in 25 U.S.C. 450b (section 4 of the Indian Self-Determination and Education Assistance Act).

Institution of higher education has the same meaning as in 20 U.S.C. 1002(a) (section 102(a) of the Higher Education Act of 1965).

Intermediate ingredient or feedstock means an ingredient or compound made in whole or in significant part from biological products, including renewable agricultural material (including plant, animal, and marine material), or forestry material that is subsequently used to make a more complex compound or product.

Legal entity has the same meaning as in the regulations in § 1400.3 of this chapter.

Matching payments means those CCC payments provided for eligible material delivered to a qualified biomass conversion facility.

Native sod means land:

(1) On which the plant cover is composed principally of native grasses, grasslike plants, forbs, or shrubs suitable for grazing and browsing; and

(2) That had never been tilled for the production of an annual crop as of June 18, 2008.

Nonindustrial private forest land means, as defined in 16 U.S.C. 2103a (the Cooperative Forestry Assistance Act of 1978, as amended), rural lands with existing tree cover, or suitable for growing trees, where the land is owned by any private individual, group, association, corporation, Indian tribe, or other private legal entity.

Offer means, unless otherwise indicated, the per-acre rental payment requested by the owner or operator in such owner's or operator's request to participate in the establishment payment and annual payment component of BCAP.

Operator means a person who is in general control of the land enrolled in BCAP, as determined by CCC.

Participant means a person who is participating in BCAP—either as a person who has applied for and is eligible to receive payments, has a BCAP contract, or is a project sponsor.

Payment period means a contract period of either up to 5 years for annual and non-woody perennial crops, or up to 15 years for woody perennial crops, during which the participant receives an annual payment under the establishment payment and annual payment component of BCAP.

Person has the same meaning as in the regulations in § 1400.3 of this chapter. In addition, for BCAP, the term "producer" means either an owner or operator of BCAP project acreage that is physically located in a BCAP project area, or a producer of an eligible crop produced on that acreage.

Producer means, with respect to subpart B of this part, a person who had the risk of loss in the production of the material that is the subject of the BCAP payment; and with respect to subpart C of this part, an owner or operator of contract acreage that is physically located within a BCAP project area or a producer of an eligible crop produced on that acreage and who has the risk of loss in the relevant crop at the relevant period of time or who will have the risk of loss in crops required to be produced.

Project area means a geographic area with specified boundaries submitted by a project sponsor and approved by CCC under the establishment payment and annual payment component of BCAP.

Project sponsor means a group of producers or a biomass conversion facility who proposes a project area.

Qualified biomass conversion facility means a biomass conversion facility that meets all the requirements for BCAP

qualification, and whose facility representatives enter into a BCAP agreement with CCC.

Renewable biomass means:

(1) Appropriate materials, pre-commercial thinnings, or invasive species from National Forest System land and U.S. Department of the Interior, Bureau of Land Management land that:

(i) Are by-products of preventive treatments that are removed to reduce hazardous fuels, to reduce or contain disease or insect infestation, or to restore ecosystem health;

(ii) Would not otherwise be used for higher-value products; and

(iii) Are harvested in accordance with applicable law and land management plans and the requirements for old-growth maintenance, restoration, and management direction of 16 U.S.C. 6512 (specifically, sections 102(e)(2), (3), and (4) of the Healthy Forests Restoration Act of 2003 and large-tree retention provisions of subsection (f)); or

(2) Any organic matter that is available on a renewable or recurring basis from non-Federal land or land belonging to an Indian or Indian Tribe that is held in trust by the United States or subject to a restriction against alienation imposed by the United States, including:

(i) Renewable plant material, including:

(A) Feed grains;

(B) Other agricultural commodities;

(C) Other plants and trees; or

(D) Algae;

(ii) Waste material, including:

(A) Crop residue;

(B) Other vegetative waste material (including wood waste and wood residues);

(C) Animal waste and byproducts (including fats, oils, greases, and manure); and

(D) Food waste and yard waste.

Socially disadvantaged farmer or rancher means, unless other classes of persons are approved by CCC in writing, a farmer or rancher who is a member of a group whose members have been subject to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities. Groups include:

(1) American Indians or Alaskan Natives;

(2) Asians or Asian Americans;

(3) Blacks or African Americans;

(4) Native Hawaiians or other Pacific Islanders; and

(5) Hispanics.

Technical assistance means assistance in determining the eligibility of land and practices for BCAP, implementing and certifying practices, ensuring contract performance, and providing annual rental rate surveys. The technical assistance provided in connection with BCAP to owners or operators, as approved by CCC, includes, but is not limited to: Technical expertise, information, and tools necessary for the conservation of natural resources on land; technical services provided directly to farmers, ranchers, and other eligible entities, such as conservation planning, technical consultation, and assistance with design and implementation of eligible practices; and technical infrastructure, including activities, processes, tools, and functions needed to support delivery of technical services, such as technical standards, resource inventories, training, data, technology, monitoring, and effects analyses.

Tribal government means any Indian tribe, band, nation, or other organized group, or community, including pueblos, rancherias, colonies and any Alaska Native Village, or regional or village corporation as defined in or established pursuant to 43 U.S.C. 1601–1629h (the Alaska Native Claims Settlement Act), that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Violation means an act by the participant, either intentional or unintentional, that would cause the participant to no longer be eligible to receive or retain all or a portion of BCAP payments.

Yard waste means any renewable biomass generated from municipal or residential land, such as urban forestry materials, construction or demolition materials, trimmings from grasses and trees, or biomass removed due to invasive species or weather-related disaster, that can be separated from and has low potential (such as contamination with plastics, metals, chemicals, or other toxic compounds that cannot be removed) for the generation of toxic byproducts resulting from conversion, and that otherwise cannot be recycled for other purposes (such as post-consumer waste paper).

§ 1450.3 General.

(a) The objectives of BCAP are to:

(1) Support the establishment and production of eligible crops for conversion to bioenergy and biobased products in selected project areas; and

(2) Assist agricultural and forest landowners and operators with matching payments to support the collection, harvest, storage, and transportation costs of eligible material for use in a biomass conversion facility.

(b) A participant must implement and adhere to a conservation plan, forest stewardship plan, or equivalent plan prepared in accordance with BCAP guidelines, as established and determined by CCC. A conservation plan, forest stewardship plan, or equivalent plan for contract acreage must be implemented by a participant and must be approved by the conservation district in which the lands are located, or, in the case of Federal lands, the appropriate approval authority of jurisdiction. If the conservation district declines to review the conservation plan, forest stewardship plan, or equivalent plan, the provider of technical assistance may take such further action as is needed to account for lack of such review.

(c) Agricultural and forest landowners and operators must comply with any applicable existing conservation plan, forest stewardship plan, or equivalent plan and all other applicable laws, regulations, or Executive Orders for any removal of eligible material for use in a biomass conversion facility to receive matching payments.

(d) Except as otherwise provided in this part, a participant may receive, in addition to any payments under this part, financial assistance, rental or easement payments, tax benefits, or other payments from a State or a private organization in return for enrolling lands in BCAP, without any commensurate reduction in BCAP payments.

§ 1450.4 Violations.

(a)(1) If a participant fails to carry out the terms and conditions of a BCAP contract, CCC may terminate the BCAP contract.

(2) If the BCAP contract is terminated by CCC in accordance with this paragraph:

(i) The participant will forfeit all rights to further payments under the contract and must refund all payments previously received, plus interest; and

(ii) The participant must pay liquidated damages to CCC in an amount as specified in the contract.

(b) CCC may reduce a demand for a refund under this section to the extent CCC determines that such relief would be appropriate and would not deter the accomplishment of the purposes of BCAP.

§ 1450.5 Performance based on advice or action of USDA.

(a) The provisions of § 718.303 of this title relating to performance based on the action or advice of an authorized representative of USDA applies to this part, and may be considered as a basis

to provide relief to persons subject to sanctions under this part to the extent that relief is otherwise permitted by this part.

(b) [Reserved]

§ 1450.6 Access to land.

(a) For purposes related to this program, the participant must upon request provide any representative of USDA, or designee thereof, with access to land that is:

(1) The subject of an application for a contract under this part; or

(2) Under contract or otherwise subject to this part.

(b) For land identified in paragraph (a) of this section, the participant must provide such representatives or designees with access to examine records for the land to determine land classification, eligibility, or for other purposes, and to determine whether the participant is in compliance with the terms and conditions of the BCAP contract.

§ 1450.7 Division of payments and provisions about tenants and sharecroppers.

(a) Payments received under this part will be divided as specified in the applicable contract. CCC may refuse to enter into a contract when there is a disagreement among persons or legal entities seeking enrollment as to a person's or legal entity's eligibility to participate in the contract as a tenant or sharecropper, and there is insufficient evidence, as determined by CCC, to indicate whether the person or legal entity seeking participation as a tenant or sharecropper has an interest in the acreage offered for enrollment in the BCAP.

(b) CCC may remove an operator or tenant from a BCAP contract when:

(1) The operator or tenant requests in writing to be removed from the BCAP contract;

(2) The operator or tenant files for bankruptcy and the trustee or debtor in possession fails to affirm the contract, to the extent permitted by applicable bankruptcy laws;

(3) The operator or tenant dies during the contract period and the administrator of the estate fails to succeed to the contract within a period of time determined appropriate by CCC; or

(4) A court of competent jurisdiction orders the removal of the operator or tenant from the BCAP contract and such order is received by CCC.

(c) Tenants who fail to maintain tenancy on the acreage under contract for any reason may be removed from a contract by CCC.

§ 1450.8 Payments not subject to claims.

(a) Subject to part 1403 of this chapter, any payment or portion of the payment due any person or legal entity under this part will be allowed without regard to questions of title under State law, and without regard to any claim or lien in favor of any creditor, except agencies of the U.S. Government.

(b) [Reserved]

§ 1450.9 Assignments.

(a) Participants may assign the right to receive cash payments under BCAP, in whole or in part, as provided in part 1404 of this chapter.

(b) [Reserved]

§ 1450.10 Appeals.

(a) Except as provided in paragraph (b) of this section, a person or legal entity applying for participation may appeal or request reconsideration of an adverse determination in accordance with the administrative appeal regulations at parts 11 and 780 of this title.

(b) Determinations by the Natural Resources Conservation Service may be appealed in accordance with procedures established under part 614 of this title or otherwise established by the Natural Resources Conservation Service.

§ 1450.11 Scheme or device.

(a) If CCC determines that a person or legal entity has employed a scheme or device to defeat the purposes of this part, or any part, of any USDA program, payment otherwise due or paid such person or legal entity during the applicable period may be required to be refunded, with interest calculated from the date of disbursement of the funds by CCC, as determined appropriate by CCC.

(b) A scheme or device includes, but is not limited to, coercion, fraud, misrepresentation, depriving any other person or legal entity of any payments, or obtaining a payment that otherwise would not be payable.

(c) A new owner or operator or tenant of land subject to this part who succeeds to the contract responsibilities must report in writing to CCC any interest of any kind in the land subject to this part that is retained by a previous participant. Such interest may include a present, future, or conditional interest, reversionary interest, or any option, future or present, on such land, and any interest of any lender in such land where the lender has, will, or can legally obtain, a right of occupancy to such land or an interest in the equity in such land other than an interest in the appreciation in the value of such land occurring after the loan was made. Failure to fully disclose such interest will be considered a scheme or device under this section.

§ 1450.12 Filing of false claims.

(a) If CCC determines that any participant has knowingly supplied false information or has knowingly filed a false claim, such participant will be ineligible for payments under this part with respect to the fiscal year in which the false information or claim was filed and the contract may be terminated, in which case CCC may demand a full refund of all prior payments.

(b) False information or false claims include, but are not limited to, claims for payment for practices that do not comply with the conservation plan, forest stewardship plan, or equivalent plan. Any amounts paid under these circumstances must be refunded to CCC, together with interest as determined by CCC, and any amounts otherwise due the participant will be withheld.

(c) The remedies provided for in this section will be in addition to any other remedy available to CCC and in addition to any criminal penalty or any other remedy available to the United States.

§ 1450.13 Miscellaneous.

(a) Except as otherwise provided in this part, in the case of death, incompetency, or disappearance of any participant, any payments due under this part may be paid to the participant's successor(s) in accordance with part 707 of this title.

(b) Unless otherwise specified in this part, payments under this part will be subject to the compliance requirements of part 12 of this title concerning highly erodible land and wetland conservation and payments.

(c) Any remedies permitted CCC under this part will be in addition to any other remedy, including, but not limited to, criminal remedies or actions for damages in favor of CCC, or the United States as may be permitted by law.

(d) Absent a scheme or device to defeat the purposes of BCAP, when an owner loses control of BCAP acreage enrolled under subpart C of this part due to foreclosure and the new owner chooses not to continue the contract in accordance with § 1450.215 refunds will not be required from any participant on the contract to the extent that the Deputy Administrator determines that forgiving such repayment is appropriate in order to provide fair and equitable treatment.

Subpart B—Matching Payments

§ 1450.100 General.

(a) A person or legal entity with the right to collect or harvest eligible

material for the sale and delivery of such eligible material to a qualified biomass conversion facility, may be eligible for payment under the provisions of this subpart.

(b) [Reserved]

§ 1450.101 Qualified biomass conversion facility.

(a) To be considered a qualified biomass conversion facility, a biomass conversion facility must enter into an agreement with CCC and must:

(1) Meet all applicable regulatory and permitting requirements by applicable Federal, State, or local authorities;

(2) Agree in writing to:

(i) Maintain accurate records of all eligible material purchases and related documents regardless of whether matching payments will be sought by the seller; and

(ii) Make available at one place and at all reasonable times for examination by representatives of USDA, all books, papers, records, contracts, scale tickets, settlement sheets, invoices, written price quotations, or other documents related to BCAP for not less than 3 years after the date that eligible material was delivered to the qualified biomass conversion facility;

(iii) Clearly indicate the actual tonnage delivered on the scale ticket or equivalent to be provided to the eligible material owner;

(iv) Calculate a total dry ton weight equivalent of the actual tonnage delivered and provide that measurement to the eligible material owner;

(v) Use commercial weight scales that are certified for accuracy by applicable State or local authorities and accurate moisture measurement equipment to determine the dry ton weight equivalent of actual tonnage delivered;

(vi) Pay fair market value for eligible material regardless of whether the seller has applied for or receives a matching payment authorized by this subpart.

(b) For a qualified biomass conversion facility, CCC can:

(1) Periodically inform the public that payments may be available for deliveries of eligible material to such qualified biomass conversion facility;

(2) Maintain a listing of qualified biomass conversion facilities for general public access and distribution that may include general information about the facility and its eligible material needs; and

(3) Suspend, terminate, or take other actions as appropriate when CCC determines a qualified biomass conversion facility fails to comply with the agreement.

§ 1450.102 Eligible material owner.

(a) In order to be eligible for a payment under this subpart, a person or legal entity must:

(1) Be a producer of an eligible crop that is produced on contract acreage authorized by subpart C of this part; or

(2) Have the right to collect or harvest eligible material and such person may only receive payment if the risk of loss for the material transferred to that person occurred prior to the time the payment is made that will be used to determine the matching payment that is requested under this subpart; and

(3) Certify that the eligible material for which a payment may be issued according to § 1450.106 has been harvested according to a conservation plan, forest stewardship plan, or equivalent plan, and, if not crop residues, are byproducts of preventative treatments that are removed to reduce hazardous fuels, to reduce or contain disease or insect infestation, or to restore ecosystem health.

(b) A qualified biomass conversion facility that meets the requirements of paragraph (a) of this section may be considered an eligible material owner if it otherwise meets the definition in this part.

§ 1450.103 Eligible material that qualifies for payment.

(a) Except for paragraph (b) of this section, in order to qualify, as determined by CCC, for a payment under this subpart:

(1) Eligible material must be renewable biomass that, at a minimum, meets the definition in § 1450.2 and is listed on the official Web site for BCAP as an eligible material at *http://www.fsa.usda.gov/energy;*

(2) Eligible material must be collected or harvested by the eligible material owner:

(i) Directly from:

(A) National Forest System land, Bureau of Land Management land;

(B) Non-Federal land; or

(C) Land belonging to an Indian or Indian tribe that is held in trust by the United States or subject to a restriction against alienation imposed by the United States;

(ii) Consistent with a conservation plan, forest stewardship plan, or plan that CCC determined to be an equivalent plan, that provides the following:

(A) The purpose of the harvest of the eligible material;

(B) The expected volume of the harvest;

(C) The total number of acres to be harvested;

(D) The name of the eligible material owner(s); and

(E) Any additional information, as determined by CCC; and

(iii) Consistent with Executive Order 13112, "Invasive Species. "

(3) Woody eligible material produced on land other than contract acreage must be:

(i) Byproducts of preventative treatments that are removed to reduce hazardous fuels, to reduce or contain disease or insect infestation, or to restore ecosystem health; and

(ii) If harvested from Federal lands then done so in accordance with the requirements for old-growth maintenance, restoration, and management direction provided by 16 U.S.C. 6512 for Federal lands; and

(4) Eligible material must be delivered to a qualified biomass conversion facility (as specified in § 1450.101 and other provisions of these regulations).

(b) Notwithstanding paragraph (a) of this section, payments under this subpart are not authorized for:

(1) Any eligible material delivered before October 27, 2010;

(2) Any eligible material for which payment from a biomass conversion facility was received before the application for payment under this subpart is received and approved by the FSA county office, as specified in § 1450.104;

(3) Any woody eligible material collected or harvested outside contract acreage that would otherwise be used for higher-value products; or

(4) Any otherwise eligible material collected or harvested outside contract acreage that, after delivery to a biomass conversion facility, its campus, or its affiliated facilities, must be separated from an eligible material used for a higher-value market product in order to be used for heat, power, biobased products, or advanced biofuels.

§ 1450.104 Signup.

(a) Applications for participation and requests for payments under this subpart will be accepted on a continuous basis.

(b) An eligible material owner must apply to participate in the matching payments component of BCAP before payment for the eligible material is received from a qualified biomass conversion facility. The application must be submitted to the FSA county office and approved by CCC before any payment is made by the qualified biomass conversion facility for the eligible material.

(c) Applications must include the following:

(1) Based on information obtained from contracts, agreements, or binding letters of intent:

(i) An estimate of the total dry tons of eligible material expected to be sold to the qualified biomass conversion facility;

(ii) The type(s) of eligible material that is expected to be sold;

(iii) The name of the qualified biomass conversion facility that will purchase the eligible material;

(iv) The expected, fair market, per dry ton payment rate the owner plans to receive for the delivery of the eligible material; and

(v) The date or dates the eligible material is expected to be delivered to the qualified biomass conversion facility.

(2) A new or amended conservation plan, forest stewardship plan, or equivalent plan, as specified in § 1450.103.

(d) Eligible material owners who deliver eligible material to more than one qualified biomass conversion facility must submit separate applications for each facility to which eligible material will be delivered.

(e) After delivery, eligible material owners must notify CCC and request the payment. Payments will be disbursed only after delivery is verified by CCC.

(f) Information that must be submitted to CCC in order to request payments includes settlement, summary, or other acceptable data that provide:

(1) Total actual tonnage delivered and a total dry weight tonnage equivalent amount determined by the qualified biomass conversion facility using standard moisture determinations applicable to the eligible material;

(2) Total payment received, including the per dry-ton payment rate(s) matched with actual and dry weight tonnage delivered; and

(3) The qualified biomass conversion facility's certification as to the authenticity of the information.

§ 1450.105 Obligations of participant.

(a) All participants whose payment application was approved must agree to:

(1) Carry out and certify compliance with the terms and conditions of the payment application including adherence to a conservation plan, forest stewardship plan, or equivalent plan, as appropriate; and

(2) Be jointly and severally responsible, if the participant has a share of the payment greater than zero, with other contract participants for compliance with the provisions of such contract and the provisions of this part, and for any refunds or payment adjustments that may be required for violations of any of the terms and conditions of the BCAP contract and this part.

(b) [Reserved]

§ 1450.106 Payments.

(a) Payments under this subpart will be for a term not to exceed 2 years beginning the date that CCC issues the first payment, under this subpart to the participant and for each participant runs from the date that the participant receives a matching payment from CCC even though the participant may over time change facilities. The Deputy Administrator may further limit the period to reflect participation in BCAP for any time prior to October 27, 2010 as the Deputy Administrator deems appropriate. In addition, where ownership of a source of material has changed, or where it is deemed that other circumstances warrant, the Deputy Administrator may apply the time limit applicable to a person or entity or to another person or entity to assure that the 2-year limit is not avoided by private arrangement or other circumstance.

(b) Payments under this subpart will be paid at a rate of $1 for each $1 per dry ton provided by the qualified biomass conversion facility for the market-based sale of eligible material in an amount up to $45 per dry ton.

Subpart C—Establishment Payments and Annual Payments

§ 1450.200 General.

(a) As provided in this subpart, establishment payments and annual payments may be provided by CCC to producers of eligible crops within a project area.

(b) [Reserved]

§ 1450.201 Project area proposal submission requirements.

(a) To be considered for selection as a project area, a project sponsor must submit a proposal to CCC that includes, at a minimum:

(1) A description of the sources of renewable biomass, eligible land, and eligible crops that may be enrolled within the proposed project area;

(2) A letter of commitment from a biomass conversion facility stating that the facility will use, for BCAP purposes, eligible crops intended to be produced in the proposed project area;

(3) Information demonstrating that the biomass conversion facility will have sufficient equity available to operate if the facility is not operational at the time the project area proposal is submitted; and

(4) Other information that gives CCC a reasonable assurance that the biomass conversion facility will be in operation in a timely manner so that it will utilize the eligible crops, as determined by CCC.

(b) The project area description required in paragraph (a) of this section needs to specify geographic boundaries and be described in definite terms such as acres, watershed boundaries, mapped longitude and latitude coordinates, or counties.

(c) The project area needs to be physically located near a biomass conversion facility or facilities, as determined by CCC.

(d) Project area proposals may limit the nature and types of eligible crops to be established within a project area.

§ 1450.202 Project area selection criteria.

(a) In selecting project areas, CCC will consider:

(1) The dry tons of the eligible crops proposed to be produced in the proposed project area and the probability that such crops will be used for BCAP purposes;

(2) The dry tons of renewable biomass projected to be available from sources other than the eligible crops grown on contract acres;

(3) The anticipated economic impact in the proposed project area;

(4) The opportunity for producers and local investors to participate in the ownership of the biomass conversion facility in the proposed project area;

(5) The participation rate by beginning or socially disadvantaged farmers or ranchers;

(6) The impact on soil, water, and related resources;

(7) The variety in biomass production approaches within a project area, including agronomic conditions, harvest and postharvest practices, and monoculture and polyculture crop mixes;

(8) The range of eligible crops among project areas; and

(9) Any other additional criteria, as determined by CCC.

(b) [Reserved]

§ 1450.203 Eligible persons and legal entities.

(a) In order to be eligible to enter into a BCAP contract for this subpart, a person or legal entity must be an owner, operator, or tenant of eligible land within a project area, as defined in § 1450.204 and be the person or entity with the ability to perform under the terms of the contract.

(b) [Reserved]

§ 1450.204 Eligible land.

(a) For the purposes of this subpart, eligible land must be physically and legally capable of producing an eligible crop and must be:

(1) Agricultural land; or
(2) Nonindustrial private forest land.
(b) For the purposes of this subpart, eligible land is not:
(1) Federal- or State-owned land, including land owned by local governments or municipalities;
(2) Land that is native sod;
(3) Land enrolled in the Conservation Reserve Program operated under part 1410 of this chapter;
(4) Land enrolled in the Wetlands Reserve Program operated under part 1467 of this chapter; or
(5) Land enrolled in the Grassland Reserve Program operated under part 1415 of this chapter.

§ 1450.205 Duration of contracts.

(a) Contracts under this subpart will be for a term of up to:
(1) 5 years for annual and non-woody perennial crops; and
(2) 15 years for woody perennial crops.
(b) The establishment time period may vary due to: Type of crop, agronomic conditions (for example, establishment time frame, winter hardiness), and other factors.

§ 1450.206 Obligations of participant.

(a) All participants subject to a BCAP contract must:
(1) Carry out the terms and conditions of the contract;
(2) Make available to CCC or to an institution of higher education or other entity designated by CCC, such information as CCC determines to be appropriate to promote the production of eligible crops and the development of renewable biomass conversion technology;
(3) Comply with the highly erodible land and wetland conservation requirements of part 12 of this chapter;
(4) Implement a:
(i) Conservation plan,
(ii) Forest stewardship plan, or
(iii) Equivalent plan.
(5) Implement the conservation plan, forest stewardship plan, or equivalent plan which is part of such contract, in accordance with the schedule of dates included in such conservation plan, forest stewardship plan, or equivalent plan, unless CCC determines that the participant cannot fully implement the conservation plan, forest stewardship plan, or equivalent plan for reasons beyond the producer's control and CCC and the participant agree to a modified plan.
(6) Demonstrate compliance with the conservation plan, forest stewardship plan, or equivalent plan through required self-certification subject to compliance spot checks, as determined by CCC.
(7) Establish temporary vegetative cover either within the timeframes required by the conservation plan, forest stewardship plan, or equivalent plan or as determined by the Deputy Administrator, if the eligible crops cannot be timely established; and
(8) If the participant has a share of the payment greater than zero, be jointly and severally responsible with the other contract participants for compliance with the provisions of such contract and the provisions of this part, and for any refunds or payment adjustments that may be required for violations of any of the terms and conditions of the contract and this part.
(b) Payments may cease and producers may be subject to contract termination for failure to establish eligible crops.
(c) A contract will not be terminated for failure by the participant to establish an approved cover on the land if, as determined by CCC:
(1) The failure to plant or establish such cover was due to a natural disaster such as excessive rainfall, flooding, or drought; and
(2) The participant establishes the approved cover as soon as practicable after the wet or drought conditions that prevented the establishment of such cover subside.

§ 1450.207 Conservation plan, forest stewardship plan, or equivalent plan.

(a) The producer must implement a conservation plan, forest stewardship plan, or equivalent plan that complies with CCC guidelines and is approved by the appropriate conservation district for the land to be entered in BCAP. If the conservation district declines to review the conservation plan, forest stewardship plan, or equivalent plan, or disapproves the conservation plan, forest stewardship plan, or equivalent plan, such approval may be waived by CCC.
(b) The practices and management activities included in a conservation plan, forest stewardship plan, or equivalent plan, and agreed to by the producer, must be implemented in a cost-effective manner that meets BCAP purposes as determined by CCC.
(c) If applicable, a tree planting plan must be developed and included in the conservation plan, forest stewardship plan, or equivalent plan. Such tree planting plan may allow a reasonable time to complete plantings, as determined by CCC.
(d) Each conservation plan, forest stewardship plan, or equivalent plan, and any revision of the plan, will be subject to approval by CCC.

1450.208 Eligible practices.

(a) Eligible practices are those practices specified in the conservation plan, forest stewardship plan, or equivalent plan that meet all standards needed to cost-effectively establish:
(1) Annual crops;
(2) Non-woody perennial crops; and
(3) Woody perennial crops.
(b) [Reserved]

§ 1450.209 Signup.

(a) Offers for contracts may be submitted on a continuous basis to CCC as determined by the Deputy Administrator.
(b) [Reserved]

§ 1450.210 Acceptability of offers.

(a) Acceptance or rejection of any contract offered will be at the sole discretion of CCC, and offers may be rejected for any reason as determined appropriate to accomplish the purposes of BCAP.
(b) An offer to enroll land in BCAP will be irrevocable for such period as is determined and announced by CCC. The producer will be liable to CCC for liquidated damages if the applicant revokes an offer during the period in which the offer is irrevocable as determined by CCC. CCC may waive payment of such liquidated damages if CCC determines that the assessment of such damages, in a particular case, is not in the best interest of CCC and BCAP.

§ 1450.211 BCAP contract.

(a) In order to enroll land in BCAP, the participant must enter into a contract with CCC.
(b) The contract is comprised of:
(1) The terms and conditions for participation in BCAP;
(2) The conservation plan, forest stewardship plan, or equivalent plan; and
(3) Any other materials or agreements determined necessary by CCC.
(c) In order to enter into a contract, the producer must submit an offer to participate as specified in § 1450.209;
(d) The contract must, within the dates established by CCC, be signed by:
(1) The producer; and
(2) The owners of the eligible land to be placed in the BCAP and other eligible participants, if applicable.
(e) The Deputy Administrator is authorized to approve contracts on behalf of CCC.
(f) CCC will honor contracts even in the event that a project area biomass conversion facility does not become fully or partially operational.
(g) Contracts may be terminated by CCC before the full term of the contract has expired if:

(1) The owner loses control of or transfers all or part of the acreage under contract and the new owner does not wish to continue the contract;

(2) The participant voluntarily requests in writing to terminate the contract and obtains the approval of CCC according to terms and conditions as determined by CCC;

(3) The participant is not in compliance with the terms and conditions of the contract;

(4) The BCAP practice fails or is not established after a certain time period, as determined CCC, and the cost of restoring or establishing the practice outweighs the benefits received from the restoration or establishment;

(5) The contract was approved based on erroneous eligibility determinations; or

(6) CCC determines that such a termination is needed in the public interest.

(h) Except as allowed and approved by CCC where the new owner of land enrolled in BCAP is a Federal agency that agrees to abide by the terms and conditions of the terminated contract, the participant in a contract that has been terminated must refund all or part of the payments made with respect to the contract plus interest, as determined by CCC, and must pay liquidated damages as provided for in the contract and this part. CCC may permit the amount(s) to be repaid to be reduced to the extent that such a reduction will not impair the purposes of BCAP. Further, a refund of all payments need not be required from a participant who is otherwise in full compliance with the contract when the land is purchased by or for the United States, as determined appropriate by CCC.

§ 1450.212 Establishment payments.

(a) Establishment payments will be made available upon a determination by CCC that an eligible practice, or an identifiable portion of a practice, has been established in compliance with the appropriate standards and specifications.

(b) Except as otherwise provided for in this part, such payments will be made only for the cost-effective establishment or installation of an eligible practice, as determined by CCC.

(c) Except as provided in paragraph (d) of this section, such payments will not be made to the same owner or operator on the same acreage for any eligible practices that have been previously established, or for which such owner or operator has received establishment assistance from any Federal agency.

(d) Establishment payments may be authorized for the replacement or restoration of practices on land for which assistance has been previously allowed under BCAP, only if the failure of the original practice was due to reasons beyond the control of the participant, as agreed to by CCC.

(e) In addition, CCC may make partial payments when the participant completes identifiable components of the contract. CCC may make supplemental establishment payments, if necessary.

§ 1450.213 Levels and rates for establishment payments.

(a) CCC will pay not more than 75 percent of the actual or average cost (whichever is lower) of establishing non-woody perennial crops and woody perennial crops specified in the conservation plan, forest stewardship plan, or equivalent plan.

(b) The average cost of performing a practice may be determined by CCC based on recommendations from the State Technical Committee. Such cost may be the average cost in a State, a county, or a part of a State or county, as determined by CCC. This means that the calculated 75 percent of the average cost may represent less than 75 percent of the actual cost for an individual participant.

(c) Except as otherwise provided for in this part, a participant may receive, in addition to any payment under this part, establishment assistance, rental payments, or tax benefits from a State or a private organization in return for enrolling lands in BCAP without a commensurate reduction in BCAP establishment payments.

§ 1450.214 Annual payments.

(a) Annual payments will be made in such amount and in accordance with such time schedule as may be agreed upon and specified in the BCAP contract.

(b) Based on the regulations in § 1410.42 of this chapter and as determined by CCC, annual payments include a payment based on all or a percentage of:

(1) A weighted average soil rental rate for cropland;

(2) The applicable marginal pastureland rental rate for all other land except for nonindustrial private forest land;

(3) For forest land, the average county rental rate for cropland as adjusted for forest land productivity for nonindustrial private forest land; and

(4) Any incentive payment as determined by CCC.

(c) The annual payment will be divided among the participants on a single contract as agreed to in such contract, as determined by CCC.

(d) A participant that has an established eligible crop and is therefore not eligible for establishment payments under § 1450.212 may be eligible for annual payments under the provisions of this section.

(e) In the case of a contract succession, annual payments will be divided between the predecessor and the successor participants as agreed to among the participants and approved by CCC. If there is no agreement among the participants, annual payments will be divided in such manner deemed appropriate by the Deputy Administrator and such distribution may be prorated based on the actual days of ownership of the property by each party.

(f) Annual payments will be reduced, as determined by CCC:

(1) By a percentage of the sum of the sale price and payments under subpart B of this part for the crop collected or harvested from the contract acreage as follows:

(i) By 1 percent if the eligible crop is delivered to a biomass conversion facility for conversion to cellulosic biofuels as defined by 40 CFR 80.1401;

(ii) By 10 percent if the eligible crop is delivered to a biomass conversion facility for conversion to advanced biofuels;

(iii) By 25 percent if the eligible crop is delivered to a biomass conversion facility for conversion to heat, power, or biobased products;

(iv) By 100 percent if the eligible crop is used for a purpose other than conversion to heat, power, biobased products, or advanced biofuels;

(2) If the producer violates a term of the contract; or

(3) In other circumstances deemed necessary or appropriate to carry out BCAP.

§ 1450.215 Transfer of land.

(a)(1) If a new owner or operator purchases or obtains the right and interest in, or right to occupancy of, land subject to a BCAP contract, such new owner or operator, upon the approval of CCC, may become a participant to a new BCAP contract with CCC for the transferred land.

(2) For the transferred land, if the new owner or operator becomes a successor to the existing BCAP contract, the new owner or operator will assume all obligations of the BCAP contract of the previous participant.

(3) If the new owner or operator is approved as a successor to a BCAP contract with CCC, then, except as otherwise determined by the Deputy Administrator:

(i) Establishment payments will be made to the past or present participant who established the practice; and

(ii) Annual payments to be paid during the fiscal year when the land was transferred will be divided between the new participant and the previous participant in the manner specified in § 1450.214(c).

(b) If a participant transfers all or part of the right and interest in, or right to occupancy of, land subject to a BCAP contract and the new owner or operator does not become a successor to such contract within 60 days of such transfer, or such other time as CCC determines to be appropriate, such contract will be terminated with respect to the affected portion of such land, and the original participant:

(1) Forfeits all rights to any future payments for that acreage;

(2) Must refund all previous payments received under the contract by the participant or prior participants, plus interest, except as otherwise specified by CCC. The provisions of § 1450.211(g) will apply.

(c) Federal agencies acquiring property, by foreclosure or otherwise, that contains BCAP contract acreage cannot be a party to the contract by succession. However, through an addendum to the contract, if the current operator of the property is one of the contract participants, the contract may remain in effect and, as permitted by CCC, such operator may continue to receive payments under such contract if CCC determines that such allowance is in the public interest and:

(1) The property is maintained in accordance with the terms of the contract;

(2) Such operator continues to be the operator of the property; and

(3) Ownership of the property remains with such Federal agency.

Signed at Washington, DC, on October 19, 2010.

Jonathan W. Coppess,

Executive Vice President, Commodity Credit Corporation.

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Part IV

Department of Housing and Urban Development

24 CFR Parts 5, 91, 880, et al.
HUD Programs: Violence Against Women Act Conforming Amendments; Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 5, 91, 880, 882, 883, 884, 886, 891, 903, 960, 966, 982, and 983

[Docket No. FR–5056–F–02]

RIN 2577–AC65

HUD Programs: Violence Against Women Act Conforming Amendments

AGENCY: Office of the Secretary, HUD.

ACTION: Final rule.

SUMMARY: This final rule follows a November 28, 2008, interim rule that conformed HUD's regulations to those provisions of the Violence Against Women Act (VAWA), as enacted in January 2006, and subsequently amended in August 2006, that were determined to be self-implementing. VAWA provides statutory protections for victims of domestic violence, dating violence, sexual assault, and stalking. Such protections apply to families receiving rental assistance under HUD's public housing and tenant-based and project-based Section 8 programs. This rule adopts as final the regulations in the November 28, 2008, interim rule, along with certain clarifying changes made in response to public comment, and with some restructuring of the regulations to improve organization within the Code of Federal Regulations.

DATES: *Effective Date:* November 26, 2010.

FOR FURTHER INFORMATION CONTACT: For information about HUD's Public Housing program, please contact the Director of the Public Housing Management and Occupancy Division, Office of Public and Indian Housing, Room 4226, telephone number 202–708–0744. For information about the Office of Public and Indian Housing's Section 8 Tenant-Based program, please contact Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public and Indian Housing, Room 4210, telephone number 202–402–2425. For information about the Office of Housing's Section 8 Project-Based program, please contact Catherine Brennan, Director, Housing Assistance Policy Division, Office of Housing, Room 6138, telephone number 202–402–3000. The address for all of the above offices is the Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410–0500. The above-listed telephone numbers are not toll-free numbers. Persons with hearing or speech impairments may access the numbers through TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

The Violence Against Women Act of 1994 (VAWA 1994) was enacted as Title IV of the Violent Crime Control and Enforcement Act of 1994 (Pub. L. 103–322, approved September 13, 1994), codified at 42 U.S.C. 13931 *et seq.* VAWA 1994 was not applicable to HUD programs, but it was applicable to other Federal agencies and authorized those agencies to award grants to assist victims of sexual assault, and included provisions to maintain the confidentiality of domestic violence shelters and addresses of abused persons. On January 5, 2006, the Violence Against Women and Department of Justice Reauthorization Act of 2005 (Pub. L. 109–162) was signed into law, and, on August 28, 2006, a bill that made technical corrections to the Violence Against Women and Department of Justice Reauthorization Act of 2005 (Pub. L. 109–271) was signed into law. (Those two public laws are collectively referred to as "VAWA 2005"). Except as provided in Section 4 of the technical corrections law, VAWA 2005 became effective upon enactment of the law on January 5, 2006. Section 4 of the technical corrections law delayed the effectiveness of certain provisions to the commencement of Fiscal Year (FY) 2007, none of which are directly applicable to this rulemaking, which commenced with the November 28, 2008, interim rule.

VAWA 2005 reauthorized and substantially amended VAWA 1994 for FYs 2007 through 2011, and, among other things, consolidated major law enforcement grant programs, made amendments to criminal and immigration laws, and made amendments to other statutes, including certain HUD statutes, to support and strengthen efforts to combat domestic violence and other forms of violence against women. The provisions of VAWA 2005, as amended in 2006, that are applicable to HUD programs are found in Title VI entitled "Housing Opportunities and Safety for Battered Women and Children." Section 601 of VAWA 2005 amended VAWA 1994 to add a new Subtitle N to VAWA 1994 entitled "Addressing the Housing Needs of Victims of Domestic Violence, Dating Violence, Sexual Assault, and Stalking."

The VAWA 2005 amendments that are applicable to HUD's public housing and tenant-based and project-based Section 8 programs (covered programs) were determined to be self-implementing. To ensure that housing providers participating in the covered programs were aware that the majority of VAWA 2005 is self-implementing, HUD's Office of Public and Indian Housing (PIH) issued, on June 23, 2006, a notice (PIH 2006–23) on the subject of VAWA 2005. In that notice, PIH advised public housing agencies (PHAs) of the VAWA 2005 provisions that were effective, and implementable, on the date of enactment—January 5, 2006. This notice can be found at *http://www.hud.gov/offices/pih/publications/notices/06/pih2006-23.pdf.* PIH Notice 2006–23 was followed by PIH Notice 2006–42, which transmitted the certification form for use by tenants claiming protection under VAWA. That notice can be found at *http://www.hud.gov/offices/adm/hudclips/notices/pih/06pihnotices.cfm.* In addition, PIH notice 2007–5 addressed the VAWA provisions that were incorporated into the Housing Choice Voucher Housing Assistance Payments (HAP) contract and tenancy addendum. That notice can be found at *http://www.hud.gov/offices/adm/hudclips/notices/pih/07pihnotices.cfm.*

HUD's Office of Housing also has provided guidance on the implementation of VAWA 2005. On September 30, 2008, it issued Notice H 08–07, which advised owners and management agents on VAWA provisions related to the administration of project-based Section 8 properties. That notice transmitted both the certification form for victims' use and a lease addendum for owners and management agents to use toward integrating VAWA's statutory provisions into the HUD model lease for project-based Section 8 properties. That notice, which was extended and reissued as Notice H 09–15 on October 1, 2009, can be found at *http://www.hud.gov/offices/adm/hudclips/notices/hsg/09hsgnotices.cfm.*

In addition to these direct notices, HUD issued a **Federal Register** notice that addressed the applicability of VAWA 2005 to all HUD programs. That notice, which was published on March 16, 2007 (72 FR 12696), provided an overview of the key VAWA provisions that affect HUD programs, and advised program participants concerning compliance with VAWA. The notice described those provisions of VAWA determined to be self-implementing and their effect on HUD programs. That notice also advised that HUD would be amending its regulations to conform existing regulations to the VAWA requirements. The November 28, 2008, interim rule, found at 73 FR 72336,

presented those conforming amendments.

II. The November 28, 2008, Interim Rule

The November 28, 2008, interim rule (73 FR 72336) amended those regulations for HUD's covered programs that required changes to conform to the VAWA amendments made to the authorizing statutes for these programs.

The November 2008 interim rule also amended HUD's Consolidated Plan regulations at 24 CFR 91.205(b) and 91.305(b) to reflect the VAWA amendment made to section 105(b)(1) of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 12705(b)(1)). The amendments made by the November 2008 interim rule require jurisdictions' consolidated plans to include, as a planning data, estimated housing needs for victims of domestic violence, dating violence, sexual assault, and stalking.

The November 2008 interim rule also amended HUD's PHA plan regulations at 24 CFR 903.6 and 903.7 to include the additional information required by VAWA 2005 in the annual and 5-year PHA plans. VAWA 2005 amended section 5A of the U.S. Housing Act of 1937, which requires the submission of annual and 5-year plans by PHAs. VAWA amended section 5A to require PHAs to include, in their 5-year plans, a statement about goals, activities, objectives, policies, or programs that will enable a PHA to serve the needs of child and adult victims of domestic violence, dating violence, sexual assault, or stalking. VAWA also amended section 5A to require PHAs to include, in their annual plans, a statement about any domestic violence, dating violence, sexual assault, and stalking prevention programs they make available.

The November 2008 interim rule amended HUD's regulations in 24 CFR part 5. The regulations in 24 CFR part 5 contain the requirements applicable to one or more HUD programs (cross-cutting requirements). VAWA 2005 amended the U.S. Housing Act of 1937 (1937 Act), specifically, section 6 (applicable to public housing) and section 8 (applicable to voucher and project-based programs) (42 U.S.C. 1437d and 1437f, respectively), by making changes to admission, occupancy, and termination of assistance provisions of these statutory sections to incorporate the VAWA protections. The cross-cutting admission, occupancy, and termination/eviction requirements are codified in 24 CFR part 5. The November 2008 interim rule codified the VAWA protections in a new subpart in 24 CFR part 5, which is subpart L.

The November 2008 interim rule provided, consistent with the VAWA 2005 amendments to the 1937 Act, that being a victim of domestic violence, dating violence, or stalking, as these terms are defined in VAWA 2005, is not a basis for denial of assistance or admission to public or Section 8 assisted housing, if the applicant otherwise qualifies for assistance or admission. The statutory amendments also provide that incidents or threats of abuse will not be construed as serious or repeated violations of the lease or as other "good cause" for termination of the assistance, tenancy, or occupancy rights of a victim of abuse. The VAWA 2005 amendments also set forth the rights and obligations of PHAs, owners, and management agents regarding criminal activity or acts of violence against family members or others. The regulations in new subpart L of part 5 contain the VAWA protections as applicable to admission, occupancy, termination, and eviction.

The November 2008 interim rule also conformed HUD's regulations to reflect the VAWA 2005 certification and confidentiality provisions. VAWA 2005 provides that owners, management agents, and PHAs may request an individual claiming VAWA protection to document, by means of a HUD-approved certification form, that the individual is a victim of abuse and that the incidences of abuse are bona fide. VAWA 2005 provides that the individual's certification must include the name of the perpetrator. Forms HUD–50066, for use by PHAs, and HUD–91066, for use by owners and management agents, were developed for the purpose of this optional certification.[1] It is not mandatory that the victim provide the HUD form, and the PHA, owner, or management agent may not require the victim to provide the form. A victim may also provide documentation from a third-party source. Documentation from a third-party source may also satisfy the request of an individual claiming VAWA protections to document the abuse. With respect to the third-party source, the third-party may be an employee, agent, or volunteer of a victim service provider, an attorney, or a medical professional, from whom the victim has sought assistance in addressing domestic violence, dating violence, or stalking, or the effects of the abuse. Pursuant to VAWA, other acceptable forms of documentation from a third-party source include a Federal, state, tribal, territorial, or local police or court record.

The November 2008 interim rule also amended 24 CFR 982.353(b) to reflect VAWA 2005's amendment to section 8(r) of the U.S. Housing Act of 1937 (42 U.S.C. 1437f(r)), which provides an exception to the prohibition against a family moving under the portability provisions in violation of the lease.[2] VAWA 2005 provides that the family may receive a voucher and move in violation of the lease under the portability procedures, if the family has complied with all other obligations of the voucher program and has moved out of the assisted dwelling unit in order to protect the health or safety of an individual who is or has been the victim of domestic violence, dating violence, or stalking and who reasonably believed he or she was imminently threatened by harm from further violence if he or she remained in the assisted dwelling unit.

The November 2008 interim rule also amended 24 CFR 5.2007(a)(3), by incorporating the VAWA 2005 requirement imposed on PHAs to provide notice to public housing residents and tenants assisted under section 8 of their rights, including their rights to confidentiality, and notice to owners and management agents of their rights and obligations under VAWA 2005. In addition to the notice required by PHAs, the November 2008 interim rule also required owners and management agents administering an Office of Housing project-based Section 8 program to provide their tenants with the notification as per the VAWA 2005 requirement.

The November 2008 interim rule also added several new definitions to its new regulations in 24 CFR part 5, subpart L, to reflect terminology defined by VAWA 2005, including "domestic violence," "dating violence," "stalking," and "immediate family member."

The amendments made by the November 2008 interim rule are discussed in more detail in the November 28, 2008, **Federal Register** notice at 73 FR 72337 through 723339.

III. This Final Rule

As the preamble to the November 2008 interim rule explained and as

[1] Forms HUD–50066 and HUD–91066 are available on HUD's Web site, respectively, at: *http://www.hud.gov/offices/adm/hudclips/forms/files/50066.doc,* and *http://www.hud.gov/offices/adm/hudclips/forms/files/91066.pdf.*

[2] Portability refers to the right of voucher-holding families to move outside the jurisdiction of a PHA that issues the voucher into the jurisdiction of another PHA that administers a tenant-based rental assistance program. Section 8(r) of the U.S. Housing Act of 1937 establishes the right to portability, and HUD's implementing amendments of this right are found at 24 CFR 982.353.

reiterated in the preamble to this final rule, HUD's initial rulemaking for VAWA 2005, as commenced in November 2008, and the notices that preceded the November 2008 interim rule, were issued to ensure that PHAs, owners, and management agents participating in HUD's covered programs were aware of the self-implementing provisions of VAWA 2005, and of the need to immediately implement the protections provided by VAWA 2005 in situations covered by VAWA 2005. That is, PHAs, owners, and management agents were not to delay their updating of policies pertaining to admission, occupancy or termination while waiting for HUD to issue regulations on those subjects. Because the regulations in HUD's November 2008 interim rule were conforming regulations, generally incorporating, almost verbatim, the VAWA 2005 statutory language, HUD anticipated no significant changes would be made at this final rule stage, and that is in fact the case. However, commenters did identify certain areas where the regulatory language would increase comprehensibility if HUD provided further explanation or elaboration; this rule does provide that. HUD also determined that the organization of the regulations in 24 CFR part 5, subpart L, would be enhanced by some reorganization, and this rule reflects that reorganization.

Therefore, with respect to reorganization, and in response to public comments, the following changes are made at this final rule stage:

A. Reorganization Changes

Section 5.2005, formerly entitled "Protection of victims of domestic violence, dating violence, and stalking in public and Section 8 housing," is now entitled "VAWA protections," and now addresses only VAWA 2005 protections. The provisions of § 5.2005 of the interim rule that addressed lease bifurcation and court orders are now in a new § 5.2009, entitled "Remedies available to victims of domestic violence, dating violence, or stalking in HUD-assisted housing." Section 5.2009 of the interim rule entitled "Effect on other laws" has been redesignated as § 5.2011.

B. Clarification Changes

In § 5.2003 (Definitions), HUD has added a definition of VAWA.

In § 5.2005 (VAWA protections), paragraph (a) that pertains to notice of VAWA protections is amended to include a new paragraph (a)(4), which provides that the HUD required lease, lease addendum, or tenancy addendum, as used in programs covered by this rule, must include a description of specific protections afforded to the victims of domestic violence, dating violence, or stalking.

In § 5.2005, paragraph (d)(1) of this section, which addresses the limitation of VAWA protections, and the authority of PHAs, owners, and management agents, now includes reference to termination of assistance to clarify that Section 8 vouchers are covered by VAWA 2005 protections. The interim rule merely addressed eviction, termination of tenancy, and occupancy rights.

In § 5.2005, HUD clarifies in paragraph (d)(2) that the standard for eviction, termination of tenancy, or termination of assistance is both the actual *and* imminent threat of violence, not an actual *or* imminent threat of violence. (*Please see* also HUD's response to the first comment under Section IV.A.)

In § 5.2005, HUD adds a new paragraph (d)(3), which addresses the VAWA statutory language's emphasis that nothing in VAWA interferes with the right of a PHA, owner, or management agent to evict or terminate assistance to any tenant or lawful occupant if the PHA, owner, or management agent can demonstrate an actual and imminent threat to other tenants or those employed at or providing service to the public housing or Section 8-assisted property, if that tenant or lawful occupant is not terminated from assistance. New paragraph (d)(3) provides that any eviction or termination of assistance undertaken on this basis should be utilized only by a PHA, owner, or management agent when there are no other actions that could be taken to reduce or eliminate the threat, including, but not limited to, transferring the victim to a different unit, barring the perpetrator from the property, contacting law enforcement to increase police presence, developing other plans to keep the property safe, or seeking other legal remedies to prevent the perpetrator from acting on a threat. Restrictions predicated on public safety cannot be based on stereotypes, but must be tailored to particularized concerns about individual residents.

Further, in § 5.2005, HUD adds a new paragraph (e) to address the meaning of actual and imminent threat to better guide what constitutes an "actual and imminent threat" and how to determine when one exists.

In § 5.2007 (Documenting the occurrence of domestic violence, dating violence, or stalking), HUD has revised the title of this regulatory section to be more clear regarding the issue to which this section is directed, which is simply that the victim is required to submit written evidence, if requested by a PHA, owner, or management agent, that verifies that the domestic violence, dating violence, or stalking occurred. This revision also clarifies that the claim presented to the PHA, owner, or management agent, as provided in this regulatory section, may be a claim for continued occupancy or initial tenancy or assistance. The interim rule merely referenced continued occupancy. Commenters pointed out that reference to continued occupancy would make the documentation request applicable only to terminations of public housing tenants. Inclusion of "initial tenancy" and "assistance" clarifies that terminations are also applicable to Section 8 participants, and to denying assistance to public housing and Section 8 applicants.

As will be seen by the discussion of public comments, there appeared to be confusion as to what was meant by certification; that is, whether certification referred to the use of a HUD-approved form or whether it referred to the process of verifying, in writing, the occurrence of domestic violence, dating violence, or stalking. What the statute contemplates, and what this regulation puts into place, is that upon request, the victim will provide evidence, which could be in the form of the victim's written statement on a HUD-approved certification form. The evidence could also consist of a police or court record, or the written statement of an employee, agent, or volunteer of a victim service provider, an attorney, or a medical professional, from whom the victim has sought assistance in addressing domestic violence, dating violence, or stalking, or in addressing the effects of abuse, in which the professional attests under the penalty of perjury to the professional's belief that the incident or incidents in question are bona fide incidents of abuse. In brief, a written document that verifies that the violence occurred could be requested by the PHA, owner, or management agent. Therefore, HUD will use "documentation" and "document" to refer to the process of providing written verification. HUD will apply the terms "certification" and "certify" to refer to the HUD-approved form and its use by the victim.

In addition, in § 5.2007, HUD includes the phrase "dating violence or stalking" along with "domestic violence." This section clarifies that if a PHA, owner, or management agent requests a tenant, alleging domestic violence, dating violence, or stalking, to document his or her claim of such

violence, the request must be made in writing. This section also clarifies that at its discretion, a PHA, owner, or management agent may provide benefits to an individual based solely on the individual's verbal statement or other corroborating evidence.

In § 5.2007(b)(4), HUD expands on the responsibility of the PHA, owner, and management agent to maintain the confidentiality of information provided by a victim of domestic violence, dating violence, or stalking.

Finally, in § 5.2007, a new paragraph (e) is added to clarify the way in which the PHA, owner, or management agent may determine the true victim of domestic violence in a situation of conflicting certifications.

In § 5.2009 (Remedies available to victims of domestic violence, dating violence, or stalking in HUD-assisted housing), HUD clarifies in paragraph (a), which pertains to lease bifurcation, that the programs covered by this provision are the public housing, Section 8 Housing Choice Voucher (HCV), and Section 8 project-based programs.

HUD has included an amendment to 24 CFR 966.4 (Lease requirements) to include the VAWA 2005 protections as a required provision of the public housing lease, and to require the PHA to consider lease bifurcation if appropriate in a domestic violence situation.

HUD has included amendments to 24 CFR 982.314 (move with continued tenant-based assistance) to clarify that PHA policies restricting timing and number of moves do not apply when the family or a member of the family is or has been the victim of domestic violence, dating violence, or stalking, and the move is needed to protect the health or safety of the family or family member. New amendments to 24 CFR 982.314 also clarify that a PHA may not terminate assistance if the family, with or without prior notification to the PHA, already moved out of a unit in violation of the lease, if such move occurred to protect the health or safety of a family member who is or has been the victim of domestic violence, dating violence, or stalking and who reasonably believed he or she was threatened with imminent harm if he or she remained in the dwelling unit. HUD has included an amendment to 24 CFR 982.315 (Family break-up) to address the same concerns as provided in the amendment to 24 CFR 982.314.

IV. Public Comments and HUD's Responses

The public comment period on the November 2008 interim rule closed on January 27, 2009, and HUD received 13 public comments. Commenters included legal aid organizations, domestic violence advocacy groups, housing advocacy groups, and public housing agencies.

Overall, commenters appeared pleased to see the VAWA 2005 protections codified in regulations, but some commenters said the November 2008 interim rule was more than a conforming rule, while others said HUD had failed to fully conform its regulations to certain VAWA 2005 statutory provisions. Other commenters stated that they understood that regulations were not the appropriate place for comprehensive guidance on the VAWA 2005 protections, but encouraged HUD to provide additional guidance on the VAWA 2005 protections and provide examples on the various situations in which the need for such protections may occur. The following presents key issues raised by the commenters and HUD's responses to these issues.

A. Scope and Definition Issues

Comment: Interim rule's language on "actual or imminent threat" departs from the statutory language. Several commenters stated that HUD's interpretation of "actual and imminent threat" departs from the statutory language in VAWA 2005. A commenter stated that the statutory language of VAWA 2005 refers to an actual and imminent threat, and HUD's interim rule, by contrast, refers to actual or imminent threat.

HUD Response: The interim rule deviated from the statutory language of VAWA 2005 by indicating that an owner, management agent, or public housing agency may evict or terminate from assistance any tenant or lawful occupant if the owner, management agent, or public housing agency can demonstrate an actual or imminent threat to other tenants or those employed at or providing service to the property if that tenant is not evicted or terminated from assistance. VAWA 2005 states that an owner, management agent, or public housing agency may evict or terminate from assistance any tenant or lawful occupant if the owner, management agent, or public housing agency can demonstrate an actual and imminent threat to other tenants or those employed at or providing service to the property if that tenant is not evicted or terminated from assistance. This deviation from the statutory language resulted from the use of two similar, but contextually distinct, phrases within the statute. Both the phrase "actual and imminent threat" and "actual or threatened domestic violence" appear in VAWA 2005, and are used to refine proscribed protection and prohibited activity in different potential situations.

The phrase "actual or threatened domestic violence" appears in section 606 and section 607 of VAWA 2005 in the amendments made to section 8(c)(9)(B) and section 6(l)(5) of the U.S. Housing Act of 1937 (42 U.S.C. 1437f(c) and 42 U.S.C. 1437d(l)). The revision to section 6(1)(5) of the U.S. Housing Act states that an incident or incidents of actual or threatened domestic violence, dating violence, or stalking will not be construed as a serious or repeated violation of the lease by the victim or threatened victim, and shall not be good cause for terminating the assistance, tenancy, or occupancy rights of such victim.

In contrast, section 606 of VAWA 2005 (section 8(c)(9)(C) of the 1937 Act) and section 607 of VAWA 2005 (section 6(l)(6) of the 1937 Act) provide that criminal activity directly relating to domestic violence, dating violence, or stalking engaged in by a member of a tenant's household or any guest or other person under the tenant's control is not cause for termination of assistance, tenancy, or occupancy rights if the tenant or a member of the tenant's immediate family is the victim of the corresponding violence. This protection, however, is limited by sections 8(c)(9)(C)(v) and 6(l)(6)(E), which provide that a tenant, or other lawful occupant, who is a victim of such domestic violence, dating violence, or stalking may be evicted or terminated from assistance if the owner, management agent, or public housing agency can demonstrate that such an action is required due to an actual and imminent threat posed to other tenants or to employees or service providers of the property that will result if that tenant or lawful occupant is not evicted or terminated from assistance. In this context, the phrase "actual and imminent threat," rather than "actual or imminent threat," narrows the use of this limitation by the owner, management agent, or public housing agency, thereby, providing greater protection for the victim. Accordingly, HUD has clarified this distinction in 24 CFR 5.2005(d)(2).

Comment: Definition of "imminent threat" requires revisions. Two commenters questioned the interim rule's definition of "imminent threat" on the basis that they found that it failed to include the imminence of the threat; that is, the likelihood that the threat would become reality. Other commenters recommended using the standard of "serious bodily harm" to

give meaning to "violent criminal activity," which is the term used in VAWA 2005. Commenters stated that the term "bodily harm" was too vague and general.

HUD Response: Section 5.2005(e) of HUD's interim rule provides that words, gestures, actions, or other indicators are considered an imminent threat "if a reasonable person, considering all of the relevant circumstances, would have a well-grounded fear of death or bodily harm as a result." HUD based its definition of "imminent threat" in the interim rule, in part, on the definition of "stalking" in VAWA 2005. VAWA 2005 defines "stalking" to include acts of pursuit or surveillance or repeatedly committed acts that "place a person in reasonable fear of the death of, or serious bodily injury to, or to cause substantial emotional harm to" that person, a member of the immediate family, or the spouse or intimate partner of that person. The definition of "stalking" described the types of actions that were actual and imminently threatening in a domestic violence situation.

However, in response to public comments, HUD has reexamined the interim rule guidance on actual and imminent threat, and also reviewed case law, as suggested by commenters in the following comment. The case law recommended by the commenters was helpful in developing standards that would better guide what actions constitute actual and imminent threat. Section 5.2005 of this final rule includes a new paragraph (e) to help PHAs, owners, and management agents determine when actual and imminent threat exists. This new paragraph (e) is discussed more fully in HUD's response to the following comment.

Comment: Clarify standards for determining actual and imminent threat. Commenters stated that HUD's final rule needed to elaborate on the meaning of "actual and imminent" threat in order to be more helpful to housing providers in understanding when they may be confronting an actual and imminent threat situation. Two commenters suggested that the legislative history of, and similar exceptions in, the Fair Housing Act and the Americans with Disabilities Act should be used as standards to elaborate on the proper application of actual and imminent threat to specific circumstances encountered by PHAs, owners, or management agents under VAWA 2005. One commenter recommended that HUD's final rule follow the Fair Housing Act and base any specific determination of an actual and imminent threat based on the consideration of four factors: (1) The nature of the risk, (2) the duration of the risk, (3) the severity of the risk or potential harm to third parties, and (4) the probability of harm. The commenter claimed that the Fair Housing Act codifies the factors of *School Board of Nassau County, Florida* v. *Arline,* 480 U.S. 273, 107 S.Ct. 1123 (1987) in 42 U.S.C. 3604(f)(9). The commenter added that HUD's final rule should describe the analysis of actual and imminent threat with more specificity so that PHAs, owners, or management agents know they must have objective evidence in order to find an exception to VAWA 2005. The commenter stated that otherwise an exception may be based on fear or conjecture rather than on an objectively proven imminent threat.

The commenter recommended that the factors be listed in HUD's final rule, as is done in two similar regulations describing the direct threat exception for the Americans with Disabilities Act (ADA): The Department of Justice's ADA regulations and the Department of Labor's ADA regulations at 28 CFR 36.208 and 29 CFR 1630.2(r), respectively. The commenter stated that, as HUD's interim rule reads, it fails to emphasize the need for objectivity, evidence, and the examination of particular circumstances needed to understand and implement this exception.

HUD Response: HUD understands that the need for elaboration on this important terminology—actual and imminent threat—as used in the statute, and appreciates the commenters' suggestions on standards or factors to consider in determining whether there is a situation of actual and imminent threat. Although there appears to be an absence of case law interpreting "actual and imminent" threat, the commenters are correct that cases involving housing discrimination or violence in a direct threat situation are instructive on standards that should be considered. More importantly, the commenters are correct that any interpretation of these terms should emphasize the need for objective evidence that the actual and imminent threat of physical danger is real, not hypothetical or presumed; would occur within an immediate time frame, and thus not be remote or speculative; could result in death or serious bodily harm; and could not be reduced or eliminated by reasonable actions. Accordingly, HUD's final rule provides, in a new paragraph (e) to § 5.2005, that an actual and imminent threat consists of a physical danger that is real, would occur within an immediate time frame, and could result in death or serious bodily harm. Additionally, this paragraph provides that in determining whether an individual would pose an actual and imminent threat, the factors to be considered include: the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the length of time before the potential harm would occur. In addition to including this language in the regulatory text, HUD intends to issue further guidance that may be helpful in determining and dealing with actual and imminent threat.

Comment: Commenters stated that the rule omits reference to crimes of dating violence and stalking. According to commenters, HUD's interim rule, in several places, addresses domestic violence, but fails to include the crimes of dating violence and stalking. The commenters recommended that the provisions be amended to more closely track VAWA 2005.

HUD Response: HUD's interim rule (in § 5.2003, as well as in § 5.2005 (the title of § 5.2005, includes the phrase dating violence and stalking), and § 5.2009) already includes reference to the crimes of dating violence and stalking. The final rule includes dating violence or stalking in addition to domestic violence at section 5.2007(d) and section 5.2007(a). HUD has not identified any other key provision of the interim rule where such terminology was omitted.

Comment: Clarify criminal activity directly related to domestic violence, dating violence, or stalking. A commenter stated that the statute and interim rule contain detailed definitions of the terms "domestic violence, "dating violence," and "stalking," but does not clarify the meaning of "directly related" in the context of protecting a victim from eviction due to such criminal activity. The commenter stated that Congress intended to limit the reach of the provision so that activities distantly related to domestic violence, dating violence, or stalking would not bring into play the statutory scheme.

HUD Response: As the commenter notes, the interim rule mirrors the statutory language, which provides that criminal activity "directly related" to domestic violence, dating violence, or stalking, engaged in by a member of a tenant's household or any guest or other person under the tenant's control, shall not be cause for termination of tenancy, or of occupancy rights of, or assistance to the victim, if the tenant or immediate family member of the tenant is the victim. HUD finds that in this context, the meaning of "directly related" is clear and does not require further elaboration.

Comment: VAWA 2005 should apply to men, Project Rental Assistance Contracts (PRACs), and Section 8 properties. One commenter stated that VAWA 2005 should protect men from domestic violence and not only women. The commenter added that VAWA 2005 should cover housing under PRACs, as well as other Section 8 properties.

HUD Response: VAWA 2005 does protect men. Although the name of the statute references only women, the substance of the statute makes it clear that its protections are not exclusively applicable to women. With respect to broader coverage of VAWA 2005, HUD notes that the scope of VAWA 2005 protections is limited to the 1937 Act.

Comment: Rule must address battered immigrants' eligibility. Commenters stated that HUD's interim rule omits housing eligibility for battered immigrant-qualified aliens. Battered immigrant-qualified aliens are statutorily eligible to receive public and assisted housing as part of the Illegal Immigration Reform and Immigration Responsibility Act of 1996. In 2003, according to the commenters, Congress directed HUD and the Department of Justice to interpret housing statutes consistently with immigration and public benefits statutes so that qualified alien-battered immigrants would be eligible for federally subsidized housing. (*See* H. Rep. No. 108–10 at 1495). According to the commenters, qualified alien-battered immigrants continue to be denied housing benefits they both need and are eligible to receive, and HUD should revise its VAWA rule, at the final rule stage, to make it clear that battered alien immigrants are eligible to receive housing benefits.

HUD Response: The November 2008 interim rule and this final rule are directed only to addressing the provisions of the Violence Against Women Act of 2005. This rule does not address the categories of legal immigrants eligible for housing under Section 214 of the Housing and Community Development Act of 1980. However, VAWA 2005 protects victims of domestic violence, dating violence, or stalking residing in HUD public and assisted housing covered by VAWA 2005, regardless of whether they are citizens or eligible immigrants.

B. Certification and Verification (Documentation of Abuse) Issues

Comment: Certification language in interim rule is at odds with the statutory language. One commenter stated that the certification section of the rule is confusing and must be revised to include correct VAWA 2005 statutory language, which provides that a PHA, owner, or management agent may ask a victim of domestic violence, dating violence, or stalking to document this status in any one of the following forms: a HUD-approved certification form completed by the victim or documentation signed by an employee, agent, or volunteer of a victim service provider; an attorney; or a medical professional, or via a court or police record.

HUD Response: As discussed in Section III.B. of this preamble, HUD has revised § 5.2007 to eliminate any confusion about the "certification/or verification" of abuse. As noted in Section III.B. of this preamble, a PHA, owner, or management agent may request that a victim of domestic violence, dating violence, or stalking document or provide written evidence to demonstrate that the violence occurred. Accepted means of documentation include providing the PHA, owner, or management agent with a completed HUD-approved certification form, or other form of written verification of the abuse, signed by a third party. The PHA, owner or management agent also may accept the victim's verbal statement or other corroborating evidence as sufficient verification of the abuse. Therefore, as long as the victim provides a HUD-approved certification form, third-party documentation, a verbal statement, or other corroborating evidence, the victim is statutorily entitled to VAWA 2005 protections. A tenant's file should document acceptance of an individual's verbal statement.

Comment: Clarify permissibility of self-certification and third-party verification. Some commenters stated that the option to self-certify, despite the request from a PHA, owner, or management agent for certification on the HUD form or another form of certification, is at odds with VAWA 2005. Other commenters stated that the November 2008 interim rule is unclear as to when third-party verification can be required instead of self-certification. A commenter stated that third-party verification should be allowed because such verification provides a PHA, owner, or management agent with a comparatively higher level of protection from potential abuse of VAWA 2005, and would eliminate the need for an independent judgment call.

Other commenters stated that VAWA 2005 indicates that a PHA or owner does not have to require that a person seeking VAWA 2005 protections produce documentation of his or her status as a victim of domestic violence, dating violence, or stalking, and that VAWA 2005 protections may be provided to individuals based solely on their own statements or other corroborating evidence. Another commenter stated that, if a PHA, owner, or management agent decides to obtain verification of an individual's status as a victim, the tenant may satisfy the requirement to document the abuse by providing documentation signed by an attorney or member of a victim service provider or contained in a police or court record.

HUD Response: With respect to self-certification, VAWA 2005 allows, but does not require, the victim to self-certify, in order to be afforded protection under VAWA 2005. Form HUD–50066, for use by PHAs, and form HUD–91066, for use by owners and management agents, have been developed for the purpose of the optional certification. They are standard forms and collect limited, relevant information from the victim.

With respect to the issue of third-party verification, HUD has determined that an individual requesting protection cannot be required to provide third-party documentation. If a documentation request is made to an individual seeking protection under VAWA 2005, the PHA, owner, or management agent must accept the standard HUD certification form as a complete request for relief, without insisting on additional documentation. Additionally, third-party documentation must be accepted in lieu of the HUD standard certification form if such documentation is produced by the individual requesting relief.

Comment: Clarify whether a HUD-approved certification is always needed. Certain commenters stated that the certification provision of HUD's interim rule should be revised to clarify that a HUD-approved certification form is not always required. According to one commenter, the interim rule improperly combines the HUD certification form with the option for the victim to submit a police or court record or qualified third-party documentation in lieu of the certification form. Other commenters stated that the regulatory text of the interim rule should follow the statutory language, which references a written request for certification by the PHA or owner.

HUD Response: HUD believes that the changes made to § 5.2007 eliminate confusion about what is required under the statute, as implemented by HUD's regulation. However, in response to the question raised by the commenters, a PHA, owner, or management agent may, but is not required to, request that the individual complete a HUD-approved

certification form documenting the abuse. The victim may satisfy a request to document the domestic violence, dating violence, or stalking by submitting the HUD-approved form. The victim may satisfy the PHA's, owner's, or management agent's request for documentation without providing the HUD-approved form, by submitting third-party documentation of the abuse or other corroborating evidence. The PHA, owner, or management agent must accept the HUD-approved form as a complete request for protection in the absence of third-party documentation. Third-party documentation may include, among other things, court or police records. In addition, the PHA, owner, or management agent may provide benefits based solely on the individual's verbal statement or other corroborating evidence.

With respect to a written request for certification, HUD acknowledges that this language could be clearer, and believes the changes made to § 5.2007 provide greater clarity. In order to deny relief for protection under VAWA, a PHA, owner, or management agent must provide the individual with a written request for documentation. If the individual fails to provide the requested documentation within 14 business days of receiving a written request for information, the relief may be denied. The 14-business day window for submission of documentation does not begin until the individual receives the written request. The PHA, owner, or management agent has discretionary authority to extend the statutory 14-business day period. While HUD's interim rule covered these time frames, the "request" by the PHA, owner, or management agent was not phrased specifically in terms of a "written request." However, the subject of request for documentation is now addressed in § 5.2007(a) of the final rule.

Comment: Content of certification requires clarification. A commenter stated that VAWA 2005 is ambiguous as to whether the content of certification should be left to the victim's discretion or to the discretion of the PHA, owner, or management agent. Commenters suggested that the housing providers be given the discretion to specify the content and types of information that should be provided in the certification.

HUD Response: As noted earlier, although VAWA 2005 speaks in terms of a victim's certification that the violence occurred, HUD's regulation is revised by this final rule to speak in terms of documentation of the violence. Nevertheless, to the commenters' question about the statute, the 1937 Act, at both 42 U.S.C. 1437d(u)(1)(A) and 1437f(ee)(1)(A), states that the PHA, owner, or management agent may request that an individual certify through a HUD-approved certification form that the individual is a victim of domestic violence, dating violence, or stalking, and that the incident or incidents in question are bona fide incidents of such actual or threatened abuse and meet the requirements set forth in the above-referenced statutory provisions. Under VAWA 2005, the only required content of the certification is that such certification shall include the name of the perpetrator. Certifications are typically very brief documents by which an individual who has provided certain information attests that such information is true. HUD finds that its treatment of certification in its regulations, which mirrors VAWA 2005's treatment, is the correct approach.

Comment: VAWA 2005 does not require victims to sign certifications under penalty of perjury. Commenters stated that the interim rule requires victims to sign certifications under penalty of perjury, which is not required by VAWA 2005 or HUD's published certification form, form-50066. One commenter stated that HUD has the discretionary authority to require victims to certify their status under penalty of perjury, and that HUD's form should provide for self-certification under penalty of perjury, so long as the form is amended to describe the penalties associated with perjury. Other commenters stated that HUD appears to have the discretion to offer a certification process through which program sponsors could also require third-party verification under penalty of perjury, victims' self-certification of their status under penalty of perjury, or "victims" providing of police reports. The commenters stated that these alternatives would help to prevent abuse of VAWA 2005 protections.

HUD Response: Given the possible consequences to both the victim and the alleged perpetrator of domestic violence, dating violence, or stalking, HUD's position is that it is important that any allegations made by one individual against another are made with the understanding that there are consequences if the allegations are false. In this regard, HUD's VAWA forms, HUD–50066 and HUD–91066, advise that the submission of false information may be a basis for termination of assistance or for eviction. HUD maintains that this language is a sufficient deterrence from false reporting and that the inclusion of the language "under penalty of perjury" is unnecessary.

Comment: Additional guidance is necessary to protect victims' confidentiality and safety in the documentation process. One commenter stated that PHAs and owners could benefit from guidance on how to maintain confidentiality when a victim seeks to port a voucher to a different jurisdiction. Other commenters stated that the rule should explicitly state that any release of information for the purpose of enforcing that person's rights under VAWA 2005 is limited in time and scope. One commenter stated that because of the sensitive nature of domestic violence, HUD must include safeguards to ensure that PHAs or landlords do not require any information beyond that required in a HUD-approved form.

HUD Response: The release of confidential information was addressed in § 5.2007(a)(1)(v) of the interim rule [§ 5.2007(b)(4) in the reorganized regulation of this final rule]. This section, which tracks the statutory language in VAWA 2005 (at section 8(ee)(2) of the Housing Act of 1937 (42 U.S.C. 1437f(ee)(2))), has been expanded in the final rule stage. This section now states that information provided by the victim of domestic violence, dating violence, or stalking shall be kept confidential and shall not be entered into any shared database or provided to any other entity except to the extent that disclosure is requested by the tenant, required for use in an eviction proceeding, or required by applicable law. Further, this section prohibits employees of the PHA, owner, or management agent, or individuals within their employ (e.g., contract workers) from having access to such information, unless they are specifically and explicitly authorized by the PHA, owner, or management agent to access this information because it is necessary to their work for the PHA, owner, or management agent. These employees or individuals in the employ of the PHA, owner, or management agent are equally bound to maintain the confidentiality of such information. Maintaining confidentiality is essential to protect victims from further harm. In addition to expanding the confidentiality requirements in § 5.2007(b)(4), HUD will provide additional guidance to PHAs, owners, and management agents on confidentiality protocols that each PHA, owner, and management agent should maintain and enforce.

Further, HUD notes that the situations mentioned by commenters are also covered by the Privacy Act (5 U.S.C. 552a). The Privacy Act controls the purposes for which information may be released, and those purposes are

supposed to be stated when the information is collected.

Comment: Guidance needed for processing VAWA 2005 certifications. Several commenters sought guidance on how to process a VAWA 2005 certification, including cases involving the submission of certifications from household members that are in conflict with one another. In some instances, where the perpetrator of domestic violence is a member of the household and faces eviction, the perpetrator may claim to be a victim of domestic violence and attempt to have the true victim evicted instead.

HUD Response: As noted earlier in this preamble, the process that is at issue is not the processing of certifications, but rather documenting violence that has occurred. As also discussed in this preamble, such documentation may be provided in several ways, including a certification, but also a third-party statement or a court or police record. Individuals seeking protection under VAWA 2005 must notify the PHA, owner, or management agent of their intent to request protection. The PHA, owner, or management agent may, but is not required to request, that the individual provide documentation of the abuse. The individual may satisfy the documentation requirement by submitting the HUD-approved certification form. The individual may also satisfy a request for documentation by submitting third-party documentation of the abuse or other corroborating evidence. Although the victim has discretion as to the means of documentation, the PHA, owner, or management agent may request some additional proof beyond a verbal statement. If the requesting individual is unable to produce documentation or other corroborating evidence and is unwilling to self-certify on the HUD-approved form, the individual may request, and the PHA, owner, or management agent must, in accordance with the procedures established in the applicable program regulations, provide an opportunity for an informal review or informal hearing prior to ultimate denial of protection.

Third-party documentation may include, among other things, court or police records. The PHA, owner, or management agent must accept the certification form as a complete request for protection, in the absence of third-party documentation. A PHA, owner, or management agent also must accept third-party documentation in lieu of the HUD standard certification form if such documentation is produced by the individual requesting relief.

The certification form and/or third-party documentation should be placed in the tenant's file, and the PHA, owner, or management agent should explain to the individual the remedies available. Additional information on processing the certification and/or third-party documentation will be described in HUD administrative guidance.

With respect to conflicting certification from two members of a household, HUD recognizes that PHAs, owners, and management agents may not be in a position to determine the victim from the perpetrator. Trained third parties (such as law enforcement or a victim service provider, attorney, or medical professional, as described in 42 U.S.C. 1437(f)(ee)(C)) are often better equipped to make accurate judgments. The statute also notes that the eviction protections do not limit the authority of a PHA, owner, or management agent, when notified, to honor court orders addressing rights of access to control of the property, including civil protection orders issued to protect the victim and issued to address the distribution or possession of property among the household members in cases where a family breaks up. Use of this third-party documentation would enable PHAs, owners, and management agents to make a more accurate decision. It would also discourage perpetrators from attempting to abuse the system and further harm their victims. A victim may well have already sought assistance in addressing the abuse and be able to produce documentation relatively quickly. Should any questions remain, a court or another adjudication process, such as a PHA grievance hearing, informal hearing or informal review, could be an appropriate venue to pursue fact-finding and make a determination.

To assist PHAs, owners, and management agents navigate such conflicts, HUD has added a new paragraph (e) to § 5.2007, to clarify the ways in which the PHA, owner, or management agent may determine the true victim of domestic violence in a situation of conflicting certifications. HUD will also issue additional guidance to assist PHAs, owners, or management agents when confronted with conflicting certifications.

C. Transfer Policies and Portability Issues

Comment: Transfer policies to protect victims. Commenters encouraged HUD to go beyond merely conforming HUD's regulations to the VAWA 2005 provisions, by promulgating regulations that mandate emergency transfers for victims of domestic violence in public housing and project-based Section 8 housing. The commenters stated that VAWA 2005 creates specific transfer rights for victims of domestic violence with HCVs, with one commenter encouraging HUD to exercise its rulemaking authority and create specific rights for victims in public housing and project-based Section 8 housing, in addition to the rights provided for voucher tenants. That commenter stated that while there is no direct guidance on the problems facing victims of domestic violence who need to flee their project-based Section 8 housing without jeopardizing their subsidies, there is general recognition of the problem by HUD, owners, and advocates. One commenter stated that HUD's VAWA 2005 regulations should encourage project-based Section 8 owners to allow transfers to other project-based Section 8 developments they own or to developments where they have cooperative agreements with other owners. Such a policy would not be a violation of waiting list regulations.

HUD Response: HUD's November 2008 interim rule was issued for the purpose of conforming HUD's regulations to the self-implementing provisions of VAWA 2005 and, as stated earlier in this preamble, for the purpose of ensuring there was no confusion on the part of PHAs, owners, and management agents that they should immediately commence compliance with VAWA 2005. With respect to the request to HUD to undertake rulemaking beyond this conforming rulemaking process, for the purpose of establishing specific rights to victims of domestic violence, dating violence, or stalking in HUD-subsidized housing, it is HUD's view that VAWA 2005 well establishes those rights. HUD believes that this view is consistent with the statutory language of VAWA 2005, which was made effective upon enactment, and which did not direct HUD to undertake rulemaking to implement the provisions applicable to HUD programs.

With respect to transfer policies, HUD will continue to encourage, rather than require, PHAs to include protections for victims of domestic violence, dating violence, or stalking, within existing transfer policies. While there are no transfer policies for project-based Section 8 properties, HUD Handbook 4350.3 REV–1, *Occupancy Requirements of Subsidized Multifamily Housing Programs,* already states that owners may adopt a preference for families that include victims of domestic violence. HUD will be revising the Handbook so that the language also includes victims of dating violence and stalking. HUD believes that the responsibilities of PHAs, multifamily

housing owners, and management agents are clear under VAWA 2005 to protect tenants who are victims of domestic violence, dating violence, or stalking and that PHAs, multifamily housing owners, and management agents also need the flexibility to confront the various domestic violence, dating violence, or stalking situations that may occur.

Comment: Address possible problems with moving and portability policies. Certain commenters expressed concern about moving and portability policies. According to one commenter, HUD's November 2008 interim rule allows a family to receive a voucher and to move out of a unit in violation of the lease if the family believes itself in immediate danger. However, the commenter stated that HUD has not provided guidance on how to handle such situations with HCV landlords. The commenter stated that clarification of such procedures is critical if HUD expects landlords to continue to participate in the HCV program.

A second commenter stated that all parties would benefit from more guidance on the portability issue. A third commenter stated that if the November 2008 interim rule is read in conjunction with PIH Notice 2008–43, it appears that a PHA can continue to deny a victim's request for portability if the PHA has established a policy that prohibits a move by the family during the initial lease term, or more than one move by the family during any one-year period. In order to address this problem, the commenter recommended that an exception be recognized in § 982.314(c) for voucher participants. The commenter stated that PHAs need guidance from HUD on how to handle VAWA 2005-related absence from the unit or the need to vacate the unit.

HUD Response: HUD agrees that denying a request for portability in such a situation would be contrary to the intent of VAWA 2005. Therefore, HUD has revised its regulation at § 982.314(b) to clarify that a PHA may not refuse to issue a voucher to an assisted family due to the family's failure to seek approval prior to moving to a new unit in violation of the original lease, if such move occurred to protect the health or safety of a family member who is or has been the victim of domestic violence, dating violence, or stalking and who reasonably believed he or she was threatened with imminent harm if he or she remained in the dwelling unit. This move, however, does not relieve the family of any financial obligations on the original lease. Additionally, HUD has revised its regulation at § 982.314(c) to clarify that PHA policies restricting the timing and number of moves do not apply when the family or a member of the family is or has been the victim of domestic violence, dating violence, or stalking, and the move is needed to protect the health or safety of the family or family member.

Comment: Clarification needed for addressing family break-ups due to domestic violence. Three commenters asked HUD to clarify how PHAs should respond when violence leads to family break-up. The commenters suggested that HUD issue guidance stating that family break-up cannot result in an eviction or termination in violation of VAWA and that survivors of violence can be treated as the highest priority in determining continuation of housing assistance. Another commenter requested that HUD's final rule revise the regulatory text on the Section 8 voucher program's approach to family breakup. The commenter suggested that the approach for the Section 8 voucher program should be broadened, by a cross reference, to include all types of violence encompassed by VAWA, including survivors of domestic violence, dating violence, or stalking.

HUD Response: HUD is committed to developing and providing guidance on family break-up and lease bifurcation. The guidance will include information on how to add victims currently residing with an abuser to the lease or voucher. HUD agrees that its voucher regulations in 24 CFR part 982 should include domestic violence, dating violence, or stalking as defined by VAWA as an additional factor to consider in determining which members of an assisted family should continue receiving assistance if the family breaks up. This final rule has been revised at § 982.315 accordingly.

D. Lease Issues

Comment: Bifurcation of leases. One commenter stated that the interim rule's definition of "bifurcate" is not lifted directly from the statute. The commenter stated that while the regulatory definition goes beyond a merely conforming amendment, that doing so is in fact useful for implementation of VAWA 2005 protections. The commenter stated that the proposed definition makes it clear to housing providers and Section 8 owners that leases can be revised to permit domestic violence survivors to retain their housing assistance, while tenancy rights of their abusers can be extinguished.

Other commenters expressed concern about the efficacy of bifurcation of leases, because bifurcation is new and yet to be tested at the state level. However, a commenter added that the interim rule implements the relevant statutory provision properly and without adding any additional constraints on lease enforcement. Other commenters requested guidance on bifurcation that is specifically addressed to the voucher program. A commenter asked whether two vouchers will be issued when a lease is bifurcated and other families need the voucher.

One commenter stated that because Federal preemption is implicit in the VAWA 2005 provisions on lease bifurcation, HUD's final rule should articulate a Federal preemption to the extent necessary to carry out VAWA 2005. Because bifurcation of leases is a new concept, the commenter recommended that the subject be described in more detail in nonregulatory guidance, to inform state courts in eviction proceedings when bifurcation is requested. The commenter suggested that the rule include conforming amendments reflecting the bifurcation concept, in 24 CFR part 966, which covers public housing leases and grievance, as well as 24 CFR part 982, governing the voucher program and other regulations where appropriate.

HUD Response: HUD appreciates the concerns raised about lease bifurcation and preemption. With respect to articulation of a justification of Federal preemption doctrine, the preamble to the interim rule specifically cites the VAWA 2005 statutory language on this issue, and states that VAWA 2005 does not preempt an entire field of state law and shall not be construed to supersede any provisions of Federal, State, or local laws that provide greater protection for victims of abuse (section 8(c)(9)(C)(vi) of the Housing Act of 1937). In the "Findings and Certifications" section of the interim rule, there is a discussion of Executive Order 13132, "Federalism," which states that the November 2008 interim rule, in so far as it incorporates the statutory language that provides for bifurcation of leases to protect victims of domestic violence, has only minor effects on the states and does not meet the definition of rules with "federalism implications." Any preemptive effect of the bifurcation provision is limited to Section 8 and public housing. Moreover, the possible effect of the provision is limited to only those eviction actions where the tenant to be evicted has a valid claim of protection as a victim of domestic violence, dating violence, or stalking or where lease bifurcation is sought because of domestic violence, dating violence, or stalking. HUD's November 2008 interim rule makes solely minor adjustments to any existing laws that do not offer greater protection

to victims of domestic violence, dating violence, or stalking and does not preempt an entire field of state law as is the case in circumstances in which preemption occurs. For those reasons, HUD does not believe this rule has a preemptive effect, as defined by the Executive Order on Federalism.

With respect to issuing nonregulatory guidance on bifurcation of leases in state courts, the PHA, owner, or management agent bears the responsibility to advise the court on the PHA's, owner's, or management agent's obligations as a housing provider under VAWA 2005 and HUD regulations. HUD accepts the commenter's suggestion about cross-referencing 24 CFR parts 966 and 982 to part 5. HUD agrees that lease bifurcation should work the same way in HUD's public housing and voucher programs.

With respect to the issue of whether two vouchers will be issued when a lease is bifurcated, one voucher will be issued to the victim. The perpetrator will be removed from the original voucher and will not receive a new voucher.

Comment: VAWA protection provisions are needed in public housing leases. Commenters stated that VAWA 2005 requires that public housing leases include VAWA protections regarding evictions. The commenters stated that HUD's final rule needs to take account of this requirement. One commenter added that confidentiality language should be added to public housing leases. Commenters suggested that 24 CFR 966.4 of HUD's regulations, which pertains to lease requirements, incorporates the public housing lease requirements of VAWA 2005.

HUD Response: HUD currently requires that lease provisions be construed to contain these protections. The absence of reference, in regulation or in leases, to the VAWA 2005 protections does not render these protections inapplicable. However, since this rulemaking is a conforming rulemaking, HUD has conformed the regulations in 24 CFR part 5 and 24 CFR part 966 that govern lease and tenancy addendum provisions to reference the VAWA 2005 protections.

Comment: Incorporate VAWA protections in grievance procedures. According to commenters, HUD's final rule should incorporate amendments to 24 CFR 966.51 that allow PHAs to exclude a termination action from its administrative grievance procedure if violent criminal activity arising from an incident of domestic violence, dating violence, or stalking can be excluded from the grievance process. The commenter added that the final rule should ensure that PHAs properly handle terminations involving VAWA 2005 through a PHA's grievance procedure, including proper cross-references.

HUD Response: The grievance procedures in 24 CFR 966.54 and 966.55 address the grievance process. These regulations do not list or prescribe all items or actions that can be grieved under the lease. The absence of a prescriptive list is to provide the tenants with leeway as to what they choose to grieve. Victims of domestic violence, dating violence, or stalking have the same access that other public housing tenants have to the grievance process. Accordingly, it is not necessary to incorporate the VAWA 2005 protections in these regulatory sections.

Comment: VAWA protections need to be applicable to admissions and voucher terminations. Commenters stated that the portion of HUD's interim rule that prohibits, consistent with VAWA, a PHA, owner, or management agent from applying a "more demanding standard" to evict or terminate tenancy of a victim of domestic violence, than that to which other tenants are subjected, should be revised to cover Section 8 voucher terminations. Other commenters stated HUD's rule addresses VAWA protections regarding termination of tenancy and evictions but omits VAWA protections regarding admissions and voucher terminations. The commenters urged that 24 CFR 5.2005(b) be revised to include VAWA protections regarding admissions and voucher terminations. Commenters also urged HUD to amend 24 CFR 5.2005(c), because it fails to reflect that vouchers can be bifurcated.

HUD Response: HUD has considered the comments and agrees to revise 24 CFR 5.2005(b) [§ 5.2005(d) in the reorganized regulation of this final rule] to clarify the prohibition regarding the use of a "more demanding standard" with respect to Section 8 voucher terminations. To that end, § 5.2005(d) has been revised to include the phrase "terminate assistance" after the phrase "evict a tenant," in order to clarify coverage of tenants with Section 8 vouchers. HUD has also revised 24 CFR 5.2005(c) [§ 5.2009(a) in the reorganized regulation of this final rule], pertaining to lease bifurcation, to clarify that the range of HUD programs covered by the VAWA 2005 protections are the public housing, Section 8 HCV, and Section 8 project-based programs.

Comment: Permit termination of a household member who commits criminal acts of violence, while continuing Section 8 assistance to the victim. One commenter stated that HUD's rule does not include the language of VAWA 2005 that allows for termination of a household member who commits criminal acts of violence, while the victim of the violence continues to receive Section 8 assistance. According to the commenter, the preamble to HUD's interim rule was clear on the issue, but the regulatory text is not clear. Another commenter stated that HUD's rule omits VAWA 2005 provisions regarding termination of voucher assistance for household members who commit criminal acts of violence.

HUD Response: HUD believes its rule satisfactorily addresses the issues raised by the commenters pertaining to VAWA protection in the case of family break-up due to violence. Specifically, in § 982.553, the rule dictates that the victim protections under 24 CFR part 5, subpart L apply to cases of criminal activity related to domestic violence, dating violence, or stalking. In the reorganized regulation, 24 CFR 5.2005(c)(2) provides that victims of domestic violence, dating violence, or stalking shall not be terminated from assistance due to criminal activity directly related to domestic violence, dating violence, or stalking engaged in by a member of the victim's household, guest, or other person under the victim's control. Section 982.315 has also been amended to explicitly reflect the protections available under VAWA pertaining to retention of assistance by the victim in cases of family break-up resulting from domestic violence, dating violence, or stalking. In such a family break-up, the victim protected under VAWA must retain voucher assistance.

Comment: Denial of assistance for criminal activity. According to a commenter, HUD's final rule must include the amendment to 24 CFR 982.553 that addresses denial of assistance for criminal activity. According to the commenter, applicants who have survived domestic violence, dating violence, or stalking should not be denied assistance in cases of criminal history where that history is related to self-defense or coercion or mutual arrests that are common in domestic violence situations.

HUD Response: HUD agrees that victims of domestic violence, dating violence, or stalking must not be denied assistance or terminated from programs based solely on a criminal history related to domestic violence, dating violence, or stalking, and believes its regulation is clear on this issue. HUD's interim rule provides in paragraph (e) of § 982.553, which pertains to denial of admission and termination of assistance for criminals and alcohol abusers, that

the protections for victims covered by the regulations in 24 CFR part 5, subpart L apply in cases of criminal activity related to domestic violence, dating violence, or stalking.

Comment: Guidance is needed on termination of assistance in HCV program. One commenter stated that PHAs should have the authority to terminate assistance to abusers, while protecting victims. The commenter urged HUD to provide more guidance on how to administer such terminations. The commenter raised several questions seeking HUD's input through guidance, including whether HUD will expect PHAs to complete a household recertification if the family loses one of its members; procedures a PHA should follow if, as a result of termination, a family becomes over-housed; and whether a PHA may wait until the next recertification to determine a new standard payment amount if the family loses one of its members due to a termination under VAWA 2005. The commenter encouraged HUD to issue guidance on how to handle the loss of a family member under the VAWA 2005 provisions.

HUD Response: HUD is developing guidance on this and other issues. Until such guidance is issued, PHAs should continue to follow existing regulations and the written PHA policies in place for managing moves, terminations, and changes in family size due to implementation of VAWA 2005.

E. Enforcement and Oversight

Comment: Guidelines needed for VAWA enforcement and oversight. Two commenters offered guidelines for the enforcement of VAWA 2005 protections, including delegations of authority to HUD's Office of Fair Housing and Equal Opportunity (FHEO) to receive and investigate complaints, and the holding of informal hearings. Another commenter stated that explicit guidelines for enforcement of VAWA 2005 provisions should be established.

HUD Response: HUD appreciates the interest in ensuring the effective enforcement of VAWA 2005, but HUD has the requisite authority to enforce the VAWA 2005 protections.

Comment: Guidelines needed for the content of notices pertaining to VAWA rights and obligations. Commenters stated that HUD's interim rule, like VAWA 2005, requires that housing providers give notice to tenants of rights under VAWA 2005, but that HUD's rule fails to instruct PHAs, owners, or management agents on compliance with the notice requirement. The commenters stated that victims of domestic violence cannot ask for protections they do not know about. The commenters stated that HUD's final rule must not only require notice, but must explain how to give notice. Commenters asked HUD, in elaborating on this statutory requirement, to clarify the frequency of notifications and specify how often residents and landlords be notified of their rights and obligations. One commenter stated that any guidance HUD provides on this issue should include guidelines for making notices accessible to tenants with disabilities and to those with limited English proficiency. Another commenter added that consistency is important and that HUD should provide a standard notification to be sent to all parties rather than ask PHAs, owners, or management agents to interpret the requirements. In contrast to these comments, one commenter stated that HUD's restraint in elaborating on this statutory requirement is appropriate because PHAs and other housing providers have procedures in place to notify applicants and residents of regulatory changes.

HUD Response: HUD agrees with the commenters that consistency is important on this issue. While HUD does not want to limit any flexibility that housing providers have with respect to this issue, HUD believes this is an area in which further guidance from HUD, outlining the core content of the notice, among other things, would be helpful to housing providers and ensure their compliance with this notification requirement. Providers must also ensure that various notices and other communications comply with the applicable requirements of 24 CFR 8.6 with regard to persons with disabilities, and provide meaningful access to persons with limited English Proficiency; see Executive Order 13166, "Improving Access to Services for Persons with Limited English Proficiency (LEP)" and HUD's *Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons* (72 FR 2732).

HUD notes that PIH Notice 2006–42 suggested that PHAs make the certification form available to all eligible families at the time of admission. Also, in the event of a termination or start of an eviction proceeding, PHAs may enclose the form with the appropriate notice and direct the family to complete, sign, and return the form (if applicable) by a specified date. PHAs could also include language discussing the VAWA protections in the termination/eviction notice and request that a tenant come into the office to pick up the form, or request another means to receive the form if needed as a reasonable accommodation for a person with a disability, if the tenant believes the VAWA protections apply.

In addition, Notice H 08–07, which has been extended by Notice H 09–15, suggests that owners and management agents of project-based Section 8 properties integrate VAWA policies and protections into their Tenant Selection Plans and/or House Rules. This notice also encourages owners and management agents to establish policies that support or assist affected families and prevent the loss of HUD-assisted housing as a consequence of domestic violence, dating violence, or stalking. This notice suggests that owners and management agents make the certification form available to all eligible families at the time of admission, and/or they may enclose the certification in the appropriate notice to the family in the event of a termination or start of an eviction. Finally, this notice requires owners and management agents to attach the HUD-approved Lease Addendum, form HUD–91067, which includes the VAWA provisions, to each existing or new lease.

Comment: Compliance with VAWA should be included in the annual, 5-year, and consolidated plan. One commenter asked if PHAs are required to offer the activities, services, or programs described in the new annual plan requirements for PHAs. Another commenter asked if PHAs have any affirmative obligations to victims of domestic violence under VAWA 2005. One commenter stated support for how HUD's rule appears to bring the PHA annual and 5-year plan requirements into conformance with VAWA 2005, while not imposing any additional requirements. Two commenters stated that the provision for inclusion of VAWA 2005 implementation and all related activities in the annual, 5-year, and consolidated plans should be explicit.

HUD Response: HUD is currently reviewing PHA planning requirements and will take these issues into consideration in the context of that review.

V. Findings and Certifications

Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this proposed rule under Executive Order 12866 (entitled "Regulatory Planning and Review"). A determination was made that this proposed rule is a "significant regulatory action," as defined in section 3(f) of the

Order (although not economically significant, as provided in section 3(f)(1) of the Order). The docket file is available for public inspection in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276 Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the docket file by calling the Regulation Division at 202–402–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Information Relay Service at 800–877–8339.

Paperwork Reduction Act

The information collection requirements contained in 24 CFR part 5, subpart L that are applicable to PHAs have been approved by OMB in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) and assigned OMB Control Number 2577–0249. The information collection requirements contained in 24 CFR part 5, subpart L that are applicable to owners and management agents have been approved by OMB in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) and assigned OMB Control Number 2502–0204. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a currently valid control number.

Impact on Small Entities

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This final rule, which reaffirms and makes minor changes to the November 28, 2008, interim rule, applies to PHAs, owners, and management agents. This VAWA rulemaking has been limited to amending HUD's regulations, by incorporating statutory requirements that are already applicable to PHAs, owners, and management agents, due to their being self-implementing statutory provisions. Accordingly, this rule will not have a significant economic effect on a substantial number of small entities.

Environmental Impact

This rule involves a policy document that, with the exception of the amendments to 24 CFR part 903, sets out nondiscrimination standards. The amendments to 24 CFR part 903 do not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(3) and (1), respectively, this rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Executive Order 13132, Federalism

Section 6(c) of Executive Order 13132 (entitled "Federalism") requires an agency that is publishing a regulation that has federalism implications and that preempts state law to follow certain procedures. Regulations that have federalism implications, according to section 1(a) of the Order, are those 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 final rule, which reaffirms the November 28, 2008, interim rule and makes only minor changes to the interim rule, incorporates the statutory language that provides for bifurcation of leases to protect victims of domestic violence, dating violence, or stalking, notwithstanding state law. In addition, the final rule, consistent with statute, provides that incidents of, or criminal acts connected to domestic violence, dating violence, or stalking cannot be the basis for termination of assistance or tenancy.

As stated in the interim rule, HUD finds that this statutory provision has only minor effects on the states and, therefore, this rule, by incorporating this provision in HUD's regulations, does not meet the definition of rules with "federalism implications." First, any preemptive effect of this provision is limited to Section 8 and public housing, which together represent only a small portion of the total housing market. Second, the possible effect appears limited to only those eviction actions where the tenant to be evicted has a valid claim of protection as a victim of domestic violence, dating violence, or stalking, or where lease bifurcation is sought because of domestic violence, dating violence, or stalking. The rule does not, for example, involve the preemption of a whole field of state law as is the case in other situations in which preemption occurs, but rather merely requires a small adjustment to any existing laws that do not already offer greater protection to victims of domestic violence, dating violence, or stalking. Therefore, HUD has determined that this rule, by directly incorporating the statutory provision on bifurcation of lease, will not have substantial direct effects on states or their political subdivisions, on the relationship between the Federal Government and the states, or on the distribution of power and responsibilities among the various levels of government, and would not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

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

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers applicable to the programs that would be affected by this rule are: 14.195, 14.850, 14.856, and 14.871.

List of Subjects

24 CFR Part 5

Administrative practice and procedure, Aged, Claims, Drug abuse, Drug traffic control, Grant programs—housing and community development, Grant programs—Indians, Individuals with disabilities, Loan programs—housing and community development, Low and moderate income housing, Mortgage insurance, Pets, Public housing, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 91

Grant programs—housing and community development, Low- and moderate-income housing, Reporting and recordkeeping requirements.

24 CFR Part 880

Grant programs—housing and community development, Loan

programs—housing and community development, Low and moderate income housing, Rent subsidies.

24 CFR Part 882

Grant programs—housing and community development, Housing, Homeless, Lead poisoning, Manufactured homes, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 883

Grant programs—housing and community development, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 884

Grant programs—housing and community development, Rent subsidies, Reporting and recordkeeping requirements, rural areas.

24 CFR Part 886

Grant programs—housing and community development, Lead poisoning, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 891

Aged, Capital advance programs, Civil rights, Grant programs—housing and community development, Individuals with disabilities, Loan programs—housing and community development, Low- and moderate-income housing, Mental health programs, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 903

Grant programs, Civil rights, Public housing agency plans, Public housing.

24 CFR Part 960

Aged, Grant programs—housing and community development, Individuals with disabilities, Pets, Public housing.

24 CFR Part 966

Grant programs—housing and community development, public housing, Reporting and recordkeeping requirements.

24 CFR Part 982

Grant programs—housing and community development, Housing, Low- and moderate-income housing, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 983

Grant programs—housing and community development, Housing, Low- and moderate-income housing, Rent subsidies, Reporting and recordkeeping requirements.

■ Accordingly, for the reasons stated in the preamble, HUD amends 24 CFR parts 5, 880, 882, 883, 884, 886, 891, 903, 960, 966, 982, and 983, as follows.

PART 5—GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS

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

Authority: 42 U.S.C. 1437a, 1437c, 1437d, 1437f, 1437n, 3535(d), Sec. 327, Pub. L. 109–115, 119 Stat. 2936, and Sec. 607, Pub. L. 109–162, 119 Stat. 3051.

■ 2. Revise subpart L to read as follows:

Subpart L—Protection for Victims of Domestic Violence, Dating Violence, or Stalking in Public and Section 8 Housing

Sec.

Subpart L—Protection for Victims of Domestic Violence, Dating Violence, or Stalking in Public and Section 8 Housing

§ 5.2001 Applicability.

This subpart addresses the protections for victims of domestic violence, dating violence, or stalking residing in public and Section 8 housing, as provided in the 1937 Act, as amended by the Violence Against Women Act (VAWA) (42 U.S.C. 1437f and 42 U.S.C. 1437d). This subpart applies to the Housing Choice Voucher program under 24 CFR part 982, the project-based voucher and certificate programs under 24 CFR part 983, the public housing admission and occupancy requirements under 24 CFR part 960, and renewed funding or leases of the Section 8 project-based program under 24 CFR parts 880, 882, 883, 884, 886, and 891.

§ 5.2003 Definitions.

The definitions of *1937 Act, PHA, HUD, household, responsible entity,* and *other person under the tenant's control* are defined in subpart A of this part. As used in this subpart L:

Bifurcate means, with respect to a public housing or a Section 8 lease, to divide a lease as a matter of law such that certain tenants can be evicted or removed while the remaining family members' lease and occupancy rights are allowed to remain intact.

Dating violence means violence committed by a person:

(1) Who is or has been in a social relationship of a romantic or intimate nature with the victim; and

(2) Where the existence of such a relationship shall be determined based on a consideration of the following factors:

(i) The length of the relationship;

(ii) The type of relationship; and

(iii) The frequency of interaction between the persons involved in the relationship.

Domestic violence includes felony or misdemeanor crimes of violence committed by a current or former spouse of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

Immediate family member means, with respect to a person:

(1) A spouse, parent, brother, or sister, or child of that person, or an individual to whom that person stands in loco parentis; or

(2) Any other person living in the household of that person and related to that person by blood or marriage.

Stalking means:

(1)(i) To follow, pursue, or repeatedly commit acts with the intent to kill, injure, harass, or intimidate another person; or

(ii) To place under surveillance with the intent to kill, injure, harass, or intimidate another person; and

(2) In the course of, or as a result of, such following, pursuit, surveillance, or repeatedly committed acts, to place a person in reasonable fear of the death of, or serious bodily injury to, or to cause substantial emotional harm to

(i) That person,

(ii) A member of the immediate family of that person, or

(iii) The spouse or intimate partner of that person.

VAWA means the Violence Against Women and Department of Justice Reauthorization Act of 2005 (Pub. L. 109–162, approved August 28, 2006), as amended by the U.S. Housing Act of 1937 (42 U.S.C. 1437d and 42 U.S. 1437f).

§ 5.2005 VAWA protections.

(a) *Notice of VAWA protections.* (1) PHAs must provide notice to public housing and Section 8 tenants of their rights under VAWA and this subpart,

including the right to confidentiality and the exceptions; and

(2) PHAs must provide notice to owners and management agents of assisted housing, of their rights and obligations under VAWA and this subpart; and

(3) Owners and management agents of assisted housing administering an Office of Housing project-based Section 8 program must provide notice to Section 8 tenants of their rights and obligations under VAWA and this subpart.

(4) The HUD-required lease, lease addendum, or tenancy addendum, as applicable, must include a description of specific protections afforded to the victims of domestic violence, dating violence, or stalking, as provided in this subpart.

(b) *Applicants.* Admission to the program shall not be denied on the basis that the applicant is or has been a victim of domestic violence, dating violence, or stalking, if the applicant otherwise qualifies for assistance or admission.

(c) *Tenants*—(1) *Domestic violence, dating violence, or stalking.* An incident or incidents of actual or threatened domestic violence, dating violence, or stalking will not be construed as a serious or repeated lease violation by the victim or threatened victim of the domestic violence, dating violence, or stalking, or as good cause to terminate the tenancy of, occupancy rights of, or assistance to the victim.

(2) *Criminal activity related to domestic violence, dating violence, or stalking.* Criminal activity directly related to domestic violence, dating violence, or stalking, engaged in by a member of a tenant's household or any guest or other person under the tenant's control, shall not be cause for termination of tenancy of, occupancy rights of, or assistance to the victim, if the tenant or immediate family member of the tenant is the victim.

(d) *Limitations of VAWA protections.* (1) Nothing in this section limits the authority of the PHA, owner, or management agent to evict a tenant or terminate assistance for a lease violation unrelated to domestic violence, dating violence, or stalking, provided that the PHA, owner, or management agent does not subject such a tenant to a more demanding standard than other tenants in making the determination whether to evict, or to terminate assistance or occupancy rights;

(2) Nothing in this section may be construed to limit the authority of a PHA, owner, or management agent to evict or terminate assistance to any tenant or lawful occupant if the PHA, owner, or management agent can demonstrate an actual and imminent threat to other tenants or those employed at or providing service to the public housing or Section 8 assisted property if that tenant or lawful occupant is not terminated from assistance. In this context, words, gestures, actions, or other indicators will be considered an "actual imminent threat" if they meet the standards provided in paragraph (e) of this section.

(3) Any eviction or termination of assistance, as provided in paragraph (d)(3) of this section, should be utilized by a PHA, owner, or management agent only when there are no other actions that could be taken to reduce or eliminate the threat, including, but not limited to, transferring the victim to a different unit, barring the perpetrator from the property, contacting law enforcement to increase police presence or develop other plans to keep the property safe, or seeking other legal remedies to prevent the perpetrator from acting on a threat. Restrictions predicated on public safety cannot be based on stereotypes, but must be tailored to particularized concerns about individual residents.

(e) *Actual and imminent threat.* An actual and imminent threat consists of a physical danger that is real, would occur within an immediate time frame, and could result in death or serious bodily harm. In determining whether an individual would pose an actual an imminent threat, the factors to be considered include: The duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the length of time before the potential harm would occur.

§ 5.2007 Documenting the occurrence of domestic violence, dating violence, or stalking.

(a) *Request for documentation.* A PHA, owner, or management agent presented with a claim for continued or initial tenancy or assistance based on status as a victim of domestic violence, dating violence, stalking, or criminal activity related to domestic violence, dating violence, or stalking may request that the individual making the claim document the abuse. The request for documentation must be in writing. The PHA, owner, or management agent may require submission of documentation within 14 business days after the date that the individual received the request for documentation. However, the PHA, owner, or management agent may extend this time period at its discretion.

(b) *Forms of documentation.* The documentation required under this section:

(1) May consist of a HUD-approved certification form indicating that the individual is a victim of domestic violence, dating violence, or stalking, and that the incident or incidents in question are bona fide incidents of such actual or threatened abuse. Such certification must include the name of the perpetrator, and may be based solely on the personal signed attestation of the victim; or

(2) May consist of a Federal, State, tribal, territorial, or local police report or court record; or

(3) May consist of documentation signed by an employee, agent, or volunteer of a victim service provider, an attorney, or medical professional, from whom the victim has sought assistance in addressing domestic violence, dating violence, or stalking, or the effects of abuse, in which the professional attests under penalty of perjury under 28 U.S.C. 1746 to the professional's belief that the incident or incidents in question are bona fide incidents of abuse, and the victim of domestic violence, dating violence, or stalking has signed or attested to the documentation; and

(4) Shall be kept confidential by the PHA, owner, or management agent. The PHA, owner, or management agent shall not:

(i) Enter the information contained in the documentation into any shared database;

(ii) Allow employees of the PHA, owner, or management agent, or those within their employ (*e.g.,* contractors) to have access to such information unless explicitly authorized by the PHA, owner, or management agent for reasons that specifically call for these employees or those within their employ to have access to this information; and

(iii) Disclose this information to any other entity or individual, except to the extent that disclosure is:

(A) Requested or consented to by the individual making the documentation, in writing;

(B) Required for use in an eviction proceeding, or

(C) Otherwise required by applicable law.

(c) *Failure to provide documentation.* In order to deny relief for protection under VAWA, a PHA, owner, or management agent must provide the individual with a written request for documentation of the abuse. If the individual fails to provide the documentation within 14 business days from the date of receipt of the PHA's, owner's, or management agent's written request, or such longer time as the PHA, owner, or management agent at their discretion may allow, VAWA

protections do not limit the authority of the PHA, owner, or management agent to evict or terminate assistance of the tenant or a family member for violations of the lease or family obligations that otherwise would constitute good cause to evict or grounds for termination. The 14-business day window for submission of documentation does not begin until the individual receives the written request. The PHA, owner, or management agency has discretionary authority to extend the statutory 14-day period.

(d) *Discretion to provide relief.* At its discretion, a PHA, owner, or management agent may provide benefits to an individual based solely on the individual's verbal statement or other corroborating evidence. A PHA's, owner's, or management agent's compliance with this section, whether based solely on the individual's verbal statements or other corroborating evidence, shall not alone be sufficient to constitute evidence of an unreasonable act or omission by a PHA, PHA employee, owner, or employee or agent of the owner. Nothing in this subparagraph shall be construed to limit liability for failure to comply with the requirements of 24 CFR part 5.

(e) *Response to conflicting certification.* In cases where the PHA, owner, or management agent receives conflicting certification documents from two or more members of a household, each claiming to be a victim and naming one or more of the other petitioning household members as the perpetrator, a PHA, owner, or management agent may determine which is the true victim by requiring third-party documentation as described in this section and in accordance with any HUD guidance as to how such determinations will be made. A PHA, owner, or management agent shall honor any court orders addressing rights of access or control of the property, including civil protection orders issued to protect the victim and issued to address the distribution or possession of property among the household.

§ 5.2009 Remedies available to victims of domestic violence, dating violence, or stalking in HUD-assisted housing.

(a) *Lease bifurcation.* Notwithstanding any Federal, State, or local law to the contrary, a PHA, owner, or management agent may bifurcate a lease, or remove a household member from a lease without regard to whether the household member is a signatory to the lease, in order to evict, remove, terminate occupancy rights, or terminate assistance to any tenant or lawful occupant who engages in criminal acts of physical violence against family members or others, without evicting, removing, terminating assistance to, or otherwise penalizing the victim of such violence who is a tenant or lawful occupant. Such eviction, removal, termination of occupancy rights, or termination of assistance shall be effected in accordance with the procedures prescribed by Federal, State, or local law for termination of assistance or leases under the relevant public housing, Section 8 Housing Choice Voucher, and Section 8 project-based programs.

(b) *Court orders.* Nothing in this subpart may be construed to limit the authority of a PHA, owner, or management agent, when notified, to honor court orders addressing rights of access to or control of the property, including civil protection orders issued to protect the victim and to address the distribution of property among household members in a case where a family breaks up.

§ 5.2011 Effect on other laws.

Nothing in this subpart shall be construed to supersede any provision of any Federal, State, or local law that provides greater protection than this section for victims of domestic violence, dating violence, or stalking.

PART 91—CONSOLIDATED SUBMISSIONS FOR COMMUNITY PLANNING AND DEVELOPMENT PROGRAMS

■ 3. The authority citation for part 91 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 3601–3619, 5301–5315, 11331–11388, 12701–12711, 12741–12756, and 12901–12912.

■ 4. Amend § 91.205 to revise the first sentence of paragraph (b)(1) to read as follows:

§ 91.205 Housing and homeless needs assessment.

* * * * *

(b) * * *

(1) The plan shall estimate the number and type of families in need of housing assistance for extremely low-income, low-income, moderate-income, and middle-income families, for renters and owners, for elderly persons, for single persons, for large families, for public housing residents, for families on the public housing and section 8 tenant-based waiting lists, for persons with HIV/AIDS and their families, for victims of domestic violence, dating violence, sexual assault, and stalking, and for persons with disabilities. * * *

* * * * *

■ 5. Amend § 91.305 to revise the first sentence of paragraph (b)(1) to read as follows:

§ 91.305 Housing and homeless needs assessment.

* * * * *

(b) * * *

(1) The plan shall estimate the number and type of families in need of housing assistance for extremely low-income, low-income, moderate-income, and middle-income families, for renters and owners, for elderly persons, for single persons, for large families, for persons with HIV/AIDS and their families, for victims of domestic violence, dating violence, sexual assault, and stalking, and for persons with disabilities. * * *

* * * * *

PART 880–SECTION 8 HOUSING ASSISTANCE PAYMENT PROGRAM FOR NEW CONSTRUCTION

■ 6. The authority citation for part 880 continues to read as follows:

Authority: 42 U.S.C. 1437a, 1437c, 1437f, 3535(d), 12701, and 13611–13619.

■ 7. Amend § 880.504 to revise paragraph (f) to read as follows:

§ 880.504 Leasing to eligible families.

* * * * *

(f) Subpart L of 24 CFR part 5 applies to selection of tenants and occupancy requirements in cases where there is involved or claimed to be involved incidents of, or criminal activity related to, domestic violence, dating violence, or stalking.

■ 8. Amend § 880.607 to revise paragraph (c)(5) to read as follows:

§ 880.607 Termination of tenancy and modification of lease.

* * * * *

(c) * * *

(5) In actions or potential actions to terminate tenancy, the Owner shall follow 24 CFR part 5, subpart L, in all cases where domestic violence, dating violence, stalking, or criminal activity directly related to domestic violence, dating violence, or stalking is involved or claimed to be involved.

* * * * *

PART 882—SECTION 8 MODERATE REHABILITATION PROGRAMS

■ 9. The authority citation for part 882 continues to read as follows:

Authority: 42 U.S.C. 1437f and 3535d.

■ 10. Revise § 882.407 to read as follows:

§ 882.407 Other Federal requirements.

The moderate rehabilitation program is subject to applicable Federal requirements in 24 CFR 5.105 and to the requirements for protection for victims of domestic violence, dating violence, or stalking in 24 CFR part 5, subpart L.

■ 11. Amend § 882.511 to revise paragraph (g) to read as follows:

§ 882.511 Lease and termination of tenancy.

* * * * *

(g) In actions or potential actions to terminate tenancy, the Owner shall follow 24 CFR part 5, subpart L, in all cases where domestic violence, dating violence, or stalking, or criminal activity directly related to domestic violence, dating violence, or stalking is involved or claimed to be involved.

■ 12. Amend § 882.514 by removing the third sentence of paragraph (c) and adding two sentences in its place to read as follows:

§ 882.514 Family participation.

* * * * *

(c) *Owner selection of families.* * * * Since the Owner is responsible for tenant selection, the Owner may refuse any family, provided that the Owner does not unlawfully discriminate. However, the Owner must not deny program assistance or admission to an applicant based on the fact that the applicant is or has been a victim of domestic violence, dating violence, or stalking, if the applicant otherwise qualifies for assistance or admission.

* * * * *

PART 883—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAMS—STATE HOUSING AGENCIES

■ 13. The authority citation for part 883 continues to read as follows:

Authority: 42 U.S.C. 1437a, 1437c, 1437f, 3535(d), and 13611–13619.

■ 14. Revise § 883.605 to read as follows:

§ 883.605 Leasing to eligible families.

The provisions of 24 CFR 880.504, including subpart L of 24 CFR part 5 pertaining to the selection of tenants and occupancy requirements in cases where there is involved or claimed to be involved incidents of, or criminal activity related to, domestic violence, dating violence, or stalking apply, subject to the requirements of § 883.105.

PART 884—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM, NEW CONSTRUCTION SET-ASIDE FOR SECTION 515 RURAL RENTAL HOUSING PROJECTS

■ 15. The authority citation for part 884 continues to read as follows:

Authority: 42 U.S.C. 1437a, 1437c, 1437f, 3535(d), and 13611–13619.

■ 16. Amend § 884.216 to revise paragraph (c) to read as follows:

§ 884.216 Termination of tenancy.

* * * * *

(c) In actions or potential actions to terminate tenancy, the Owner shall follow 24 CFR part 5, subpart L in all cases where domestic violence, dating violence, stalking, or criminal activity directly related to domestic violence, dating violence, or stalking is involved or claimed to be involved.

■ 17. Amend § 884.223 to revise paragraph (f) to read as follows:

§ 884.223 Leasing to eligible families.

* * * * *

(f) Subpart L of 24 CFR part 5 applies to selection of tenants and occupancy requirements in cases where there is involved or claimed to be involved incidents of, or criminal activity related to, domestic violence, dating violence, or stalking.

PART 886—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM—SPECIAL ALLOCATIONS

■ 18. The authority citation for part 886 continues to read as follows:

Authority: 42 U.S.C. 1437a, 1437c, 1437f, 3535(d), and 13611–13619.

■ 19. Revise § 886.128 to read as follows:

§ 886.128 Termination of tenancy.

Part 247 of this title (24 CFR part 247) applies to the termination of tenancy and eviction of a family assisted under this subpart. For cases involving termination of tenancy because of a failure to establish citizenship or eligible immigration status, the procedures of 24 CFR parts 247 and 5 shall apply. For cases involving, or allegedly involving, domestic violence, dating violence, stalking, or criminal activity directly relating to such violence, the provisions of 24 CFR part 5, subpart L, apply. The provisions of 24 CFR part 5, subpart E, of this title concerning certain assistance for mixed families (families whose members include those with eligible immigration status, and those without eligible immigration status) in lieu of termination of assistance, and concerning deferral of termination of assistance also shall apply.

■ 20. Revise § 886.132 to read as follows:

§ 886.132 Tenant selection.

Subpart F of 24 CFR part 5 governs selection of tenants and occupancy requirements applicable under this subpart A of part 886. Subpart L of 24 CFR part 5 applies to selection of tenants and occupancy requirements in cases where there is involved or claimed to be involved incidents of, or criminal activity related to, domestic violence, dating violence, or stalking.

■ 21. Revise § 886.328 to read as follows:

§ 886.328 Termination of tenancy.

Part 247 of this title (24 CFR part 247) applies to the termination of tenancy and eviction of a family assisted under this subpart. For cases involving termination of tenancy because of a failure to establish citizenship or eligible immigration status, the procedures of 24 CFR part 247 and 24 CFR part 5 shall apply. For cases involving, or allegedly involving, domestic violence, dating violence, stalking, or criminal activity directly relating to such violence, the provisions of 24 CFR part 5, subpart L, apply. The provisions of 24 CFR part 5, subpart E, concerning certain assistance for mixed families (families whose members include those with eligible immigration status, and those without eligible immigration status) in lieu of termination of assistance, and concerning deferral of termination of assistance, also shall apply.

■ 22. Amend § 886.329 to revise paragraph (f) to read as follows:

§ 886.329 Leasing to eligible families.

* * * * *

(f) Subpart L of 24 CFR part 5 applies to selection of tenants and occupancy requirements in cases where there is involved or claimed to be involved incidents of, or criminal activity related to, domestic violence, dating violence, or stalking.

PART 891—SUPPORTIVE HOUSING FOR THE ELDERLY AND PERSONS WITH DISABILITIES

■ 23. The authority citation for part 891 continues to read as follows:

Authority: 12 U.S.C. 1701q; 42 U.S.C. 1437f, 3535(d), and 8013.

■ 24. Amend § 891.575 to revise paragraph (f) to read as follows:

§ 891.575 Leasing to eligible families.

* * * * *

(f) Subpart L of 24 CFR part 5 applies to selection of tenants and occupancy requirements in cases where there is involved or claimed to be involved incidents of, or criminal activity related to, domestic violence, dating violence, or stalking.

■ 25. Revise § 891.610(c) to read as follows:

§ 891.610 Selection and admission of tenants.

* * * * *

(c) *Determination of eligibility and selection of tenants.* The Borrower is responsible for determining whether applicants are eligible for admission and for selection of families. To be eligible for admission, an applicant must be an elderly or handicapped family as defined in § 891.505; meet any project occupancy requirements approved by HUD; meet the disclosure and verification requirement for Social Security Numbers and sign and submit consent forms for obtaining of wage and claim information from State Wage Information Collection Agencies, as provided by 24 CFR part 5, subpart B; and, if applying for an assisted unit, be eligible for admission under subpart F of 24 CFR part 5, which governs selection of tenants and occupancy requirements. For cases involving, or allegedly involving, domestic violence, dating violence, stalking, or criminal activity directly relating to such violence, the provisions of 24 CFR part 5, subpart L, apply.

* * * * *

■ 26. Amend § 891.630 to revise paragraph (c) to read as follows:

§ 891.630 Denial of admission, termination of tenancy, and modification of lease.

* * * * *

(c) In actions or potential actions to terminate tenancy, the Owner shall follow 24 CFR part 5, subpart L, in all cases where domestic violence, dating violence, stalking, or criminal activity directly related to domestic violence, dating violence, or stalking is involved or claimed to be involved.

PART 903—PUBLIC HOUSING AGENCY PLANS

■ 27. The authority citation for part 903 continues to read as follows:

Authority: 42 U.S.C. 1437c; 42 U.S.C. 3535(d).

■ 28. Amend § 903.6 to revise paragraph (a)(3) to read as follows:

§ 903.6 What information must a PHA provide in the 5–Year Plan?

(a) * * *

(3) A statement about goals, activities, objectives, policies, or programs that will enable a PHA to serve the needs of child and adult victims of domestic violence, dating violence, sexual assault, or stalking.

* * * * *

■ 29. Amend § 903.7 to revise paragraph (m)(5) to read as follows:

§ 903.7 What information must a PHA provide in an annual plan?

* * * * *

(m) * * *

(5) A statement of any domestic violence, dating violence, sexual assault, and stalking prevention programs:

(i) A description of any activities, services, or programs provided or offered by an agency, either directly or in partnership with other service providers, to child or adult victims of domestic violence, dating violence, sexual assault, or stalking;

(ii) Any activities, services, or programs provided or offered by a PHA that help child and adult victims of domestic violence, dating violence, sexual assault, or stalking to obtain or maintain housing; and

(iii) Any activities, services, or programs provided or offered by a PHA to prevent domestic violence, dating violence, sexual assault, or stalking, or to enhance victim safety in assisted families.

* * * * *

PART 960—ADMISSION TO, AND OCCUPANCY OF, PUBLIC HOUSING

■ 30. The authority citation for part 960 continues to read as follows:

Authority: 42 U.S.C. 1437a, 1437c, 1437d, 1437n, 1437z–3, and 3535(d).

■ 31. Amend § 960.103 to revise the section heading and paragraph (d) to read as follows:

§ 960.103 Equal opportunity requirements and protection for victims of domestic violence, dating violence, or stalking.

* * * * *

(d) *Protection for victims of domestic violence, dating violence, or stalking.* The PHA must apply 24 CFR part 5, subpart L in all applicable cases where there is involved or claimed to be involved incidents of, or criminal activity related to, domestic violence, dating violence, or stalking.

■ 32. Amend § 960.200 to revise paragraph (b)(8) to read as follows:

§ 960.200 Purpose.

* * * * *

(b) * * *

(8) Protection for victims of domestic violence, dating violence, or stalking, 24 CFR part 5, subpart L.

■ 33. Amend § 960.203 to revise paragraph (c)(4) to read as follows:

§ 960.203 Standards for PHA tenant selection criteria.

* * * * *

(c) * * *

(4) PHA tenant selection criteria are subject to 24 CFR part 5, subpart L, protections for victims of domestic violence, dating violence, or stalking.

* * * * *

PART 966—PUBLIC HOUSING LEASE AND GRIEVANCE PROCEDURE

■ 34. The authority citation for part 966 continues to read as follows:

Authority: 42 U.S.C. 1437d and 3535(d).

■ 35. In § 966.4, revise paragraph (a)(1) and paragraph (e) to read as follows:

§ 966.4 Lease requirements.

* * * * *

(a) *Parties, dwelling unit and term.* (1) The lease shall state:

(i) The names of the PHA and the tenant;

(ii) The unit rented (address, apartment number, and any other information needed to identify the dwelling unit);

(iii) The term of the lease (lease term and renewal in accordance with paragraph (a)(2) of this section);

(iv) A statement of what utilities, services, and equipment are to be supplied by the PHA without additional cost, and what utilities and appliances are to be paid for by the tenant;

(v) The composition of the household as approved by the PHA (family members and any PHA-approved live-in aide). The family must promptly inform the PHA of the birth, adoption, or court-awarded custody of a child. The family must request PHA approval to add any other family member as an occupant of the unit;

(vi) HUD's regulations in 24 CFR part 5, subpart L, apply, if a current or future tenant is or becomes a victim of domestic violence, dating violence, or stalking, as provided in 24 CFR part 5, subpart L.* * *

(e) *The PHA's obligations.* The lease shall set forth the PHA's obligations under the lease, which shall include the following:

(1) To maintain the dwelling unit and the project in decent, safe, and sanitary condition;

(2) To comply with requirements of applicable building codes, housing codes, and HUD regulations materially affecting health and safety;

(3) To make necessary repairs to the dwelling unit;

(4) To keep project buildings, facilities, and common areas, not otherwise assigned to the tenant for maintenance and upkeep, in a clean and safe condition;

(5) To maintain in good and safe working order and condition electrical, plumbing, sanitary, heating, ventilating, and other facilities and appliances, including elevators, supplied or required to be supplied by the PHA;

(6) To provide and maintain appropriate receptacles and facilities (except containers for the exclusive use of an individual tenant family) for the deposit of ashes, garbage, rubbish, and other waste removed from the dwelling unit by the tenant in accordance with paragraph (f)(7) of this section;

(7) To supply running water and reasonable amounts of hot water and reasonable amounts of heat at appropriate times of the year (according to local custom and usage), except where the building that includes the dwelling unit is not required by law to be equipped for that purpose, or where heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct utility connection; and

(8)(i) To notify the tenant of the specific grounds for any proposed adverse action by the PHA. (Such adverse action includes, but is not limited to, a proposed lease termination, transfer of the tenant to another unit, or imposition of charges for maintenance and repair, or for excess consumption of utilities.)

(ii) When the PHA is required to afford the tenant the opportunity for a hearing under the PHA grievance procedure for a grievance concerning a proposed adverse action:

(A) The notice of proposed adverse action shall inform the tenant of the right to request such hearing. In the case of a lease termination, a notice of lease termination, in accordance with paragraph (l)(3) of this section, shall constitute adequate notice of proposed adverse action.

(B) In the case of a proposed adverse action other than a proposed lease termination, the PHA shall not take the proposed action until the time for the tenant to request a grievance hearing has expired, and (if a hearing was timely requested by the tenant) the grievance process has been completed.

(9) To consider lease bifurcation, as provided in 24 CFR 5.2009, in circumstances involving domestic violence, dating violence, or stalking addressed in 24 CFR part 5, subpart L.

* * * * *

PART 982—SECTION 8 TENANT-BASED ASSISTANCE: HOUSING CHOICE VOUCHER PROGRAM

■ 36. The authority citation for part 982 continues to read as follows:

Authority: 42 U.S.C. 1437f and 3535d.

■ 37. Amend § 982.53 to revise the section heading and paragraph (e) to read as follows:

§ 982.53 Equal opportunity requirements and protection for victims of domestic violence, dating violence, or stalking.

* * * * *

(e) *Protection for victims of domestic violence, dating violence, or stalking.* The PHA must apply 24 CFR part 5, subpart L, in all applicable cases where there is involved incidents of, or criminal activity related to, domestic violence, dating violence, or stalking.

■ 38. Amend § 982.201 to revise paragraph (a) to read as follows:

§ 982.201 Eligibility and targeting.

(a) *When applicant is eligible: general.* The PHA may admit only eligible families to the program. To be eligible, an applicant must be a "family;" must be income-eligible in accordance with paragraph (b) of this section and 24 CFR part 5, subpart F; and must be a citizen or a noncitizen who has eligible immigration status as determined in accordance with 24 CFR part 5, subpart E. If the applicant is a victim of domestic violence, dating violence, or stalking, 24 CFR part 5, subpart L, applies.

* * * * *

■ 39. Revise § 982.202(d) to read as follows:

§ 982.202 How applicants are selected: General requirements.

* * * * *

(d) *Admission policy.* The PHA must admit applicants for participation in accordance with HUD regulations and other requirements, including, but not limited to, 24 CFR part 5, subpart L, protection for victims of domestic violence, dating violence, or stalking, and with PHA policies stated in the PHA administrative plan and the PHA plan. The PHA admission policy must state the system of admission preferences that the PHA uses to select applicants from the waiting list, including any residency preference or other local preference.

* * * * *

■ 40. Amend § 982.307 to revise paragraph (b)(4) to read as follows:

§ 982.307 Tenant screening.

* * * * *

(b) * * *

(4) In cases involving a victim of domestic violence, dating violence, or stalking, 24 CFR part 5, subpart L, applies.

■ 41. Revise § 982.310(h)(4) to read as follows:

§ 982.310 Owner termination of tenancy.

* * * * *

(h) * * *

(4) *Nondiscrimination limitation and protection for victims of domestic violence, dating violence, or stalking.* The owner's termination of tenancy actions must be consistent with fair housing and equal opportunity provisions of 24 CFR 5.105, and with the provisions for protection of victims of domestic violence, dating violence, or stalking in 24 CFR part 5, subpart L.

■ 42. In § 982.314, revise paragraphs (b) and (c)(2) to read as follows:

§ 982.314 Move with continued tenant-based assistance.

* * * * *

(b) *When family may move.* A family may move to a new unit if:

(1) The assisted lease for the old unit has terminated. This includes a termination because:

(i) The PHA has terminated the HAP contract for the owner's breach; or

(ii) The lease has terminated by mutual agreement of the owner and the tenant.

(2) The owner has given the tenant a notice to vacate, or has commenced an action to evict the tenant, or has obtained a court judgment or other process allowing the owner to evict the tenant.

(3) The tenant has given notice of lease termination (if the tenant has a right to terminate the lease on notice to the owner, for owner breach, or otherwise).

(4) The family or a member of the family is or has been the victim of domestic violence, dating violence, or stalking, as provided in 24 CFR part 5, subpart L, and the move is needed to protect the health or safety of the family or family member. A PHA may not terminate assistance if the family, with or without prior notification to the PHA, already moved out of a unit in violation of the lease, if such move occurred to protect the health or safety of a family

member who is or has been the victim of domestic violence, dating violence, or stalking and who reasonably believed he or she was imminently threatened by harm from further violence if he or she remained in the dwelling unit.

(c) * * *

(2) The PHA may establish:

(i) Policies that prohibit any move by the family during the initial lease term; and

(ii) Policies that prohibit more than one move by the family during any one-year period.

(iii) The above policies do not apply when the family or a member of the family is or has been the victim of domestic violence, dating violence, or stalking, as provided in 24 CFR part 5, subpart L, and the move is needed to protect the health or safety of the family or family member.

* * * * *

■ 43. In § 982.315, redesignate paragraph (a) as paragraph (a)(1) and add a new paragraph (a)(2), and revise paragraph (b) to read as follows:

§ 982.315 Family break-up.

* * * * *

(a) * * *

(2) If the family break-up results from an occurrence of domestic violence, dating violence, or stalking as provided in 24 CFR part 5, subpart L, the PHA must ensure that the victim retains assistance.

(b) The factors to be considered in making this decision under the PHA policy may include:

(1) Whether the assistance should remain with family members remaining in the original assisted unit.

(2) The interest of minor children or of ill, elderly, or disabled family members.

(3) Whether family members are forced to leave the unit as a result or actual or threatened domestic violence, dating violence, or stalking.

(4) Whether any of the family members are receiving protection as victims of domestic violence, dating violence, or stalking, as provided in 24 CFR part 5, subpart L, and whether the abuser is still in the household.

(5) Other factors specified by the PHA.

* * * * *

■ 44. Revise the last sentence of § 982.353(b) to read as follows:

§ 982.353 Where family can lease a unit with tenant-based assistance.

* * * * *

(b) * * * The initial PHA must not provide such portable assistance for a participant if the family has moved out of the assisted unit in violation of the lease, except that if the family moves out in violation of the lease in order to protect the health or safety of a person who is or has been the victim of domestic violence, dating violence, or stalking and who reasonably believed he or she was imminently threatened by harm from further violence if he or she remained in the dwelling unit, and has otherwise complied with all other obligations under the Section 8 program, the family may receive a voucher from the PHA and move to another jurisdiction under the Housing Choice Voucher Program.

* * * * *

■ 45. Amend § 982.452(b)(1) to revise the second sentence to read as follows:

§ 982.452 Owner responsibilities.

* * * * *

(b) * * *

(1) * * * The fact that an applicant is or has been a victim of domestic violence, dating violence, or stalking is not an appropriate basis for denial of tenancy if the applicant otherwise qualifies for tenancy.

* * * * *

■ 46. Revise §§ 982.551(e) and 982.551(l) to read as follows:

§ 982.551 Obligations of participant.

* * * * *

(e) *Violation of lease.* The family may not commit any serious or repeated violation of the lease. Under 24 CFR 5.2005(c)(1), an incident or incidents of actual or threatened domestic violence, dating violence, or stalking will not be construed as a serious or repeated lease violation by the victim or threatened victim of the domestic violence, dating violence, or stalking, or as good cause to terminate the tenancy, occupancy rights, or assistance of the victim.

* * * * *

(l) *Crime by household members.* The members of the household may not engage in drug-related criminal activity or violent criminal activity or other criminal activity that threatens the health, safety, or right to peaceful enjoyment of other residents and persons residing in the immediate vicinity of the premises (see § 982.553). Under 24 CFR 5.2005(c)(2), criminal activity directly related to domestic violence, dating violence, or stalking, engaged in by a member of a tenant's household or any guest or other person under the tenant's control, shall not be cause for termination of tenancy, occupancy rights, or assistance of the victim, if the tenant or immediate family member of the tenant is the victim.

* * * * *

■ 47. Revise § 982.552(c)(2)(v) to read as follows:

§ 982.552 PHA denial or termination of assistance for the family.

* * * * *

(c) * * *

(2) * * *

(v) *Nondiscrimination limitation and protection for victims of domestic violence, dating violence, or stalking.* The PHA's admission and termination actions must be consistent with fair housing and equal opportunity provisions of § 5.105 of this title, and with the requirements of 24 CFR part 5, subpart L, protection for victims of domestic violence, dating violence, or stalking.

* * * * *

■ 48. Amend § 982.553 to revise paragraph (e), to read as follows:

§ 982.553 Denial of admission and termination of assistance for criminals and alcohol abusers.

* * * * *

(e) In cases of criminal activity related to domestic violence, dating violence, or stalking, the victim protections of 24 CFR part 5, subpart L, apply.

PART 983—PROJECT-BASED VOUCHER (PBV) PROGRAM

■ 49. The authority citation for part 983 continues to read as follows:

Authority: 42 U.S.C. 1437f and 3535(d).

■ 50. Amend § 983.4 to add a new proviso in alphabetical order, as follows:

§ 983.4 Cross-reference to other Federal requirements.

* * * * *

Protection for victims of domestic violence, dating violence, or stalking. See 24 CFR part 5, subpart L.

* * * * *

■ 51. Amend § 983.251 to revise paragraph (a)(3) to read as follows:

§ 983.251 How participants are selected.

(a) * * *

(3) The protections for victims of domestic violence, dating violence, or stalking in 24 CFR part 5, subpart L, apply to admission to the project-based program.

* * * * *

■ 52. Amend § 983.255 to revise paragraph (d) to read as follows:

§ 983.255 Tenant screening.

* * * * *

(d) The protections for victims of domestic violence, dating violence, or

stalking in 24 CFR part 5, subpart L, apply to tenant screening.

■ 53. Amend § 983.257 to revise the last sentence of paragraph (a) to read as follows:

§ 983.257 Owner termination of tenancy and eviction.

(a) * * * Part 5, subpart L of 24 CFR, on protection for victims of domestic violence, dating violence, or stalking applies to this part.

* * * * *

Dated: October 20, 2010.

Shaun Donovan,

Secretary.

[FR Doc. 2010–26914 Filed 10–26–10; 8:45 am]

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Federal Register

Wednesday,
October 27, 2010

Part V

Department of Labor

Delegation of Authority and Assignment of Responsibility; Secretary's Order 6–2010; Notice

DEPARTMENT OF LABOR

Office of the Secretary

Delegation of Authority and Assignment of Responsibility; Secretary's Order 6–2010

Subject: Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Employment and Training.

1. Purpose and Scope

The purpose of this Secretary's Order is to delegate and assign to the Assistant Secretary for Employment and Training (ASET) the authorities and responsibilities of the Secretary of Labor for organizing, implementing, and putting into operation employment and training policies, programs, and activities.

2. Authority and Directives Affected

A. This Order is issued under 5 U.S.C. 301 (Departmental Regulations); 29 U.S.C. 551 (Establishment of the Department; Secretary; Seal); and Reorganization Plan No. 6 of 1950 (5 U.S.C. Appendix 1).

B. *Directives Affected.* Secretary's Orders 9–2006 and 3–2009 are hereby superseded and cancelled by this Order. Any Secretary's Orders or other DOL document (including policies and guidance) which references Secretary's Order 3–2007, which was superseded and cancelled by Secretary's Order 3–2009, or Secretary's Orders 4–75 (Manpower Programs), 2–79 (Targeted Jobs Tax Credit), 3–81 (Trade Act of 1974), 2–85 (Job Training Partnership Act), which were superseded and cancelled by Secretary's Order 3–2007, are deemed to refer to this Order instead.

3. Background

This Order updates the roles and responsibilities of the ASET and repeals Secretary's Order 9–2006, which established the Office of the Job Corps within the Office of the Secretary. This Order also repeals and supersedes Secretary's Order 3–2009, to include authority and responsibility for the Job Corps program. This is accomplished by deleting the exclusion for the Job Corps that was found in Secretary's Order 3–2009, Section 4 A. (22), titled Delegation of Authority and Assignment of Responsibilities.

In general, this Order constitutes the primary Secretary's Order for the Employment and Training Administration (ETA). This Order consolidates all of the authority delegated and the responsibilities assigned to the ASET for the employment and training policies, programs, and activities of ETA. The ASET is responsible for overseeing and managing a budget that funds the nation's publicly-funded workforce investment system. This system contributes to the more efficient functioning of the U.S. labor market by providing a wide array of employment and training services to employers, job seekers, and youth, including job training, employment services, labor market information, and income maintenance services. The ASET manages the agency responsible for carrying out these responsibilities.

4. Delegation of Authority and Assignment of Responsibilities

A. The Assistant Secretary for Employment and Training is hereby delegated authority and assigned responsibility for carrying out the standards, policies, programs, and activities of the Department of Labor, including grant making and contract procurement activities in accordance with existing governmental and Departmental regulations and policies, relating to workforce development activities such as employment services, benefit assistance, and training, including those functions to be performed by the Secretary of Labor under the designated provisions of the following statutes, except as provided in paragraph 5 of this Order.

(1) American Competitiveness and Workforce Improvement Act, Section 414(c), Public Law 105–277, as amended by Division J, Section 428, Public Law 108–447, 29 U.S.C. 2916a.

(2) Appalachian Regional Development Act of 1965, as amended, 40 U.S.C. 14101 *et seq.*

(3) Federal Unemployment Tax Act, as amended, 26 U.S.C. 3301–3311, including the Federal-State Extended Unemployment Compensation Act of 1970, as amended, 26 U.S.C. 3304 note.

(4) Health Coverage Tax Credit, section 31 of the Internal Revenue Code of 1986, 26 U.S.C. 31.

(5) Immigration and Nationality Act of 1952, as amended, 8 U.S.C. 1101 *et seq.* and related laws, subject to (i) Secretary's Order 9–2009, which, in relevant part, delegates authority and assigns responsibility to the Administrator, Wage and Hour Division for the enforcement of alien labor certification, attestation, and labor condition application programs, and (ii) Secretary's Order 18–2006 which remains in effect, which in relevant part, delegates authority and assigns responsibility to the Deputy Undersecretary for International Affairs for assisting the Secretary of Homeland Security in the preparation of immigration reports and assisting in the coordination of information on immigration and migration policy within the Department and coordinating the Department's participation in international forums on discussions of migration and immigration.

(6) Intergovernmental Cooperation Act of 1968, as amended, 31 U.S.C. 6501 *et seq.*

(7) National Apprenticeship Act (Fitzgerald Act), as amended, 29 U.S.C. 50 *et seq.*

(8) Older Americans Act of 1965, as amended, 42 U.S.C. 3056 *et seq.*

(9) Public Works Acceleration Act, Public Law 87–658, 42 U.S.C. 2641 *et seq.*

(10) Rehabilitation Act of 1973, as amended, 29 U.S.C. 795.

(11) Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended, sections 410 and 423, 42 U.S.C. 5177 and 5189a; Executive Order 12381, "Delegation of Emergency Management Functions" (September 8, 1982), which delegates the authority of the President to exercise powers of the President with respect to Federal disaster assistance to the Federal Emergency Management Agency; "Delegation of Authority to the Department of Labor," from the Federal Emergency Management Agency to provide Federal disaster assistance (February 10, 1986).

(12) Rural Development Act of 1972, as amended, 7 U.S.C. 1932(d)(4).

(13) Small Business Act, as amended, 15 U.S.C. 644(n).

(14) Social Security Act of 1935, as amended, Title III–Grants to States for Unemployment Compensation Administration, 42 U.S.C. 501–504; Title IX–Unemployment Security Administration Financing, 42 U.S.C. 1101–1110; Title XI, Section 1137—Income and Eligibility Verification System, 42 U.S.C. 1320b–7; Title XII–Advances to State Unemployment Funds, 42 U.S.C. 1321–1324.

(15) Trade Act of 1974, as amended, 19 U.S.C. 2271–2323, 2323—2372–2374, 2395 and 2397a.

(16) Unemployment Compensation for Federal Civilian Employees Program, 5 U.S.C. 8501–8509; and Unemployment Compensation for Ex-servicemembers Program, 5 U.S.C. 8521–8525.

(17) Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 3689, 3694, 4106, 4107(c), 4110, and 4212(a)(2)(B) and (C). Note: Secretary's Order 7–2009 remains in effect. That order delegates authority and assigns responsibility to the Director of the Office of Federal Contract Compliance Programs for

affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, including 38 U.S.C. 4212(a)(1), 4212(a)(2)(A), and 4212(b)(2004) and 38 U.S.C. 4212(a) and (b) (2002). Subject to the above delegation to ETA, Secretary's Order 3–2004 remains in effect, which in part, delegates authority and assigns responsibility to the Assistant Secretary of Labor for Veterans' Employment and Training for administering the Federal Contractor Veteran's Employment Report (VETS–100), 38 U.S.C. 4212(d), and determining compliance pursuant to 20 CFR 1001.130 regarding Federal contractor priority of employment referral and employment listings under 38 U.S.C. 4212(a)(2)(B) and (C).

(18) Jobs for Veterans Act of 2002, 38 U.S.C. 4215(b)(1) and 38 U.S.C. 4215(c), as implemented by regulations at 20 CFR 1010. This Secretary's Order delegates authority and assigns responsibility to the Assistant Secretary of Labor for Employment and Training for the following sections of the regulations: (a) Administering implementation of priority of service in accord with § 1010.200 through § 1010.230, § 1010.250, § 1010.300, and § 1010.310; (b) administering data collection and reporting on priority of service in accord with § 1010.320 and § 1010.330; and, (c) in accord with § 1010.240, monitoring compliance with priority of service jointly with the Assistant Secretary for Veterans' Employment and Training.

(19) Vocational Education Act of 1963, as amended, the Carl D. Perkins Vocational and Applied Technology Act, 20 U.S.C. 2301 *et seq.*

(20) Wagner-Peyser Act, as amended, 29 U.S.C. 49 *et seq.*

(21) Work Opportunity Tax Credit, section 51 of the Internal Revenue Code of 1986, 26 U.S.C. 51.

(22) Worker Adjustment and Retraining Notification Act, as amended, 29 U.S.C. 2101 *et seq.*

(23) Workforce Investment Act of 1998, as amended, title I and title V, Public Law 105–220, 29 U.S.C. 2801–2945, 20 U.S.C. 9271–9276 except for title I, subtitle D § 168 which pertains to the Veterans' Workforce Investment Program, 29 U.S.C. 2913.

(24) YouthBuild Transfer Act of 2005, Public Law 109–281, 29 U.S.C. 2918a.

(25) Executive Order 10582, "Prescribing Uniform Procedures for Certain Determinations under the Buy American Act" (December 17, 1954), as amended by Executive Order 11051, "Prescribing Responsibilities of the Office of Emergency Planning in the Executive Office of the President" (September 27, 1962), and Executive Order 12148, "Federal Emergency Management" (July 20, 1979).

(26) Executive Order 12656, "Assignment of Emergency Preparedness Responsibilities" (November 18, 1988).

(27) Executive Order 12789, "Delegation of Reporting Functions under the Immigration Reform and Control Act of 1986" (February 10, 1992), as amended by Executive Order 13286, "Amendment of Executive Orders, and Other Actions, in Connection With the Transfer of Certain Functions to the Secretary of Homeland Security" (February 28, 2003).

(28) Executive Order 12073, "Federal Procurement in Labor Surplus Areas" (August 16, 1978).

(29) Executive Order 13198, "Agency Responsibilities With Respect to Faith-Based and Community Initiatives" (January 29, 2001).

(30) Executive Order 13279, "Equal Protection of the Laws for Faith-Based and Community Organizations" (December 12, 2002).

(31) Such additional Federal acts, Executive Orders, or regulations that may assign to the Secretary or the Department duties and responsibilities similar to those listed under subparagraphs (1)–(30) of this paragraph including but not limited to those relating to workforce development activities, such as employment services, benefit assistance and training, and the extension or supplementation of unemployment compensation provided under Federal law.

B. The Assistant Secretary for Employment and Training is delegated authority for making organizational changes in accordance with policies established by the Secretary.

C. The Assistant Secretary for Employment and Training is also delegated the authority and assigned responsibility to carry out departmental liaison and committee representative duties as provided in the relevant authorities listed in paragraph 4(A) above, except as provided in paragraph 5 of this Order.

D. The Assistant Secretary for Employment and Training is also delegated the authority and assigned responsibility to determine whether a recipient of a grant awarded or administered by the Office of the Assistant Secretary for Employment and Training is entitled, pursuant to the Religious Freedom Restoration Act, 42 U.S.C. 2000bb–1(b), to an exemption from a religious non-discrimination provision of a statute or regulation applied and/or enforced by the Department.

E. The Solicitor of Labor is delegated authority and assigned responsibility for providing legal advice and assistance to officials of the Department relating to the administration of this Order and the statutory provisions, regulations, and Executive Orders listed above.

5. Reservation of Authority

A. No delegation of authority or assignment of responsibility under this Order will be deemed to affect the Secretary's authority to continue to exercise or further delegate such authority or responsibility.

B. The submission of reports and recommendations to the President and Congress concerning the administration of the statutory provisions and Executive Orders listed above is reserved to the Secretary.

C. Nothing in this Order shall limit or modify the delegation of authority and assignment of responsibility to the Administrative Review Board by Secretary's Order 1–2010 (Jan. 15, 2010), 75 FR 3924 (Jan. 25, 2010).

D. Nothing in this Order shall limit or modify the provision of any other Order, including Secretary's Order 04–2006 (February 21, 2006), Office of the Inspector General, except as expressly provided.

E. The Secretary reserves the authority to enter into and terminate an agreement with any State or State agency to act as an agent of the United States under section 239(a) of the Trade Act of 1974, as amended, 19 U.S.C. 2311(a), in the administration of the Trade Adjustment Assistance programs; under 5 U.S.C. 8502 in the administration of the Unemployment Compensation for Federal Employees and Unemployment Compensation for ex-service members programs; under section 410(a) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5177(a), in the administration of the Disaster Unemployment Assistance program; as well as under any Federal program providing for the extension or supplementation of unemployment compensation: and to certify unemployment compensation law under 26 U.S.C. 3304(c) and 26 U.S.C. 3303(b).

6. Redelegation of Authority

The Assistant Secretary for Employment and Training may further redelegate, unless otherwise prohibited, the authority and responsibilities herein delegated by this Order.

7. Effective Date

This Order is effective immediately.

Dated: October 20, 2010.

Hilda L. Solis,

Secretary of Labor.

[FR Doc. 2010–27139 Filed 10–26–10; 8:45 am]

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Federal Register

Wednesday,
October 27, 2010

Part VI

Federal Deposit Insurance Corporation

12 CFR Part 327

Assessment Dividends, Assessment Rates and Designated Reserve Ratio; Proposed Rule; Adoption of Federal Deposit Insurance Corporation Restoration Plan; Notice

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 327

RIN 3064–AD63

Assessment Dividends, Assessment Rates and Designated Reserve Ratio

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of proposed rulemaking (NPRM) and request for comment.

SUMMARY: In order to implement a comprehensive, long-range management plan for the Deposit Insurance Fund, the FDIC is proposing to amend its regulations to: implement the dividend provisions in the Dodd-Frank Wall Street Reform and Consumer Protection Act; set assessment rates; and set the designated reserve ratio at 2 percent. The FDIC seeks comment on all aspects of this NPRM.

DATES: Comments must be received on or before November 26, 2010.

ADDRESSES: You may submit comments on the notice of proposed rulemaking, identified by RIN number and the words "Assessments, Dividends and DRR NPRM," by any of the following methods:

- *Agency Web Site: http://www.FDIC.gov/regulations/laws/federal/propose.html.* Follow the instructions for submitting comments on the Agency Web Site.
- *E-mail: Comments@FDIC.gov*. Include the RIN number in the subject line of the message.
- *Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.
- *Hand Delivery:* Guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m.

Instructions: All submissions received must include the agency name and RIN for this rulemaking. Comments will be posted to the extent practicable and, in some instances, the FDIC may post summaries of categories of comments, with the comments themselves available in the FDIC's reading room. Comments will be posted at: *http://www.fdic.gov/regulations/laws/federal/propose.html*, including any personal information provided with the comment.

FOR FURTHER INFORMATION CONTACT: Munsell St. Clair, Acting Chief, Fund Analysis and Pricing Section, (202) 898–8967, Christopher Bellotto, Counsel, (202) 898–3801, Donna Saulnier, Deputy Director, Assessment Policy and Operations, (703) 562–6167, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

I. Background

A. Overview

The FDIC has experienced two banking crises in the years following the Great Depression, one in the late 1980s and early 1990s and the current one. In both of these crises, the balance of the deposit insurance fund (the DIF or the fund) became negative, hitting a low of negative $20.9 billion in December 2009, despite high assessment rates and, in the most recent crisis, other extraordinary measures—including a special assessment—that the FDIC was forced to adopt as losses mounted.

In the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Congress revised the statutory authorities governing the FDIC's management of the fund. The FDIC now has the ability to achieve goals for deposit insurance fund management that it has sought to achieve for decades but lacked the tools to accomplish: maintaining a positive fund balance even during a banking crisis and maintaining moderate, steady assessment rates throughout economic and credit cycles.

Among other things, Dodd-Frank: (1) Raises the minimum designated reserve ratio (DRR), which the FDIC must set each year, to 1.35 percent (from the former minimum of 1.15 percent) and removes the upper limit on the DRR (which was formerly capped at 1.5 percent) and therefore on the size of the fund; [1] (2) requires that the fund reserve ratio reach 1.35 percent by September 30, 2020 (rather than 1.15 percent by the end of 2016, as formerly required); [2] (3) requires that, in setting assessments, the FDIC "offset the effect of [requiring that the reserve ratio reach 1.35 percent by September 30, 2020 rather than 1.15 percent by the end of 2016] on insured depository institutions with total consolidated assets of less than $10,000,000,000"; [3] (4) eliminates the requirement that the FDIC provide dividends from the fund when the reserve ratio is between 1.35 percent and 1.5 percent; [4] and (5) continues the FDIC's authority to declare dividends when the reserve ratio at the end of a calendar year is at least 1.5 percent, but grants the FDIC sole discretion in determining whether to suspend or limit the declaration or payment of dividends.[5]

Given these changes, the FDIC considers the present moment optimal for implementing a comprehensive, long-range fund management plan, while the need for a sufficiently large fund and stable premiums is most apparent. Memories of the last two crises will fade and the need for a strong fund will become less apparent. Action now will establish standards for prudent fund management throughout the economic and credit cycle and better position the FDIC to resist future calls to reduce assessment rates or pay larger dividends at the expense of prudent fund management.

The FDIC has developed such a comprehensive, long-range management plan for the DIF. The FDIC sought industry input in developing this plan at a September 24, 2010 roundtable organized by the FDIC. At the roundtable, bank executives and industry trade group representatives uniformly favored steady, predictable assessments and found high assessment rates during crises objectionable.[6] The proposed plan is designed to reduce the pro-cyclicality in the existing system and achieve moderate, steady assessment rates throughout economic and credit cycles while also maintaining a positive fund balance even during a banking crisis, by setting an appropriate target fund size and a strategy for assessment rates and dividends.

The plan covers the near term, governed by the statutory requirement that the fund reserve ratio reach 1.35 percent by 2020, the medium term, when the reserve ratio has recovered to pre-crisis levels, and the long term, when the reserve ratio is sufficiently large that the fund would be able to withstand a crisis similar in magnitude to that of the late 1980s and early 1990s and the current crisis.

Near Term

Pursuant to the comprehensive plan, the FDIC has adopted a new Restoration Plan to ensure that the reserve ratio reaches 1.35 percent by September 30, 2020, as required by statute. The Restoration Plan is based on updated income, loss and reserve ratio projections, which contain lower expected losses for the period 2010 through 2014 than the FDIC's

[1] Public Law 111–203, § 334(a), 124 Stat. 1376, 1539 (to be codified at 12 U.S.C. 1817(b)(3)(B)).

[2] Public Law 111–203, § 334(d), 124 Stat. 1376, 1539 (to be codified at 12 U.S.C. 1817(nt)).

[3] Public Law 111–203, § 334(e), 124 Stat. 1376, 1539 (to be codified at 12 U.S.C. 1817(nt)).

[4] Public Law 111–203, § 332(d), 124 Stat. 1376, 1539 (to be codified at 12 U.S.C. 1817(e)).

[5] Public Law 111–203, § 332, 124 Stat. 1376, 1539 (to be codified at 12 U.S.C. 1817(e)(2)(B)).

[6] The proceedings of the roundtable can be viewed in their entirety at: *http://www.vodium.com/MediapodLibrary/index.asp?library=pn100472_fdic_RoundTable.*

projections in June 2010. Because of the lower expected losses and the additional time provided by Dodd-Frank to meet the minimum (albeit higher) required reserve ratio, the new Restoration Plan foregoes the uniform 3 basis point increase in assessment rates previously scheduled to go into effect on January 1, 2011.[7] The FDIC estimates that the fund reserve ratio will reach 1.15 percent by the fourth quarter of 2018, even without the 3 basis point uniform increase in rates.

Under Dodd-Frank, the FDIC is required to offset the effect on small institutions (those with less than $10 billion in assets) of the statutory requirement that the fund reserve ratio increase from 1.15 percent to 1.35 percent by September 30, 2020. Thus, assessment rates applicable to all insured depository institutions (IDIs) need be set only high enough to reach 1.15 percent; the mechanism for reaching 1.35 percent by the statutory deadline of September 30, 2020, and the manner of offset can be determined separately. Assessing large IDIs for that offset can be done in several ways, consistent with maintaining a risk-based assessment system for all IDIs. The Restoration Plan postpones until 2011 rulemaking regarding the method that will be used to effectuate the offset.

Medium Term

Using historical fund loss and simulated income data from 1950 to the present, the FDIC has undertaken an analysis to determine how high the reserve ratio would have had to have been before the onset of the two crises that occurred during this period to have maintained both a positive fund balance and stable assessment rates throughout the crises. The analysis, which is described in detail below, concludes that a moderate, long-term average industry assessment rate, combined with an appropriate dividend or assessment rate reduction policy, would have been sufficient to have prevented the fund from becoming negative during the crises, though the fund reserve ratio would have had to have exceeded 2 percent before the onset of the crises.

Once the reserve ratio reaches 1.15 percent, the FDIC believes that assessment rates (other than those necessary to effectuate the offset) can be reduced to a moderate level. In this rulemaking, pursuant to its statutory authority to set assessments, the FDIC is proposing a lower assessment rate schedule to take effect when the fund reserve ratio exceeds 1.15 percent.[8]

Long Term

To increase the probability that the fund reserve ratio will reach a level sufficient to withstand a future crisis, the FDIC, based on its authority to suspend or limit dividends, is also proposing to suspend dividends permanently when the fund reserve ratio exceeds 1.5 percent.[9] In lieu of dividends, and pursuant to its authority to set risk-based assessments, the FDIC is proposing to adopt progressively lower assessment rate schedules when the reserve ratio exceeds 2 percent and 2.5 percent. These lower assessment rate schedules would serve much the same function as dividends but would provide more stable and predictable effective assessment rates, an objective that representatives at the September 24, 2010 roundtable organized by the FDIC valued highly.

The FDIC also proposes setting the DRR at 2 percent, which the FDIC views as a long-range goal and the *minimum* level needed to withstand a future crisis of the magnitude of past crises. However, the FDIC's analysis shows that a reserve ratio higher than 2 percent would increase the chance that the fund will remain positive during a future economic and banking downturn similar or more severe than past crises. Thus, the 2 percent DRR should not be viewed as a cap on the fund.

B. Historical Analysis of Loss, Income and Reserve Ratios

For purposes of developing a long-term fund management strategy, the FDIC undertook an analysis to evaluate the tradeoffs between assessment rates and policies that either award dividends or reduce assessment rates by creating a simulated deposit insurance fund covering the years 1950 to 2010.[10] The analysis varied assessment rates and dividends to determine what would have happened to the simulated fund's balance over time.

As a starting point, the analysis sought to determine what constant average nominal assessment rate across the entire 60-year period would have maintained a positive fund balance during both crisis periods, assuming a policy that provided no dividends.[11] The result is a moderate rate of 7.44 basis points, which would have allowed the fund's reserve ratio to reach 2.48 percent (in 1981) before the crisis of the 1980s and early 1990s, and 2.03 percent (in 2006) before the current crisis. (See Charts A and B.) Failure to reach these reserve ratios would have resulted in a negative balance. Assessment rate volatility was by design completely eliminated.

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[7] While the range of reasonably possible losses is large, the FDIC now projects that losses during this period will be $52 billion, down from $60 billion as projected in June.

[8] Under section 7 of the Federal Deposit Insurance Act (FDI Act), the FDIC has authority to set assessments in such amounts as it determines to be necessary or appropriate. In setting assessments, the FDIC must consider certain enumerated factors, including the operating expenses of the DIF, the estimated case resolution expenses and income of the DIF, and the projected effects of assessments on the capital and earnings of IDIs.

[9] 12 U.S.C. 1817(e)(2), as amended by § 332 of the Dodd-Frank Act.

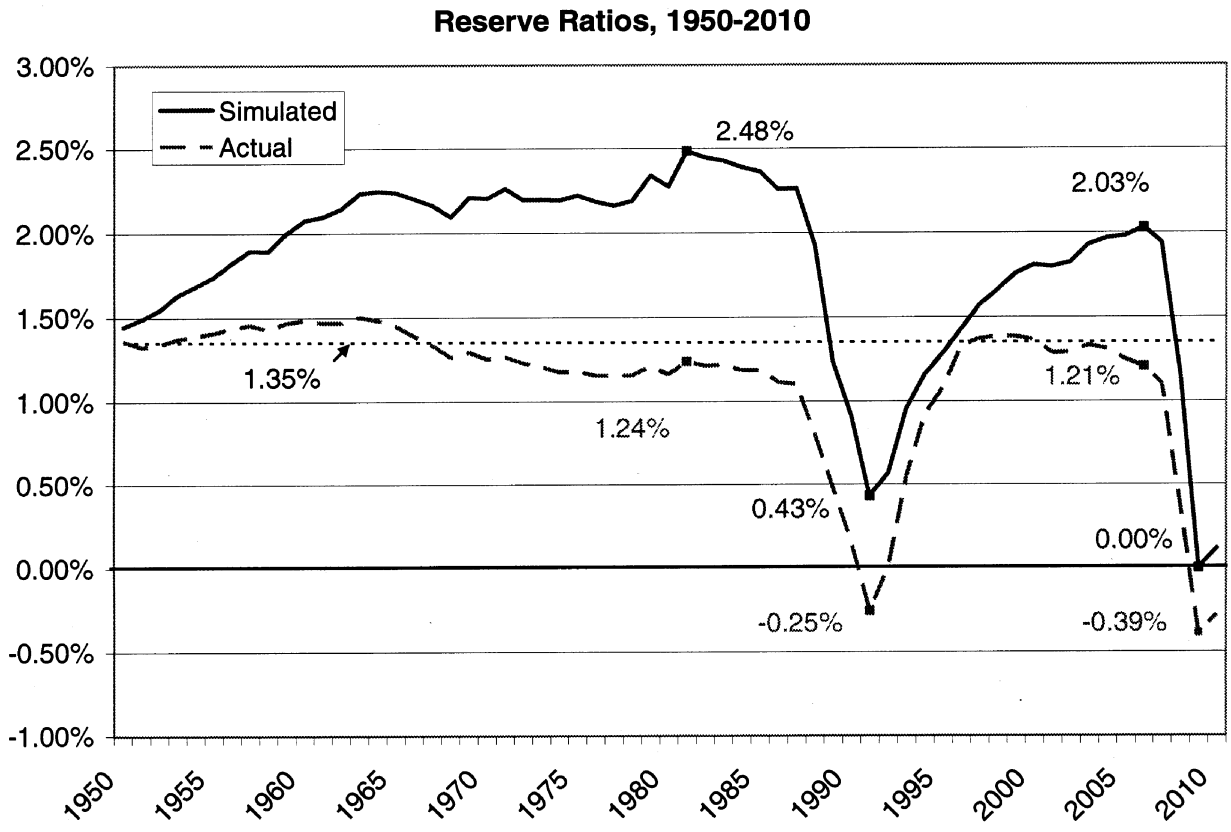
[10] The historical fund analysis uses actual FDIC historical assessment base and fund expense data and historical interest rate data from the Board of Governors of the Federal Reserve System. FDIC historical data are altered in only one respect: For the year 2007, the FDIC coverage level is assumed to be $250,000 because all depositors in failed banks during the current crisis were covered at that level. Projected data from June 30, 2010 to 2040 are based on September 2010 FDIC estimates for losses, expenses and insured deposit and assessment base growth (using adjusted total domestic deposits). Implied forward interest rates (as of September 27, 2010) from Bloomberg are used for the years after 2010. The analysis uses a modeled investment portfolio. After reviewing available historical FDIC portfolio data, a "default" investment portfolio was constructed with the following mix of Treasury securities: 35 percent in 6-month securities; 25 percent in 1-year securities; 25 percent in 3-year securities; and 15 percent in 5-year securities. This portfolio mix is retained unless the FDIC's provision for losses increases for two consecutive years. In that event, all income (proceeds from maturing securities, as well as net assessment and interest income) is invested in 6-month Treasury securities. The modeled portfolio therefore becomes shorter term as anticipated losses rise. When the fund's income exceeds expenses for two years, the fund's investments are returned to the default portfolio mix. The analysis examined fund performance over time using multiple combinations of different assessment rates and dividend policies.

The simulated fund does not include the costs of FSLIC and RTC failures during the 1980s and early 1990s. Their inclusion would have required a much higher reserve ratio to keep the fund balance positive during the late 1980s and early 1990s.

Supplementary material explaining the analysis can be found in the attached Appendix.

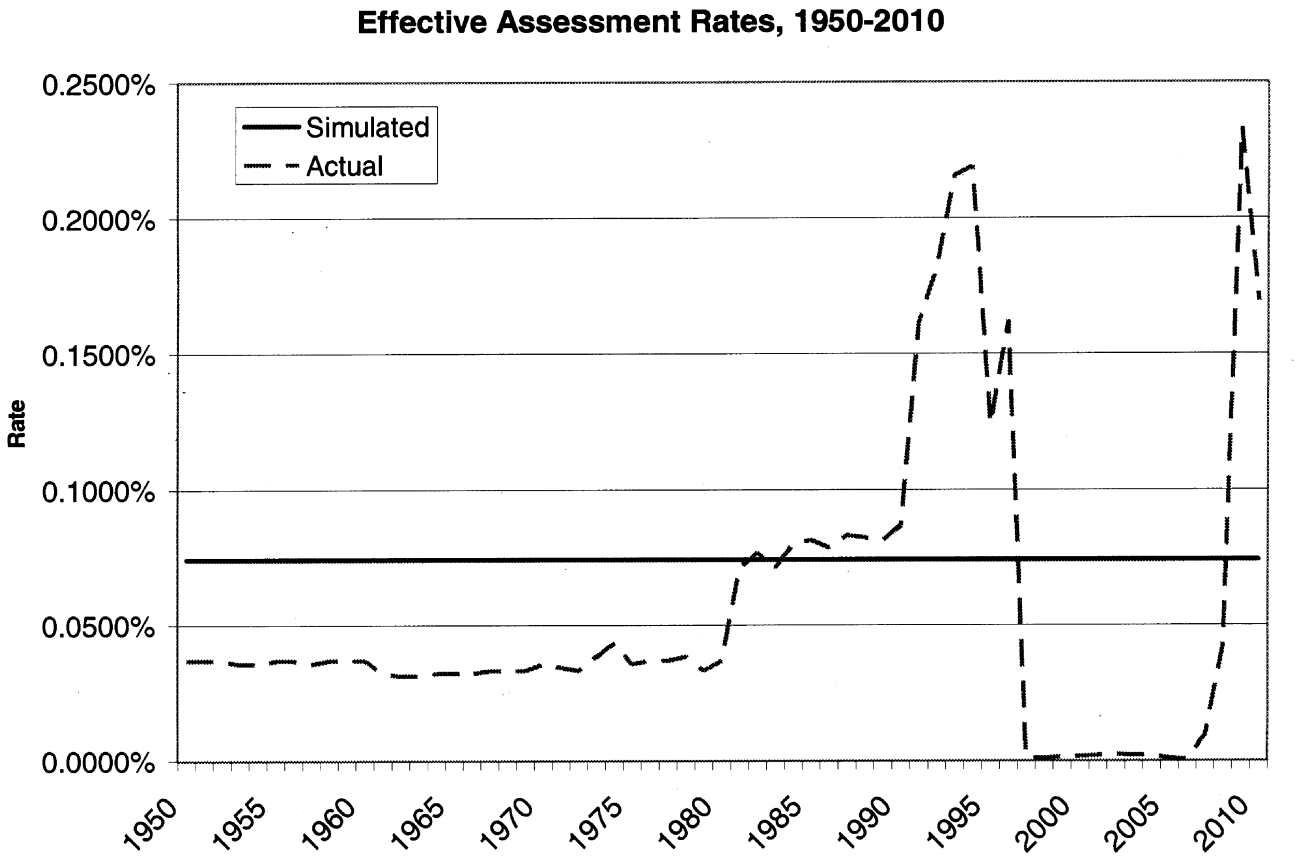
[11] All assessment rates represent an industry-wide average.

Chart A



No dividends, with 7.44 basis point average nominal assessment rate

Chart B

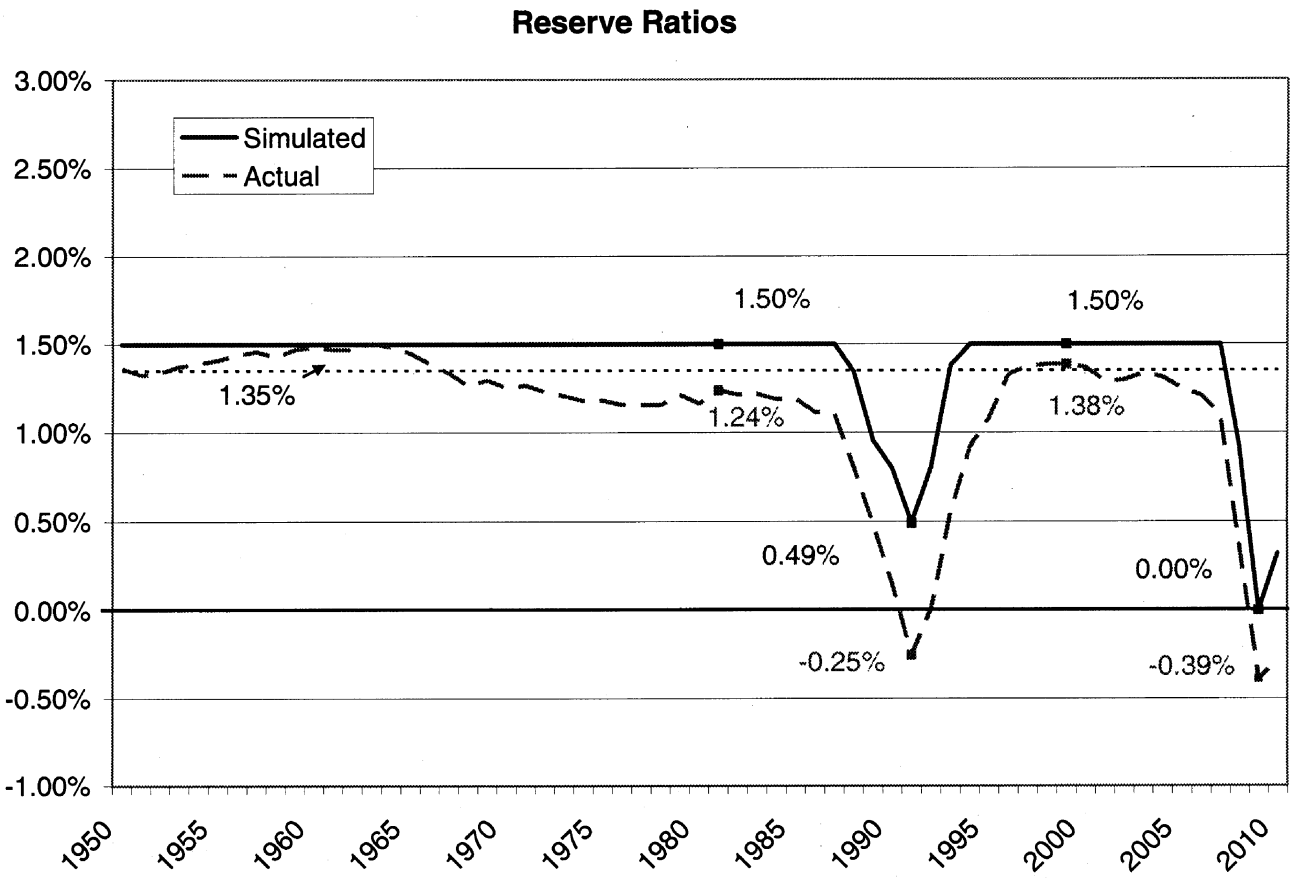


No dividends, with 7.44 basis point average nominal assessment rate

During most years since 1950, however, there has been either a credit or dividend policy provided for by statute (although since 1985 no recurring credits or dividends have been awarded). As amended by Dodd-Frank, the FDI Act continues to authorize the FDIC to dividend 100 percent of the amount in the fund in excess of the amount required to maintain the reserve ratio at 1.5 percent, but provides the FDIC with sole discretion to suspend or limit these dividends. The analysis (given its method and assumptions) sought to evaluate the consequences had the full amount of dividends possible under Dodd-Frank been granted from 1950–2010. (See Charts C and D.) Granting dividends in this way necessitates a constant average nominal assessment rate of 21.96 basis points to maintain a positive fund balance during both periods of crisis. Such a rate is historically very high, and corresponds most closely to the rates charged to recapitalize the fund after a crisis. This policy would have also resulted in substantial premium volatility and pro-cyclical average effective assessment rates.[12] In some years, the effective assessment rate would have been negative.

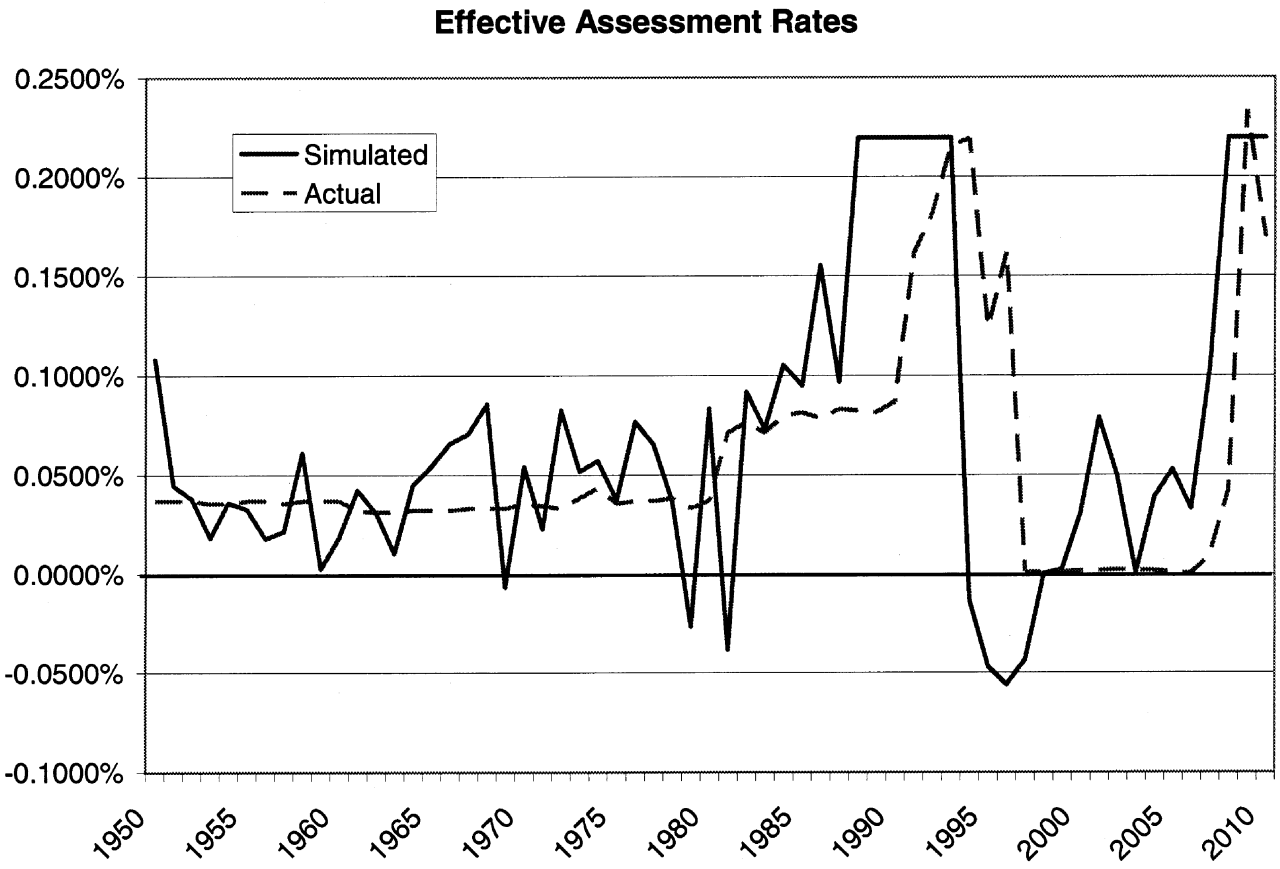
[12] Average effective assessment rates are calculated by subtracting dividends paid from assessments received.

Chart C



Dividends equal to 100 percent of the amount in the fund in excess of the amount required to maintain the reserve ratio at 1.5 percent, with 21.96 basis point average nominal assessment rate

Chart D



Dividends equal to 100 percent of the amount in the fund in excess of the amount required to maintain the reserve ratio at 1.5 percent, with 21.96 basis point average nominal assessment rate

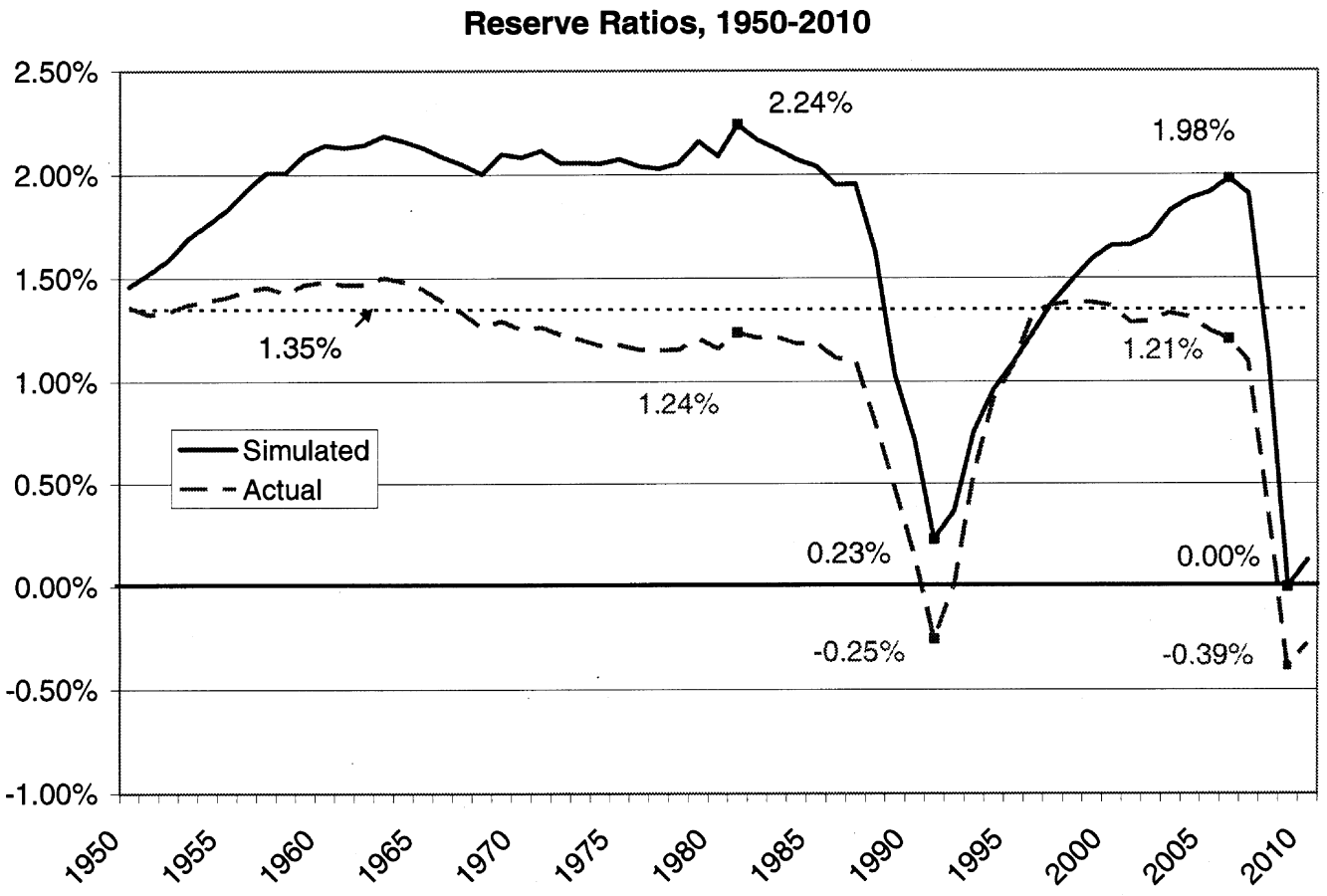
The analysis was therefore extended to examine options that limited dividends or reduced assessment rates in lieu of dividends, in keeping with the broad set of goals for fund management. The analysis examined multiple options with different levels of dividend or assessment rate reduction, and found that many options would still have required relatively high assessment rates. However, the FDIC did identify two options that would achieve the FDIC's goals of maintaining a positive fund balance even during a banking crisis and maintaining moderate, steady assessment rates throughout economic and credit cycles.

One option awards dividends as a percentage of the amount in the fund in excess of the amount required to maintain the reserve ratio at a specified level. The analysis above has already shown that granting dividends equal to 100 percent of the amount in the fund in excess of the amount required to maintain the reserve ratio at 1.5 percent would have required a very high constant average nominal assessment rate of 21.96 basis points. However, granting dividends equal to 25 percent of the amount in the fund in excess of the amount required to maintain the reserve ratio at 2 percent and increasing dividends to 50 percent of the amount in the fund in excess of the amount required to maintain the reserve ratio at 2.5 percent permitted a significantly lower constant average nominal assessment rate to maintain a positive fund balance.

This dividend method, however, introduces a potential problem—the possibility that an IDI could receive a dividend that approaches 100 percent of its assessment. The nearer a dividend comes to 100 percent of an IDI's assessment, the more it introduces moral hazard and reduces or eliminates the FDIC's ability to control and price for risk taking. To avoid this problem, dividends are limited such that no IDI could receive a dividend greater than 50 percent of its annual assessment.

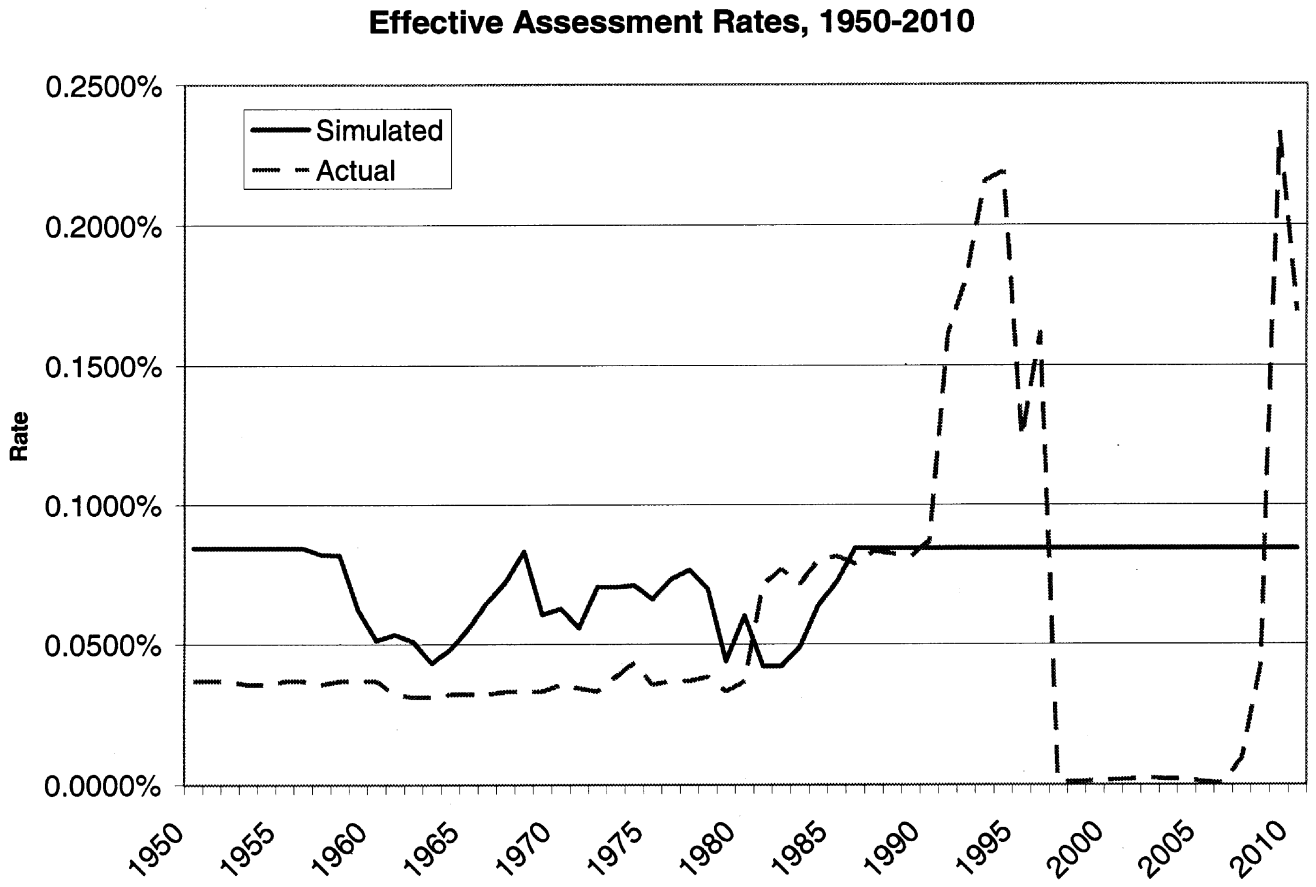
The analysis (reflected in Charts E and F) shows that this option results in a moderate constant nominal assessment rate of 8.45 basis points across the entire 60-year period. The reserve ratios necessary to maintain a positive fund balance are 2.24 percent before the crisis of the 1980s and early 1990s and 1.98 percent before the current crisis. These ratios are, of course, significantly higher than the level that the DRR has been set historically, but should be sufficient to withstand a future crisis similar in depth to those the FDIC has experienced. Pro-cyclicality is limited, but this option generates moderate premium volatility.

Chart E



Dividends equal to 25 percent of the amount in the fund in excess of the amount required to maintain the reserve ratio at 2.0 percent or 50 percent of the amount in the fund in excess of the amount required to maintain the reserve ratio at 2.5 percent, with 8.45 basis point average nominal assessment rate

Chart F

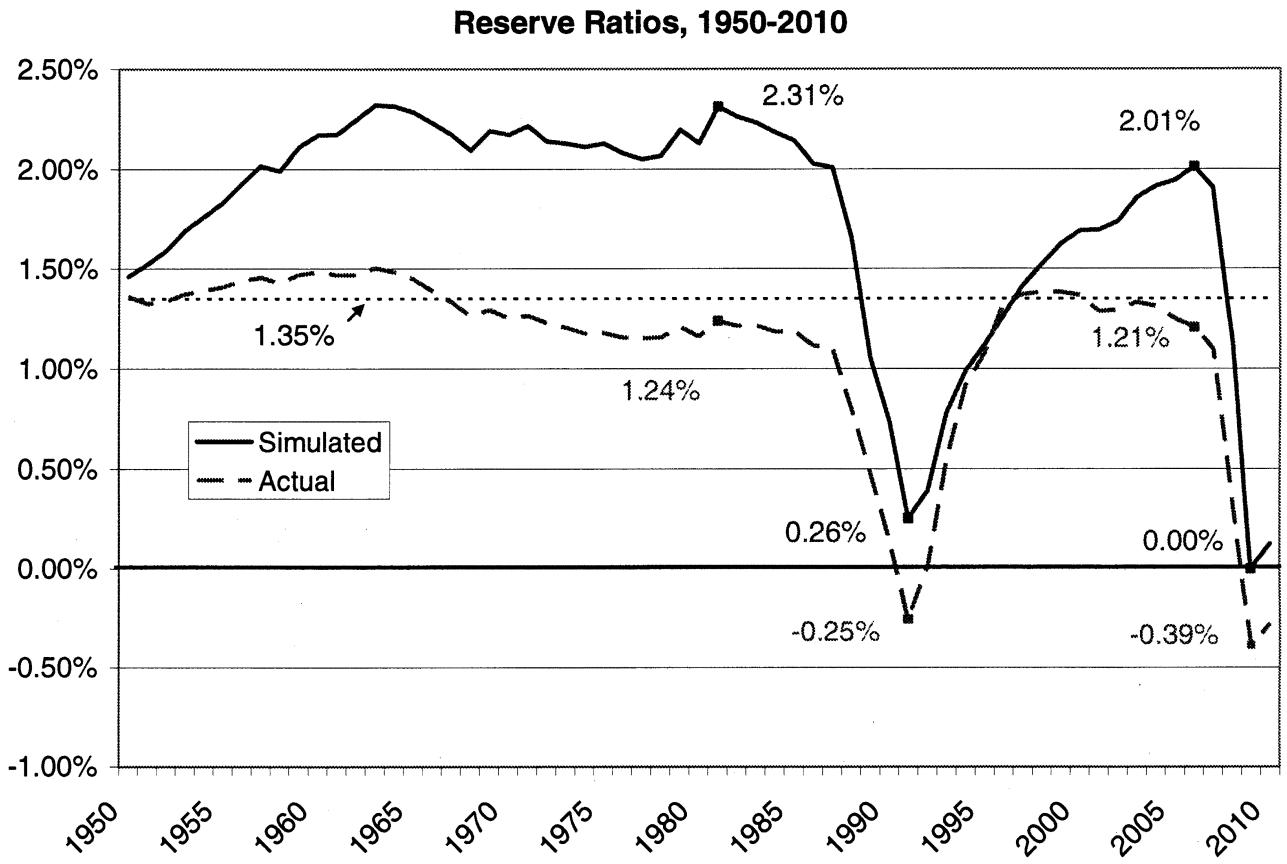


Dividends equal to 25 percent of the amount in the fund in excess of the amount required to maintain the reserve ratio at 2.0 percent or 50 percent of the amount in the fund in excess of the amount required to maintain the reserve ratio at 2.5 percent, with 8.45 basis point average nominal assessment rate

The second option that achieves the FDIC's fund management goals of maintaining a positive fund balance even during a banking crisis and maintaining moderate, steady assessment rates throughout economic and credit cycles would, in lieu of a dividend, reduce the long-term industry average nominal assessment rate by 25 percent when the reserve ratio reached 2 percent, and by 50 percent when the reserve ratio reached 2.5 percent.

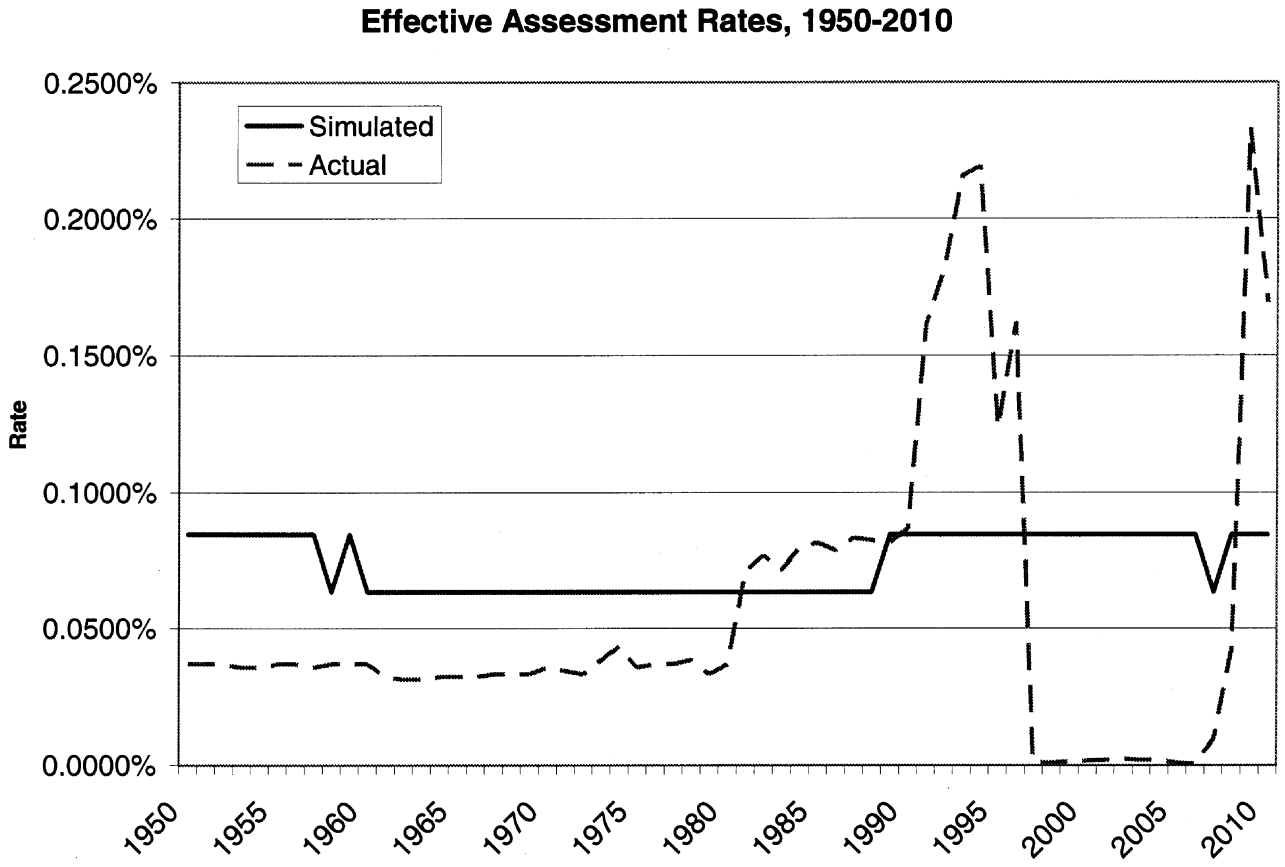
The analysis (reflected in Charts G and H) shows that this option results in a moderate constant nominal assessment rate of 8.47 basis points during the entire 60-year period (except when reduced as the result of the fund exceeding the 2 percent threshold), almost identical to the rate required under the immediately preceding option (limiting dividends). The reserve ratios necessary to maintain a positive fund balance are 2.31 percent before the crisis of the 1980s and early 1990s and 2.01 percent before the current crisis, very similar to the ratios required under the option that would limit dividends. Premium volatility and pro-cyclicality are both successfully minimized, and premium volatility is significantly lower than under the option that would limit dividends.

Chart G



Effective assessment rate reduced by 25 percent when reserve ratio reaches 2 percent and 50 percent when reserve ratio reaches 2.5 percent, with 8.47 basis point average nominal assessment rate

Chart H



Effective assessment rate reduced by 25 percent when reserve ratio reaches 2 percent and 50 percent when reserve ratio reaches 2.5 percent, with 8.47 basis point average nominal assessment rate

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One final concern is whether the fund recovers sufficiently, both in magnitude and in time, to withstand another crisis. Extending the analysis into the future, using estimates based on implied forward interest rates and assuming current FDIC assessment rates and loss projections until the reserve ratio reaches 1.15 percent (approximately the fourth quarter of 2018) and low losses and an 8.47 basis point average nominal assessment rate thereafter, the reserve ratio reaches 2 percent in 2027.[13] This would bring the fund to a level able to withstand past crises in 17 years, approximately the length of time between the depth of the crisis of the late 1980s and early 1990s (in 1991) and the beginning of the current crisis (in 2008).

However, the average rates assumed in the previous paragraph between now and 2018 are much higher than 8.47 basis points, which, if the proposed comprehensive plan is implemented, would be approximately the average rate in effect in the event a future banking crisis causes the fund balance to fall to or near zero. Starting at a reserve ratio of zero, assessment rates of 8.45 to 8.47 basis points (the rates under the option that limits dividends and the one that lowers rates) it would take 25 years for the simulated fund to reach a level of 2 percent. However, allowing the reserve ratio to exceed 2 percent should reduce the chance that the reserve ratio during a crisis would fall all the way to zero.

[13] Because of the offset requirements of Dodd-Frank discussed earlier, the fund reserve ratio is assumed to reach 1.35 percent immediately upon reaching 1.15 percent.

II. The Proposed Rule

A. Dividends

To increase the probability that the fund reserve ratio will reach a level sufficient to withstand a future crisis, the FDIC is proposing to suspend dividends permanently whenever the fund reserve ratio exceeds 1.5 percent. In lieu of dividends, and pursuant to its authority to set risk-based assessments, the FDIC is proposing to adopt progressively lower assessment rate schedules when the reserve ratio exceeds 2 percent and 2.5 percent, as discussed below. These lower assessment rate schedules would serve much the same function as dividends in preventing the DIF from growing unnecessarily large but, as discussed above, would provide more stable and predictable effective assessment rates, a feature that industry representatives

said was very important at the September 24, 2010 roundtable organized by the FDIC.

B. Assessment Rates

Current Assessment Rates

Current initial base assessment rates are set forth in Table 1 below.

TABLE 1—CURRENT INITIAL BASE ASSESSMENT RATES [14]

	Risk Category				
	I*		II	III	IV
	Minimum	Maximum			
Annual Rates (in basis points)	12	16	22	32	45

*Rates for institutions that do not pay the minimum or maximum rate will vary between these rates.

These initial assessment rates are subject to adjustment. An IDI's total base assessment rate can vary from its initial base assessment rate as the result of an unsecured debt adjustment and a secured liability adjustment. The unsecured debt adjustment lowers an IDI's initial base assessment rate using its ratio of long-term unsecured debt (and, for small IDIs, certain amounts of Tier 1 capital) to domestic deposits.[15] The secured liability adjustment increases an IDI's initial base assessment rate if the IDI's ratio of secured liabilities to domestic deposits is greater than 25 percent (the secured liability adjustment).[16] In addition, IDIs in Risk Categories II, III and IV are subject to an adjustment for large levels of brokered deposits (the brokered deposit adjustment).[17]

After applying all possible adjustments, the current minimum and maximum total base assessment rates for each risk category are set out in Table 2 below.

TABLE 2—INITIAL AND TOTAL BASE ASSESSMENT RATES

	Risk Category I	Risk Category II	Risk Category III	Risk Category IV
Initial base assessment rate	12–16	22	32	45
Unsecured debt adjustment	(5)–0	(5)–0	(5)–0	(5)–0
Secured liability adjustment	0–8	0–11	0–16	0–22.5
Brokered deposit adjustment	.....	0–10	0–10	0–10
Total Base Assessment Rate	7–24	17–43	27–58	40–77.5

All amounts for all risk categories are in basis points annually. Total base rates that are not the minimum or maximum rate will vary between these rates.

The FDIC may uniformly adjust the total base rate assessment schedule up or down by up to 3 basis points without further rulemaking.[18]

Proposed Assessment Rates Once the Reserve Ratio Reaches 1.15 Percent

As discussed earlier, under Dodd-Frank, the FDIC is required to offset the effect on small institutions (those with less than $10 billion in assets) of the statutory requirement that the fund reserve ratio increase from 1.15 percent to 1.35 percent by September 30, 2020. Thus, assessment rates applicable to all IDIs need to be set only high enough to reach 1.15 percent. The Restoration Plan postpones until 2011 rulemaking regarding the method that will be used to reach 1.35 percent by the statutory deadline of September 30, 2020, and the manner of offset.

When the reserve ratio reaches 1.15 percent, the FDIC believes that it would be appropriate to lower assessment rates so that the average assessment rate would approximately equal the long-term moderate, steady assessment rate—approximately 8.5 basis points, as discussed above—that would have been needed to maintain a positive fund balance throughout past crises. Based on the FDIC's analysis of weighted average assessment rates paid immediately prior to the current crisis (when the industry was relatively prosperous, and had both good CAMELS ratings and substantial capital), weighted average rates during times of industry prosperity tend to be somewhat less than 1 basis point greater than the minimum rate applicable to Risk Category I.[19] Thus, to achieve

[14] For purposes of determining assessment rates, each IDI is placed into one of four risk categories (Risk Category I, II, III or IV), depending upon supervisory ratings and capital levels. 12 CFR 327.9. Within Risk Category I, there are different assessment systems for large and small IDIs, but the possible range of rates is the same for all IDIs in Risk Category I.

[15] Unsecured debt excludes debt guaranteed by the FDIC under its Temporary Liquidity Guarantee Program.

[16] The initial base assessment rate cannot increase more than 50 percent as a result of the secured liability adjustment.

[17] 12 CFR 327.9(d)(7).

[18] Specifically:

The Board may increase or decrease the total base assessment rate schedule up to a maximum increase of 3 basis points or a fraction thereof or a maximum decrease of 3 basis points or a fraction thereof (after aggregating increases and decreases), as the Board deems necessary. Any such adjustment shall apply uniformly to each rate in the total base assessment rate schedule. In no case may such Board rate adjustments result in a total base assessment rate that is mathematically less than zero or in a total base assessment rate schedule that, at any time, is more than 3 basis points above or below the total base assessment schedule for the Deposit Insurance Fund, nor may any one such Board adjustment constitute an increase or decrease of more than 3 basis points.

12 CFR 327.10(c). On October 19, 2010, the FDIC adopted a new Restoration Plan that foregoes a uniform 3 basis point increase in assessment rates previously scheduled to go into effect on January 1, 2011. Thus, the assessment rates in the current regulation will remain in effect.

[19] The first year in which rates applicable to Risk Category I spanned a range (as opposed to being a single rate) was 2007, when initial assessment rates ranged between 5 and 7 basis points. During that year, weighted average annualized industry assessment rates for the first three quarters varied between 5.41 and 5.44 basis points. (By the end of

approximately an 8.5 basis point average assessment rate during prosperous times, current initial base rates would have to be set 4 basis points lower than current initial base assessment rates. Consequently, pursuant to the FDIC's authority to set assessments, the FDIC proposes that, when the fund reserve ratio first meets or exceeds 1.15 percent, the initial base and total base assessment rates set forth in Table 3 would take effect beginning the next quarter without the necessity of further action by the FDIC's Board. These rates would remain in effect unless and until the reserve ratio met or exceeded 2 percent. The unsecured debt adjustment could not exceed the lesser of 5 basis points or 50 percent of an IDI's initial base assessment rate. The FDIC's Board would retain its current authority to uniformly adjust the total base rate assessment schedule up or down by up to 3 basis points without further rulemaking.

TABLE 3—INITIAL AND TOTAL BASE ASSESSMENT RATES EFFECTIVE FOR THE QUARTER BEGINNING IMMEDIATELY AFTER THE QUARTER IN WHICH THE RESERVE RATIO MEETS OR EXCEEDS 1.15 PERCENT

	Risk Category I	Risk Category II	Risk Category III	Risk Category IV
Initial base assessment rate	8–12	18	28	40
Unsecured debt adjustment*	(5)–0	(5)–0	(5)–0	(5)–0
Secured liability adjustment	0–6	0–9	0–14	0–20
Brokered deposit adjustment	.....	0–10	0–10	0–10
Total Base Assessment Rate	4–18	13–37	23–52	35–70

All amounts for all risk categories are in basis points annually. Total base rates that are not the minimum or maximum rate will vary between these rates.

* The unsecured debt adjustment could not exceed the lesser of 5 basis points or 50 percent of an IDI's initial assessment rate; thus, for example, an IDI with an initial assessment rate of 8 would have a maximum unsecured debt adjustment of 4 basis points and could not have a total base assessment rate lower than 4 basis points.

Proposed Assessment Rates Once the Reserve Ratio Reaches 2.0 Percent

In lieu of dividends, and pursuant to its authority to set assessments, the FDIC proposes that, so long as the fund reserve ratio at the end of the prior quarter meets or exceeds 2 percent, but is less than 2.5 percent, the initial base and total base assessment rates set forth in Table 4 would come into effect without the necessity of further action by the FDIC's Board. If, however, after reaching a reserve ratio of 1.15 percent, the fund reserve ratio subsequently falls below 2 percent at the end of a quarter, the initial base and total base assessment rates set forth in Table 3 would take effect beginning the next quarter without the necessity of further action by the FDIC's Board. However, the assessment rates in Table 4 would not apply to any new depository institutions; these IDIs would remain subject to the assessment rates in Table 3, until they no longer were new depository institutions.[20] Under the proposal, the unsecured debt adjustment could not exceed the lesser of 5 basis points or 50 percent of an IDI's initial base assessment rate. The FDIC's Board would retain its current authority to uniformly adjust the total base rate assessment schedule up or down by up to 3 basis points without further rulemaking.

TABLE 4—INITIAL AND TOTAL BASE ASSESSMENT RATES EFFECTIVE FOR ANY QUARTER WHEN THE RESERVE RATIO FOR THE PRIOR QUARTER MEETS OR EXCEEDS 2 PERCENT (BUT IS LESS THAN 2.5 PERCENT)

	Risk Category I	Risk Category II	Risk Category III	Risk Category IV
Initial base assessment rate	6–10	16	26	38
Unsecured debt adjustment*	(5)–0	(5)–0	(5)–0	(5)–0
Secured liability adjustment	0–5	0–8	0–13	0–19
Brokered deposit adjustment	.....	0–10	0–10	0–10
Total Base Assessment Rate	3–15	11–34	21–49	33–67

All amounts for all risk categories are in basis points annually. Total base rates that are not the minimum or maximum rate will vary between these rates.

* The unsecured debt adjustment could not exceed the lesser of 5 basis points or 50 percent of an IDI's initial assessment rate; thus, for example, an IDI with an initial assessment rate of 6 would have a maximum unsecured debt adjustment of 3 basis points and could not have a total base assessment rate lower than 3 basis points.

Compared to Table 3, the proposed assessment rates in Table 4 should approximately reduce weighted average assessment rates by 25 percent, consistent with the analysis reflected in Chart H above. Based upon the FDIC's

2007, deterioration in the industry became more marked and weighted average rates began increasing.) 0.4 basis points is 20 percent of the 2 basis point difference between the minimum and maximum rates. 20 percent of the 4 basis point difference between the current minimum and maximum rates is 0.8 basis points. Thus, by analogy, in 2007 the current assessment schedule would have produced average assessment rates of about 12.8 basis points.

[20] Subject to exceptions, a new insured depository institution is a bank or savings association that has been federally insured for less than five years as of the last day of any quarter for which it is being assessed. 12 CFR 327.8(m). Under the proposal, other assessment rules related to new depository institutions would generally remain unchanged. For example, subject to the exceptions contained in the regulation, a new institution that is well capitalized would continue to be assessed the Risk Category I maximum initial base assessment rate in Table 3 for the relevant assessment period. 12 CFR 327.9(d)(9). Also, for example, a new institution would not be subject to the unsecured debt adjustment. 12 CFR 327.9(d)(5).

historical simulations, these rates should allow the fund to remain positive during a crisis of the magnitude of the prior two crises without significantly increasing pro-cyclicality or premium volatility.

Proposed Assessment Rates Once the Reserve Ratio Reaches 2.5 Percent

Again in lieu of dividends, and to reduce the low probability of the fund growing unreasonably large, the FDIC, under its authority to set assessments, proposes that the initial base and total base assessment rates set forth in Table 5 would apply if the fund reserve ratio at the end of the prior quarter meets or exceeds 2.5 percent, without the necessity of further action by the FDIC's Board. If, however, after reaching a reserve ratio of 1.15 percent, the fund reserve ratio subsequently falls below 2.5 percent at the end of a quarter, the rates set forth in Tables 3 or 4, whichever is applicable, would take effect beginning the next quarter without the necessity of further action by the FDIC's Board. Again, however, the assessment rates in Table 5 would not apply to any new depository institutions; these IDIs would remain subject to the assessment rates in Table 3, until they no longer were new depository institutions. Under the proposal, the unsecured debt adjustment could not exceed the lesser of 5 basis points or 50 percent of an IDI's initial base assessment rate. The FDIC's Board would retain its current authority to uniformly adjust the total base rate assessment schedule up or down by up to 3 basis points without further rulemaking.

TABLE 5—INITIAL AND TOTAL BASE ASSESSMENT RATES EFFECTIVE FOR ANY QUARTER WHEN THE RESERVE RATIO FOR THE PRIOR QUARTER MEETS OR EXCEEDS 2.5 PERCENT

	Risk Category I	Risk Category II	Risk Category III	Risk Category IV
Initial base assessment rate	4–8	14	24	36
Unsecured debt adjustment*	(4)–0	(5)–0	(5)–0	(5)–0
Secured liability adjustment	0–4	0–7	0–12	0–18
Brokered deposit adjustment	.....	0–10	0–10	0–10
Total Base Assessment Rate	2–12	9–31	19–46	31–64

All amounts for all risk categories are in basis points annually. Total base rates that are not the minimum or maximum rate will vary between these rates.

*The unsecured debt adjustment could not exceed the lesser of 5 basis points or 50 percent of an IDI's initial assessment rate; thus, for example, an IDI with an initial assessment rate of 6 would have a maximum unsecured debt adjustment of 3 basis points and could not have a total base assessment rate lower than 3 basis points.

Compared to Table 3, the proposed assessment rates in Table 5 should approximately reduce weighted average assessment rates by 50 percent, consistent with the analysis reflected in Chart H above and should allow the fund to remain positive during a crisis of the magnitude of the prior two crises without significantly increasing pro-cyclicality or premium volatility.

Capital and Earnings Analysis

The FDIC has analyzed the effect of its proposed rate schedules on the capital and earnings of IDIs.[21] The FDIC anticipates that when the reserve ratio exceeds 1.15 percent, and particularly when it exceeds 2 or 2.5 percent, the industry is likely to be prosperous. Consequently, the FDIC has examined the effect of the proposed lower rates on the industry at the end of 2006, when the industry was prosperous. Reducing average assessment rates by 4 basis points then (the approximate effect of reducing assessment rates from the current rate schedule to the one proposed when the reserve ratio reaches 1.15 percent) would have increased average after-tax income by 1.25 percent and average capital by 0.14 percent. Reducing average assessment rates by an additional 2 basis points (the effect of reducing assessment rates from the proposed rate schedule when the reserve ratio reaches 1.15 percent to the proposed rate schedule when the reserve ratio reaches 2 percent) would have increased average after-tax income by 0.62 percent and average capital by 0.07 percent. Similarly, reducing average assessment rates by an additional 2 basis points (the effect of reducing assessment rates from the proposed rate schedule when the reserve ratio reaches 2 percent to the proposed rate schedule when the reserve ratio reaches 2.5 percent) would have increased average after-tax income by 0.61 percent and average capital by 0.07 percent.

Effect of Upcoming Rulemakings

Dodd-Frank also requires the FDIC to amend its regulations to define an IDI's assessment base (with some possible exceptions) as "the average consolidated total assets of the insured depository institution during the assessment period * * * minus * * * the sum of * * * the average tangible equity of the insured depository institution during the assessment period * * *."[22] This assessment base will be more than 50 percent larger than the current assessment base, at least initially. Before the expiration of the comment period on this proposed rule, the FDIC plans to adopt and publish a notice of proposed rulemaking to define the assessment base. The FDIC anticipates that the notice will also include proposed changes to the risk-based pricing system necessitated by the change in assessment base.

The net effect of this proposal will necessitate that the FDIC also adjust the proposed assessment rates. These adjustments will ensure that the revenue collected under the new assessment system will approximately equal that under the existing assessment system.

For several reasons, however, it is neither possible nor advisable to attempt to make the new assessment system or changes to the assessment rate schedules proposed above perfectly revenue neutral. First, for simplicity, the FDIC prefers, when possible, to use whole numbers when it establishes

[21] In setting assessment rates, the FDIC's Board of Directors is authorized to set assessments for IDIs in such amounts as the Board of Directors may determine to be necessary. 12 U.S.C. 1817(b)(2)(A). In so doing, the Board shall consider: (1) the estimated operating expenses of the DIF; (2) the estimated case resolution expenses and income of the DIF; (3) the projected effects of the payment on the capital and earnings of IDIs; (4) the risk factors and other factors taken into account pursuant to 12 U.S.C.1817(b) (1) under the risk-based assessment system, including the requirement under such paragraph to maintain a risk-based system; and (5) any other factors the Board of Directors may determine to be appropriate. 12 U.S.C. 1817(b)(2)(B). As reflected in the text, the FDIC has taken into account all of these statutory factors.

[22] Public Law 111–203, § 331(b), 124 Stat. 1376, 1538 (to be codified at 12 U.S.C. 1817(nt)).

point assessment rates or the maximum and minimum of an assessment rate range. Second, the FDIC does not presently collect all of the information it needs to determine the exact revenue effect of many of the changes it anticipates proposing. Third, in response to the new assessment base, changes to the adjustments and possible changes to the large IDI assessment system, some IDIs may alter their funding structure and behavior—in ways that are not presently predictable—to minimize assessments.

C. DRR

As discussed above, Dodd-Frank eliminates the previous requirement to set the DRR within a range of 1.15 percent to 1.50 percent, directs the FDIC to set the DRR at a minimum of 1.35 percent (or the comparable percentage of the assessment base as amended by Dodd-Frank) and eliminates the maximum limitation on the DRR.[23] Dodd-Frank retains the requirement that the FDIC set and publish a DRR annually.[24]

While Dodd-Frank retains the requirement that the Board set a DRR annually, it does not direct the FDIC how to use the DRR. In effect, Dodd-Frank permits the FDIC to set the DRR as it sees fit so long as it is set no lower than 1.35 percent. Neither the FDI Act nor the amendments under Dodd-Frank establish a statutory role for the DRR as a trigger, whether for assessment rate determination, recapitalization of the fund, or dividends.

The FDIC sets forth below background information, its analysis of the statutory factors that must be considered in setting the DRR and its proposal to set the DRR for the DIF at 2 percent.[25]

Background

The FDIC must set the DRR in accordance with its analysis of the following statutory factors: Risk of losses to the DIF; economic conditions generally affecting IDIs; preventing sharp swings in assessment rates; and any other factors that the Board may determine to be appropriate and consistent with these three factors.[26] The analysis that follows considers each statutory factor, including one "other factor": maintaining the DIF at a level that can withstand substantial losses. The manner in which the FDIC's Board evaluates the statutory factors may depend on its view of the role of the DRR, which may change over time. Based on current circumstances and historical analysis, the FDIC has identified a role for the DRR as a minimum target for the reserve ratio.

Analysis of Statutory Factors

Risk of Losses to the DIF

During 2009 and 2010, losses to the DIF have been high. As of June 30, 2010, both the fund balance and the reserve ratio continue to be negative after reserving for probable losses from anticipated bank failures. During the current downturn the fund balance has fallen below zero for the second time in the history of the FDIC. The FDIC reported a negative fund balance in the early 1990s during the last banking crisis. The FDIC projects that, over the period 2010 through 2014, the fund could incur approximately $52 billion in failure-resolution costs. The FDIC projects that most of these costs will occur in 2010 and 2011.

In the FDIC's view, the high losses experienced by the DIF during the crisis of the 1980s and early 1990s and during the current economic crisis (and the potential for high risk of loss to the DIF over the course of future economic cycles) suggest that the FDIC should, as a long-range, minimum goal and in conjunction with the proposed dividend and assessment rate policy, set a DRR at a level that would have maintained a zero or greater fund balance during both crises so that the DIF will be better able to handle losses during periods of severe industry stress.

Economic Conditions Affecting FDIC-Insured Institutions

U.S. economic growth, which started in the second half of 2009, remains low. Leading economic indicators have fallen slightly after rising steadily since the spring of 2009. Continued weakness in labor and real estate markets coupled with concern about rising public debt levels have increased uncertainty in the economic outlook and heightened financial market volatility. Consensus forecasts call for the economy to grow at a slower pace in the second half of 2010 compared with the first half of the year, as fiscal stimulus measures wane.

The slow and uncertain pace of economic recovery creates a challenging operating environment for IDIs. Industry-wide loans outstanding continued to fall in the second quarter. As of June 30, there were 829 IDIs on the problem list, representing more than 10 percent of all IDIs. Through October 1, 129 IDIs have failed this year, making this year's total likely to match or exceed the 140 failures that occurred in 2009.

IDIs continue to experience significant credit distress, although loan losses and delinquencies may have peaked. Despite this, the financial performance of IDIs has shown signs of improvement. The industry reported aggregate net income of $26 billion in second quarter 2010, compared to an aggregate net loss of $4.4 billion a year ago. Almost 80 percent of IDIs were profitable in the quarter, and almost two-thirds reported year-over-year earnings growth.

Although these short-term economic conditions can inform the FDIC's decision on setting the DRR, they become less relevant in setting the DRR when, as now, the DIF is negative. In this context, the FDIC believes that the DRR should be viewed in a longer-term perspective. Twice within the past 30 years, serious economic dislocations have resulted in a significant deterioration in the condition of many IDIs and in a consequent large number of IDI failures at high costs to the DIF. In the FDIC's view, the DRR should, therefore, be viewed as a minimum goal needed to achieve a reserve ratio that can withstand these periodic economic downturns and their attendant IDI failures. Taking these longer-term economic realities into account, a prudent and consistent policy would set the DRR at a minimum of 2 percent, since that is the lowest level that would have prevented a negative fund balance at any time since 1950.

Preventing Sharp Swings in Assessment Rates

Current law directs the FDIC to consider preventing sharp swings in assessment rates for IDIs. Setting the DRR at 2 percent as a minimum goal rather than a final target would signal that the FDIC plans for the DIF to grow in good times so that funds are available to handle multiple bank failures in bad times. This plan would help prevent sharp fluctuations in deposit insurance premiums over the course of the business cycle. In particular, it would

[23] Public Law 111–203, § 334(a), 124 Stat. 1376, 1539 (to be codified at 12 U.S.C. 1817(b)(3)(B)).

[24] 12 U.S.C. 1817(b)(3)(A).

[25] The 2 percent DRR is expressed as a percentage of estimated insured deposits.

[26] Specifically, in setting the DRR for any year, the FDIC must consider the following factors:

(1) The risk of losses to the DIF in the current and future years, including historical experience and potential and estimated losses from IDIs.

(2) Economic conditions generally affecting IDIs so as to allow the DRR to increase during more favorable economic conditions and to decrease during less favorable economic conditions, notwithstanding the increased risks of loss that may exist during such less favorable conditions, as the Board determines to be appropriate.

(3) That sharp swings in assessment rates for IDIs should be prevented.

(4) Other factors as the FDIC's Board may deem appropriate, consistent with the requirements of the Reform Act.

12 U.S.C. 1817(b)(3)(B).

help reduce the risk of large rate increases during crises, when IDIs can least afford an increase.

Maintaining the DIF at a Level That Can Withstand Substantial Losses

Setting the DRR as a minimum goal and adopting the proposed dividend and assessment rate policy, which would allow the fund to grow sufficiently large in good times, would increase the likelihood that the DIF would remain positive during bad times. Having adequate funds available when entering a financial crisis would reduce the likelihood that the FDIC would need to increase assessment rates, levy special assessments on the industry or borrow from the U.S. Treasury.

Balancing the Statutory Factors

In the FDIC's view, the best way to balance all of the statutory factors (including the "other factor" identified above of maintaining the DIF at a level that can withstand the substantial losses associated with a financial crisis) is to set the DRR at 2 percent.

IV. Request for Comments

The FDIC requests comments on all aspects of the proposed rule.

V. Regulatory Analysis and Procedure

A. Solicitation of Comments on Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act, Public Law 106–102, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. We invite your comments on how to make this proposal easier to understand. For example:

- Have we organized the material to suit your needs? If not, how could this material be better organized?
- Are the requirements in the proposed regulation clearly stated? If not, how could the regulation be more clearly stated?
- Does the proposed regulation contain language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes to the format would make the regulation easier to understand?
- What else could we do to make the regulation easier to understand?

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires that each federal agency either certify that a proposed rule would not, if adopted in final form, have a significant economic impact on a substantial number of small entities or prepare an initial regulatory flexibility analysis of the rule and publish the analysis for comment.[27] Certain types of rules, such as rules of particular applicability relating to rates or corporate or financial structures, or practices relating to such rates or structures, are expressly excluded from the definition of "rule" for purposes of the RFA.[28]

As of June 30, 2010, of the 7,830 insured commercial banks and savings associations, there were 4,665 small insured depository institutions as that term is defined for purposes of the RFA (*i.e.,* institutions with $175 million or less in assets).

Among other things, the proposed rule would set the DRR at 2 percent. The FDIC views setting the DRR as having no significant economic impact on a substantial number of small insured depository institutions. However, the FDIC is voluntarily undertaking a regulatory flexibility analysis to aid the public in commenting on the small business impact of the proposed rule. The DRR would have no legal effect on small business entities for purposes of the RFA. The DRR is a minimum target only, and although the Dodd-Frank Act sets a minimum DRR of 1.35 percent of estimated insured deposits, the FDIC has the discretion to set the DRR above that level as it chooses. The DRR does not drive the needs of the Deposit Insurance Fund: the FDIC's total assessment needs are driven by statutory requirements and by the FDIC's aggregate insurance losses, expenses, investment income, and insured deposit growth, among other factors. Neither the FDI Act nor the amendments under Dodd-Frank establish a statutory role for the DRR as a trigger, whether for assessment rate determination, recapitalization of the fund, or dividends. Nor would setting the DRR at 2 percent under the proposed rule alter the distribution of assessments among IDIs. Accordingly, the proposed rule setting the DRR at 2 percent of estimated insured deposits would not have a significant economic effect on small entities for purposes of the RFA.

The remainder of the proposed rule would lower assessment rates when the reserve ratio reaches 1.15 percent, would suspend dividends permanently when the fund reserve ratio exceeds 1.5 percent and, in lieu of dividends, would progressively lower assessment rate schedules when the reserve ratio exceeds 2 percent and 2.5 percent. Dividends are simply an indirect way of lowering assessment rates; the lower assessment rate schedules proposed would serve much the same function as dividends but, as discussed above, would provide more stable and predictable effective assessment rates. This portion of the proposed rule (that is, the portion unrelated to setting the DRR) thus relates to the rates imposed on IDIs for deposit insurance, and to the risk-based assessment system components that measure risk and weigh that risk in determining an IDI's assessment rate. Consequently, a regulatory flexibility analysis is not required for this portion of the proposed rule. Nevertheless, the FDIC is voluntarily undertaking an initial regulatory flexibility analysis of the proposed rule for publication.

Pursuant to section 605(b) of the RFA, the FDIC certifies that the proposed rule would not have a significant economic effect on small entities unless and until the DIF reserve ratio exceeds specific thresholds of 1.15, 1.5, 2, and 2.5 percent. The reserve ratio is unlikely to reach these levels for many years. When it does, the overall effect of the proposed rule will be positive for entities of all sizes. All entities, including small entities, will receive a net benefit as a result of lower assessments paid. The proposed rule should not alter the distribution of the assessment burden between small entities and all others. It is difficult to realistically quantify the benefit at the present time. However, the initial magnitude of the benefit (when the reserve ratio reaches 1.15 percent) is likely to be less than a 2 percent increase in after-tax income and less than a 20 basis point increase in capital.

While each IDI will have the opportunity to request review of new assessments, the proposed rule will rely on information already collected and maintained by the FDIC in the regular course of business. The proposed rule will not directly or indirectly impose any additional reporting, recordkeeping or compliance requirements on IDIs.

C. Paperwork Reduction Act

No collections of information pursuant to the Paperwork Reduction Act (44 U.S.C. Ch. 3501 *et seq.*) are contained in the proposed rule.

[27] *See* 5 U.S.C. 603, 604, 605.

[28] *See* 5 U.S.C. 601.

D. The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

The FDIC has determined that the proposed rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105–277, 112 Stat. 2681).

List of Subjects in 12 CFR Part 327

Bank deposit insurance, Banks, Banking, Savings associations.

For the reasons set forth in the preamble, the FDIC proposes to amend chapter III of title 12 of the Code of Federal Regulations as follows:

PART 327—ASSESSMENTS

1–2. The authority citation for part 327 is revised to read as follows:

Authority: 12 U.S.C. 1441, 1813, 1815, 1817–19, 1821.

3. Revise § 327.4(g) to read as follows:

§ 327.4 Assessment Rates.

* * * * *

(g) *Designated reserve ratio.* The designated reserve ratio for the Deposit Insurance Fund is 2 percent.

4. Revise § 327.9(d)(5)(iii) to read as follows:

§ 327.9 Assessment risk categories and pricing methods.

* * * * *

(d) * * *

(5) * * *

(iii). Limitations—(A) If, after September 30, 2010, the reserve ratio of the DIF has not reached 1.15 percent, the unsecured debt adjustment for any institution shall not exceed five basis points.

(B) Once the reserve ratio of the DIF first reaches 1.15 percent after September 30, 2010, the unsecured debt adjustment for any institution shall not exceed the lesser of five basis points or 50 percent of the institution's initial base assessment rate.

* * * * *

6. Revise section 327.10 to read as follows:

§ 327.10 Assessment rate schedules.

(a) *Assessment rate schedules prior to the reserve ratio of the DIF first reaching 1.15 percent after September 30, 2010—*(1) *Applicability.* The assessment rate schedules in this paragraph (a) will cease to be applicable when the reserve ratio of the DIF first reaches 1.15 percent after September 30, 2010.

(2) *Initial Base Assessment Rate Schedule.* After September 30, 2010, if the reserve ratio of the DIF has not reached 1.15 percent, the initial base assessment rate for an insured depository institution shall be the rate prescribed in the following schedule:

INITIAL BASE ASSESSMENT RATE SCHEDULE IF, AFTER SEPTEMBER 30, 2010, THE RESERVE RATIO HAS NOT REACHED 1.15 PERCENT

	Risk Category				
	I*		II	III	IV
	Minimum	Maximum			
Annual Rates (in basis points)	12	16	22	32	45

*All amounts for all risk categories are in basis points annually. Initial base rates that are not the minimum or maximum rate will vary between these rates.

(i) *Risk Category I Initial Base Assessment Rate Schedule.* The annual initial base assessment rates for all institutions in Risk Category I shall range from 12 to 16 basis points.

(ii) *Risk Category II, III, and IV Initial Base Assessment Rate Schedule.* The annual initial base assessment rates for Risk Categories II, III, and IV shall be 22, 32, and 45 basis points, respectively.

(iii) All institutions in any one risk category, other than Risk Category I, will be charged the same initial base assessment rate, subject to adjustment as appropriate.

(3) *Total Base Assessment Rate Schedule after Adjustments.* After September 30, 2010, if the reserve ratio of the DIF has not reached 1.15 percent, the total base assessment rates after adjustments for an insured depository institution shall be the rate prescribed in the following schedule.

TOTAL BASE ASSESSMENT RATE SCHEDULE (AFTER ADJUSTMENTS)* IF, AFTER SEPTEMBER 30, 2010, THE RESERVE RATIO HAS NOT REACHED 1.15 PERCENT

	Risk Category I	Risk Category II	Risk Category III	Risk Category IV
Initial base assessment rate	12–16	22	32	45
Unsecured debt adjustment	(5)–0	(5)–0	(5)–0	(5)–0
Secured liability adjustment	0–8	0–11	0–16	0–22.5
Brokered deposit adjustment	.....	0–10	0–10	0–10
Total base assessment rate	7–24	17–43	27–58	40–77.5

*All amounts for all risk categories are in basis points annually. Total base rates that are not the minimum or maximum rate will vary between these rates.

(i) *Risk Category I Total Base Assessment Rate Schedule.* The annual total base assessment rates for all institutions in Risk Category I shall range from 7 to 24 basis points.

(ii) *Risk Category II Total Base Assessment Rate Schedule.* The annual total base assessment rates for Risk Category II shall range from 17 to 43 basis points.

(iii) *Risk Category III Total Base Assessment Rate Schedule.* The annual total base assessment rates for Risk Category III shall range from 27 to 58 basis points.

(iv) *Risk Category IV Total Base Assessment Rate Schedule.* The annual total base assessment rates for Risk Category IV shall range from 40 to 77.5 basis points.

(b) *Assessment rate schedules once the DIF reserve ratio first reaches 1.15 percent after September 30, 2010, and the reserve ratio for the immediately prior assessment period is less than 2 percent*—(1) *Initial Base Assessment Rate Schedule.* After September 30, 2010, once the reserve ratio of the DIF first reaches 1.15 percent, and the reserve ratio for the immediately prior assessment period is less than 2 percent, the initial base assessment rate for an insured depository institution shall be the rate prescribed in the following schedule:

INITIAL BASE ASSESSMENT RATE SCHEDULE ONCE THE RESERVE RATIO OF THE DIF REACHES 1.15 PERCENT AFTER SEPTEMBER 30, 2010, AND THE RESERVE RATIO FOR THE IMMEDIATELY PRIOR ASSESSMENT PERIOD IS LESS THAN 2 PERCENT

	Risk Category				
	I*	II	III	IV	
				Minimum	Maximum
Annual Rates (in basis points)	8	12	18	28	40

*All amounts for all risk categories are in basis points annually. Initial base rates that are not the minimum or maximum rate will vary between these rates.

(i) *Risk Category I Initial Base Assessment Rate Schedule.* The annual initial base assessment rates for all institutions in Risk Category I shall range from 8 to 12 basis points.

(ii) *Risk Category II, III, and IV Initial Base Assessment Rate Schedule.* The annual initial base assessment rates for Risk Categories II, III, and IV shall be 18, 28, and 40 basis points, respectively.

(iii) All institutions in any one risk category, other than Risk Category I, will be charged the same initial base assessment rate, subject to adjustment as appropriate. (2) *Total Base Assessment Rate Schedule after Adjustments.* After September 30, 2010, once the reserve ratio of the DIF first reaches 1.15 percent, and the reserve ratio for the immediately prior assessment period is less than 2 percent, the total base assessment rates after adjustments for an insured depository institution shall be the rate prescribed in the following schedule.

TOTAL BASE ASSESSMENT RATE SCHEDULE (AFTER ADJUSTMENTS)* ONCE THE RESERVE RATIO OF THE DIF REACHES 1.15 PERCENT AFTER SEPTEMBER 30, 2010, AND THE RESERVE RATIO FOR THE IMMEDIATELY PRIOR ASSESSMENT PERIOD IS LESS THAN 2 PERCENT

	Risk Category I	Risk Category II	Risk Category III	Risk Category IV
Initial base assessment rate	8–12	18	28	40
Unsecured debt adjustment	(5)–0	(5)–0	(5)–0	(5)–0
Secured liability adjustment	0–6	0–9	0–14	0–20
Brokered deposit adjustment	.....	0–10	0–10	0–10
Total base assessment rate	4–18	13–37	23–52	35–70

*All amounts for all risk categories are in basis points annually. Total base rates that are not the minimum or maximum rate will vary between these rates.

(i) *Risk Category I Total Base Assessment Rate Schedule.* The annual total base assessment rates for institutions in Risk Category I shall range from 4 to 18 basis points.

(ii) *Risk Category II Total Base Assessment Rate Schedule.* The annual total base assessment rates for Risk Category II shall range from 13 to 37 basis points.

(iii) *Risk Category III Total Base Assessment Rate Schedule.* The annual total base assessment rates for Risk Category III shall range from 23 to 52 basis points.

(iv) *Risk Category IV Total Base Assessment Rate Schedule.* The annual total base assessment rates for Risk Category IV shall range from 35 to 70 basis points.

(c) *Assessment rate schedules if the reserve ratio of the DIF for the prior assessment period is equal to or greater than 2 percent and less than 2.5 percent.* (1) *Initial Base Assessment Rate Schedule.* If the reserve ratio of the DIF for the prior assessment period is equal to or greater than 2 percent and less than 2.5 percent, the initial base assessment rate for an insured depository institution, except as provided in paragraph (e) of this section, shall be the rate prescribed in the following schedule:

INITIAL BASE ASSESSMENT RATE SCHEDULE IF RESERVE RATIO FOR PRIOR ASSESSMENT PERIOD IS EQUAL TO OR GREATER THAN 2 PERCENT AND LESS THAN 2.5 PERCENT

	Risk Category				
	I*		II	III	IV
	Minimum	Maximum			
Annual Rates (in basis points)	6	10	16	26	38

* All amounts for all risk categories are in basis points annually. Initial base rates that are not the minimum or maximum rate will vary between these rates.

(i) *Risk Category I Initial Base Assessment Rate Schedule.* The annual initial base assessment rates for all institutions in Risk Category I shall range from 6 to 10 basis points.

(ii) *Risk Category II, III, and IV Initial Base Assessment Rate Schedule.* The annual initial base assessment rates for Risk Categories II, III, and IV shall be 16, 26, and 38 basis points, respectively.

(iii) All institutions in any one risk category, other than Risk Category I, will be charged the same initial base assessment rate, subject to adjustment as appropriate.

(2) *Total Base Assessment Rate Schedule after Adjustments.* If the reserve ratio of the DIF for the prior assessment period is equal to or greater than 2 percent and less than 2.5 percent, the total base assessment rates after adjustments for an insured depository institution, except as provided in paragraph (e) of this section, shall be the rate prescribed in the following schedule.

TOTAL BASE ASSESSMENT RATE SCHEDULE (AFTER ADJUSTMENTS)* IF RESERVE RATIO FOR PRIOR ASSESSMENT PERIOD IS EQUAL TO OR GREATER THAN 2 PERCENT AND LESS THAN 2.5 PERCENT

	Risk Category I	Risk Category II	Risk Category III	Risk Category IV
Initial base assessment rate	6–10	16	26	38
Unsecured debt adjustment	(5)–0	(5)–0	(5)–0	(5)–0
Secured liability adjustment	0–5	0–8	0–13	0–19
Brokered deposit adjustment	.....	0–10	0–10	0–10
Total base assessment rate	3–15	11–34	21–49	33–67

* All amounts for all risk categories are in basis points annually. Total base rates that are not the minimum or maximum rate will vary between these rates.

(i) *Risk Category I Total Base Assessment Rate Schedule.* The annual total base assessment rates for institutions in Risk Category I shall range from 3 to 15 basis points.

(ii) *Risk Category II Total Base Assessment Rate Schedule.* The annual total base assessment rates for Risk Category II shall range from 11 to 34 basis points.

(iii) *Risk Category III Total Base Assessment Rate Schedule.* The annual total base assessment rates for Risk Category III shall range from 21 to 49 basis points.

(iv) *Risk Category IV Total Base Assessment Rate Schedule.* The annual total base assessment rates for Risk Category IV shall range from 33 to 67 basis points.

(d) *Assessment rate schedules if the reserve ratio of the DIF for the prior assessment period is greater than 2.5 percent*—(1) *Initial Base Assessment Rate Schedule.* If the reserve ratio of the DIF for the prior assessment period is greater than 2.5 percent, the initial base assessment rate for an insured depository institution, except as provided in paragraph (e) of this section, shall be the rate prescribed in the following schedule:

INITIAL BASE ASSESSMENT RATE SCHEDULE IF RESERVE RATIO FOR PRIOR ASSESSMENT PERIOD IS GREATER THAN 2.5 PERCENT

	Risk Category				
	I*		II	III	IV
	Minimum	Maximum			
Annual Rates (in basis points)	4	8	14	24	36

* All amounts for all risk categories are in basis points annually. Initial base rates that are not the minimum or maximum rate will vary between these rates.

(i) *Risk Category I Initial Base Assessment Rate Schedule.* The annual initial base assessment rates for all institutions in Risk Category I shall range from 4 to 8 basis points.

(ii) *Risk Category II, III, and IV Initial Base Assessment Rate Schedule.* The annual initial base assessment rates for Risk Categories II, III, and IV shall be 14, 24, and 36 basis points, respectively.

(iii) All institutions in any one risk category, other than Risk Category I, will be charged the same initial base assessment rate, subject to adjustment as appropriate.

(2) *Total Base Assessment Rate Schedule after Adjustments.* If the reserve ratio of the DIF for the prior assessment period is greater than 2.5 percent, the total base assessment rates after adjustments for an insured depository institution, except as provided in paragraph (e) of this section, shall be the rate prescribed in the following schedule.

TOTAL BASE ASSESSMENT RATE SCHEDULE (AFTER ADJUSTMENTS)* IF RESERVE RATIO FOR PRIOR ASSESSMENT PERIOD IS GREATER THAN 2.5 PERCENT

	Risk Category I	Risk Category II	Risk Category III	Risk Category IV
Initial base assessment rate	4–8	14	24	36
Unsecured debt adjustment	(4)–0	(5)–0	(5)–0	(5)–0
Secured liability adjustment	0–4	0–7	0–12	0–18
Brokered deposit adjustment		0–10	0–10	0–10
Total base assessment rate	2–12	9–31	19–46	31–64

* All amounts for all risk categories are in basis points annually. Total base rates that are not the minimum or maximum rate will vary between these rates.

(i) *Risk Category I Total Base Assessment Rate Schedule.* The annual total base assessment rates for institutions in Risk Category I shall range from 2 to 12 basis points.

(ii) *Risk Category II Total Base Assessment Rate Schedule.* The annual total base assessment rates for Risk Category II shall range from 9 to 31 basis points.

(iii) *Risk Category III Total Base Assessment Rate Schedule.* The annual total base assessment rates for Risk Category III shall range from 19 to 46 basis points.

(iv) *Risk Category IV Total Base Assessment Rate Schedule.* The annual total base assessment rates for Risk Category IV shall range from 31 to 64 basis points.

(e) *Assessment Rate Schedules for New Institutions.* New depository institutions, as defined in 327.8(l), shall be subject to the assessment rate schedules as follows:

(1) *Prior to the reserve ratio of the DIF first reaching 1.15 percent after September 30, 2010.* After September 30, 2010, if the reserve ratio of the DIF has not reached 1.15 percent, new institutions shall be subject to the initial and total base assessment rate schedules provided for in subsection (a).

(2) *Assessment rate schedules once the DIF reserve ratio first reaches 1.15 percent after September 30, 2010, and the reserve ratio for the immediately prior assessment period is less than 2 percent.* After September 30, 2010, once the reserve ratio of the DIF first reaches 1.15 percent, and if the reserve ratio for the immediately prior assessment period is less than 2 percent, new institutions shall be subject to the initial and total base assessment rate schedules provided for in subsection (b).

(f) *Total Base Assessment Rate Schedule adjustments and procedures*—(1) *Board Rate Adjustments.* The Board may increase or decrease the total base assessment rate schedule in paragraphs (a) through (d) of this section up to a maximum increase of 3 basis points or a fraction thereof or a maximum decrease of 3 basis points or a fraction thereof (after aggregating increases and decreases), as the Board deems necessary. Any such adjustment shall apply uniformly to each rate in the total base assessment rate schedule. In no case may such Board rate adjustments result in a total base assessment rate that is mathematically less than zero or in a total base assessment rate schedule that, at any time, is more than 3 basis points above or below the total base assessment schedule for the Deposit Insurance Fund in effect pursuant to subsection (b), nor may any one such Board adjustment constitute an increase or decrease of more than 3 basis points.

(2) *Amount of revenue.* In setting assessment rates, the Board shall take into consideration the following:

(i) Estimated operating expenses of the Deposit Insurance Fund;

(ii) Case resolution expenditures and income of the Deposit Insurance Fund;

(iii) The projected effects of assessments on the capital and earnings of the institutions paying assessments to the Deposit Insurance Fund;

(iv) The risk factors and other factors taken into account pursuant to 12 U.S.C. 1817(b)(1); and

(v) Any other factors the Board may deem appropriate.

(3) *Adjustment procedure.* Any adjustment adopted by the Board pursuant to this paragraph will be adopted by rulemaking, except that the Corporation may set assessment rates as necessary to manage the reserve ratio, within set parameters not exceeding cumulatively 3 basis points, pursuant to paragraph (c)(1) of this section, without further rulemaking.

(4) *Announcement.* The Board shall announce the assessment schedules and the amount and basis for any adjustment thereto not later than 30 days before the quarterly certified statement invoice date specified in § 327.3(b) of this part for the first assessment period for which the adjustment shall be effective. Once set, rates will remain in effect until changed by the Board.

§§ 327.51 through 327.54 [Removed]

7. Remove §§ 327.51 through 327.54.

8. Revise § 327.50 to read as follows:

§ 327.50 Dividends.

(a) *Suspension of Dividends.* The Board will suspend dividends permanently whenever the DIF reserve ratio exceeds 1.50 percent at the end of any year.

(b) *Assessment Rate Schedule if DIF Reserve Ratio Exceeds 1.50 Percent.* In lieu of dividends, when the DIF reserve ratio exceeds 1.50 percent, assessment rates shall be determined as set forth in section 327.10, as appropriate.

By order of the Board of Directors.

Dated at Washington, DC, this 19th day of October, 2010.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

The following appendix will not appear in the Code of Federal Regulations.

Appendix

The Appendix provides supplementary details on the method used to generate fund simulations in the FDIC's analysis. It also presents additional comparative examples of simulations using a variety of assessment rate policies that combine different constant nominal assessment rates with different

levels of assessment rate reduction awarded at different reserve ratio thresholds.

Methodology and Assumptions

Data

The simulated fund's assessment base and fund expenses are actual FDIC historical data.[29] For the years 1950 to 1988, data are from the FDIC insurance fund; from 1989 to 2005, data combine the BIF and the SAIF; from 2006 onwards, DIF data are used. FDIC historical data are altered in only one respect: Because all depositors in failed banks during the current crisis were covered up to $250,000, the FDIC deposit insurance coverage level for 2007 is assumed to be $250,000 even though the coverage limit in effect at the time was $100,000. (The Dodd-Frank Act extended the $250,000 coverage limit retroactively to depositors in any IDI for which the FDIC was appointed receiver or conservator on or after January 1, 2008.) Historical interest rate data are from the Board of Governors of the Federal Reserve System. From 2011 to 2040, projections are based on September 2010 FDIC estimates for losses, expenses and insured deposit and assessment base growth (using adjusted total domestic deposits). Implied forward interest rates (as of September 27, 2010) from Bloomberg are used for the years after 2010.

Treatment of Historical Assessment Credits, Special Assessments and FSLIC/RTC Costs

The simulated fund implements neither the assessment credit policies in effect from 1950 to 1984, nor the one-time assessment credit provided under the Deposit Insurance Reform Act of 2005. In addition, the simulated fund's income includes neither the one-time special assessment to recapitalize the SAIF in 1996 nor the one-time special assessment imposed in 2009. The simulated fund does not include as expenses the costs of FSLIC and RTC failures during the 1980s and early 1990s. The inclusion of these costs would require a much higher reserve ratio to keep the fund balance positive during the late 1980s and early 1990s than the analysis shows.

Investment Strategy

No consistent historical data are available describing the FDIC's investment portfolio over time. Moreover, as a simulated fund diverges from the actual fund, the FDIC's actual investment choices become increasingly irrelevant to the simulated fund's likely choices. After reviewing available FDIC data, the method chosen for the analysis was a modeled investment portfolio with the following investment strategy and set of rules for the simulated fund. The fund assumes a "default" portfolio mix of Treasury securities to be maintained under most conditions: 35 Percent in 6-month securities; 25 percent in 1-year securities; 25 percent in 3-year securities; and 15 percent in 5-year securities. This portfolio mix remains fixed unless the FDIC's provision for losses increases for two consecutive years. In that event, all income (proceeds from maturing securities, as well as net assessment and interest income) is invested in 6-month Treasury securities. The simulated fund therefore has an increasingly shorter term bias as anticipated losses from failures rise. When the fund's income exceeds expenses for two years, the fund's investments are returned to the 35–25–25–15 mix.

Assessment Rate, Dividend and Reserve Ratio Variables

Constant nominal industry average assessment rates in the analysis range from 7.44 to 25.88 basis points. The analysis examines two sets of policy options: Percentage reductions in assessment rates, and dividends as a percent of the amount in the fund over a specified reserve ratio. Rate reductions and dividend amounts range from zero to 100 percent. Reserve ratios at which assessment reductions or dividends are first awarded range from 1.5 percent to 2.5 percent.

Additional Comparative Examples

This section provides further detail and examples of the tradeoffs the FDIC examined in seeking an appropriate long-term fund management policy that takes into account the goals of maintaining a positive fund balance even during banking crises, and maintaining low, steady assessment rates throughout economic and credit cycles.[30] The examples below vary assessment rate reductions and the reserve ratio at which reductions are first awarded.

Maintaining Relatively Low Assessment Rates

Table A.1 shows the constant nominal assessment rates that need to be applied to keep the fund from becoming negative during both crises using various levels of assessment rate reduction and reserve ratios at which rates are first reduced.

Table A.1. Nominal Assessment Rates Needed to Maintain Positive Fund Balance

		Reserve Ratio at Which Rates Are First Reduced				
		1.50	1.75	2.00	2.25	2.50
% Reduction in Rates	100	25.88	14.94	9.23	8.03	7.53
	75	17.84	14.15	8.90	7.98	7.49
	50	12.32	11.70	8.73	7.99	7.46
	25	9.22	9.04	8.47	7.75	7.43
	10	8.03	7.97	7.78	7.54	7.41

[29] The assessment base used in this analysis is adjusted total domestic deposits. The Dodd-Frank Act provides that the assessment base be changed to average total consolidated assets minus average tangible equity.

[30] Specifically, the analysis sought to implement an assessment rate policy (a constant nominal rate in combination with assessment rate reductions) that would result in the fund falling to zero in 2009 (the fund's trough during the current crisis). Using assessment rates greater than those identified would cause the simulated fund to grow higher during periods of benign economic conditions and give the fund a capital buffer above zero in 2009.

In general, policies with low reserve ratios at which assessment rate reductions are first awarded and high rate reductions require relatively high nominal assessment rates, and so fail to keep assessment rates relatively low and steady. Policy options with high reserve ratios at which assessment rate reductions are awarded and low rate reductions require the lowest nominal assessment rates.

Reducing Pro-cyclical Assessments

In its analysis, the FDIC sought policies that reduced pro-cyclical assessments, which are assessments that are lower during prosperous times but higher when both IDIs and the fund are stressed by significant losses. Table A.2 compares average effective assessment rates during crisis years with average effective assessment rates during non-crisis years as a measure of how pro-cyclical effective assessment rates are throughout time.[31]

Table A.2. Assessment Rate Multiplier from Non-Crisis to Crisis Years

		Reserve Ratio at Which Rates Are First Reduced				
		1.50	1.75	2.00	2.25	2.50
% Reduction in Rates	100	4.9	2.4	1.2	1.0	0.9
	75	2.6	2.1	1.1	1.0	1.0
	50	1.4	1.3	1.1	1.0	1.0
	25	1.1	1.1	1.0	0.9	1.0
	10	1.0	1.0	1.0	1.0	1.0

Again, policies using low reserve ratios at which assessment reductions begin to be paid and high rate reductions are least desirable and produce greater pro-cyclicality. As a point of reference, the average assessment rates of the actual fund (which has historically had to implement pro-cyclical assessment policies during times of crisis to cover losses and rebuild the fund) more than quadrupled during crisis periods. An appropriate assessment reduction policy should seek relatively small changes in effective assessment rates across both crisis and non-crisis periods.

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[31] Crisis years are defined as 1981–96 (although in terms of bank failures this crisis ended by 1994, the industry had to pay high premiums for an additional two years in order to recapitalize the fund) and 2008–10, while all other years in the sample are non-crisis years: 1950–80 and 1997–2007.

FEDERAL DEPOSIT INSURANCE CORPORATION

Adoption of Federal Deposit Insurance Corporation Restoration Plan

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice.

On October 7, 2008, the FDIC established a Restoration Plan for the Deposit Insurance Fund (the DIF or the fund) to return the DIF to its statutorily mandated minimum reserve ratio of 1.15 percent within five years.[1] In February 2009, given the extraordinary circumstances facing the banking industry, the FDIC amended its Restoration Plan to extend the restoration period from five to seven years.[2] Congress amended the statute governing establishment and implementation of a restoration plan in May 2009 to allow the FDIC up to eight years to return the DIF reserve ratio to 1.15 percent, absent extraordinary circumstances.[3] The FDIC amended its Restoration Plan consistent with the statutory change and, pursuant to the amended Restoration Plan, adopted a uniform 3 basis point increase in initial assessment rates effective January 1, 2011, to meet the Restoration Plan's goal of returning the reserve ratio to 1.15 percent by the end of 2016.[4]

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) requires the FDIC to set a designated reserve ratio of not less than 1.35 percent for any year.[5] Dodd-Frank also requires the FDIC to take "such steps as may be necessary" to increase the level of the DIF to 1.35 percent of estimated insured deposits by September 30, 2020.[6] Under Dodd-Frank, the FDIC is required to offset the effect of requiring that the reserve ratio reach 1.35 percent by September 30, 2020, rather than 1.15 percent by the end of 2016, on insured depository institutions with total consolidated assets of less than $10,000,000,000.[7]

The FDIC has updated its income, loss and reserve ratio estimates and has concluded that expected losses for the period 2010 through 2014 are lower than were projected in June 2010. The FDIC now projects that losses during this period will be $52 billion, rather than $60 billion as projected in June. Given this lower loss projection, the FDIC estimates that the fund reserve ratio will reach 1.15 percent by the fourth quarter of 2018, even without the 3 basis point uniform increase in initial assessment rates presently scheduled to take effect January 1, 2011. Since Dodd-Frank provides that the FDIC is to offset the effect of the requirement that the reserve ratio reach 1.35 percent by September 30, 2020 on insured depository institutions with total consolidated assets of less than $10,000,000,000, initial assessment rates applicable to all insured depository institutions need be set only high enough to reach 1.15 percent by the statutory deadline of September 30, 2020; the mechanism for reaching 1.35 percent by the statutory deadline of September 30, 2020, and the manner of offset can be determined separately.

The FDIC has concluded that given the continuing stresses on the earnings of insured depository institutions and the additional time afforded to reach the reserve ratio required by Dodd-Frank, that it will forego the uniform 3 basis point increase in initial assessment rates scheduled to take effect on January 1, 2011. The FDIC intends to pursue further rulemaking in 2011 regarding the method that will be used to assess insured depository institutions with total consolidated assets of $10,000,000,000 or more to offset the effect of the statutory requirement that the reserve ratio reach 1.35 percent by September 30, 2020, rather than 1.15 percent by the end of 2016.

Therefore, the FDIC adopts the following Restoration Plan, which supersedes the Amended Restoration Plan adopted on September 29, 2009:

1. The period of the Restoration Plan is extended to September 30, 2020.

2. The FDIC will forego the uniform 3 basis point increase in initial assessment rates scheduled to take effect on January 1, 2011.

3. The FDIC plans to maintain the current schedule of assessment rates for all insured depository institutions.

4. The FDIC will pursue further rulemaking in 2011 regarding the method that will be used to reach 1.35 percent by September 30, 2020 and offset the effect on insured depository institutions with total consolidated assets of less than $10,000,000,000 of the statutory requirement that the reserve ratio reach 1.35 percent by September 30, 2020, rather than 1.15 percent by the end of 2016.

5. At least semiannually hereafter, the FDIC will update its loss and income projections for the fund and, if needed, will increase assessment rates, following notice-and-comment rulemaking if required. The FDIC may also lower assessment rates following notice-and-comment rulemaking if required.

6. Institutions may continue to use assessment credits (for regular quarterly assessments and for any special assessments) without additional restriction (other than those imposed by law) during the term of the Restoration Plan, since the few remaining credits should have only a minimal effect on fund revenue.

7. This Restoration Plan shall be implemented immediately.

Dated at Washington, DC, this 19th day of October, 2010.

By order of the Board of Directors.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2010–27042 Filed 10–26–10; 8:45 am]

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[1] 73 FR 61598 (Oct. 16, 2008).

[2] 74 FR 9564 (Mar. 4, 2009).

[3] 12 U.S.C. 1817(b)(3)(E)(ii), as amended by the Helping Families Save Their Homes Act of 2009, Public Law 111–22, § 204(b), 123 Stat. 1632, 1649.

[4] 74 FR 51062 (Oct. 2, 2009).

[5] Public Law 111–203, § 334(a), 124 Stat. 1376, 2709 (to be codified at 12 U.S.C. 1817(b)(3)(B)).

[6] Public Law 111–203, § 334(d), 124 Stat. 1376, 2709 (to be codified at 12 U.S.C. 1817(d)).

[7] Public Law 111–203, § 334(e), 124 Stat. 1376, 2709 (to be codified at 12 U.S.C. 1817(e)).

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